STATE OF MICHIGAN
COURT OF CLAIMS

KELLIE SAUNDERS, *et al.*,

Plaintiffs,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE,

Defendants.

No. 2022-000007-MM

HON. BROCK A. SWARTZLE

/

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DEFENDANTS MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE'S MARCH 14, 2022, MOTION FOR SUMMARY DISPOSITION

Defendants, Michigan Unemployment Insurance Agency and Julia Dale, by and through their attorney, Shannon Husband, Assistant Attorney General, move for summary disposition under MCR 2.116(C)(4) (lack of subject matter jurisdiction) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). In support of their motion, Defendants state:

1. This Court lacks subject matter jurisdiction where Plaintiffs failed to exhaust their administrative remedies.

2. Plaintiffs have failed to state valid claims upon which relief might be granted.

For these reasons, Defendants asks this Court to dismiss Plaintiffs' lawsuit in its entirety with prejudice.

Respectfully submitted,

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Date: March 14, 2022

[1] On March 10, 2022, the undersigned contacted Plaintiffs' counsel to request concurrence in the relief sought, but concurrence was denied.

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BRIEF IN SUPPORT OF DEFENDANTS MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE'S MARCH 14, 2022, MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF ISSUES PRESENTED

1. Courts lack jurisdiction to decide matters delegated to administrative agencies when they are pending at the administrative level. The Michigan Employment Security Act provides the exclusive authority and procedure for claimants to challenge Agency adjudications. This Court does not have jurisdiction to determine whether the Agency's adjudications comply with the law where available administrative remedies have not been exhausted.

2. Where a claim is so unenforceable that no factual development could justify recovery, the complaint must be dismissed. Plaintiffs' due process claims are insufficient to state a valid cause of action and should be dismissed.

3. Writs, whether superintending control or mandamus, are extraordinary actions that courts should grant in only the most exceptional circumstances. Writs for superintending control are prohibited for non-quasi-judicial agencies or where administrative remedies are available. Writs for mandamus are not available where there is no clear legal duty based upon ministerial acts, among other requirements. Because Plaintiffs have failed to demonstrate that they have meet the rigorous standards for either writ, this Court should deny their request.

4. Preliminary injunctions are equitable relief intended to preserve the status quo. They are inappropriate where the moving party cannot demonstrate a likelihood of success on the merits and where irreparable harm does not exist. Because Plaintiffs are unlikely to succeed in this matter and where irreparable harm does not exist, this Court should deny their request.

INTRODUCTION

Plaintiffs complain about action taken by the Unemployment Insurance Agency that is authorized by law. The complaint alleges each Plaintiff filed a claim for and received unemployment benefits. The Agency later determined that they were ineligible to receive those benefits and they were assessed restitution and required to repay those benefits. This is not a new process, and it is expressly permitted by the Michigan Employment Security (MES) Act.

Plaintiffs assert various allegations that the Agency violated the MES Act by: 1) assessing overpayments and undertaking collection activity based on "extrajudicial" administrative decisions, 2) seeking recovery of overpayments that should be waived due to alleged "Agency error," and 3) collecting overpayments prior to the legal finality of the administrative decision establishing restitution. (Complaint, ¶ 3.) However, they have improperly couched these alleged statutory violations in terms of constitutional violations in an attempt to avoid the available and appropriate administrative process.

STANDARD OF REVIEW

Generally, MCR 2.116 provides for summary disposition on various procedural grounds at the outset of a lawsuit. Summary disposition is proper where there is a lack of subject matter jurisdiction. MCR 2.116(C)(4). As with personal jurisdiction, the burden of establishing subject matter jurisdiction is on the plaintiff. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50 (2000). Summary disposition under this section is appropriate where a party has failed to exhaust their administrative remedies before filing suit. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157 (2004).

Summary disposition is also appropriate where a plaintiff fails to state a claim on which the court can grant relief. MCR 2.116(C)(8). A court reviews only the pleadings when deciding

a motion brought under MCR 2.116(C)(8) to analyze the legal sufficiency of the claims, accepting all factual allegations of the complaint as true. *Mays v Governor of Michigan*, 506 Mich 157, 172–173 (2020). Such a motion can be granted where the claim is "so clearly unenforceable that no factual development could possibly justify recovery." *Id*.

ARGUMENT

I. This Court lacks subject matter jurisdiction where Plaintiffs fail to exhaust their available administrative remedies.

Plaintiffs assert when the Agency issues monetary redeterminations more than one year after the issuance of the initial monetary determination, that action is contrary to the MES Act and "deprived [the Plaintiffs] of life, liberty, or property . . . without due process of law" under article 1, paragraph 17 of the Michigan Constitution. (Complaint, ¶¶ 163–166.) But, Plaintiffs fail to plead how a monetary redetermination, even if issued untimely, results in a due process violation where it provides for notice and an opportunity to be heard.

A. The MES Act provides the framework for an administrative appeal.

Any right to unemployment benefits arises under the MES Act. *Peplinski v Michigan Employment Sec Comm'n*, 359 Mich 665, 668 (1960). The Legislature created a "specific procedure to be observed in the administration of the unemployment compensation act and for a limited judicial review, [which] is exclusive of any and all other possible methods of review." *Mooney v Unemployment Compensation Comm'n*, 366 Mich 344, 355 (1953).

The Legislature gave the Agency the exclusive original jurisdiction to determine claimants' rights to receive benefits. MCL 421.32(a). The Agency must issue written decisions (called determinations or redeterminations) regarding eligibility and qualification issues. MCL 421.32, 32a and 62.

Interested parties who disagree with any determination have a multi-level appeal process available to them. If an interested party appeals, the Agency refers the matter to the Michigan Office of Administrative Hearings and Rules for a hearing before an administrative law judge. MCL 421.32a(1) and (2); MCL 421.33(1). After the administrative law judge issues a decision, an interested party may appeal to the Michigan Compensation Appellate Commission.[2] MCL 421.33(2); MCL 421.34. After the Appeals Commission issues a decision, an interested party may pursue judicial appeals (from circuit court to the Michigan Supreme Court). MCL 421.38(1), (4).

B. The Federal CARES Act and the CAUW Act did not provide additional appeal avenues, but instead require claimants to follow state law appeal procedures.

During the COVID-19 pandemic, the federal government passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020, which expanded unemployment benefits to individuals who may not be otherwise eligible for traditional unemployment benefits through the Pandemic Unemployment Assistance (PUA) program. 15 USC § 9021. This expansion allowed self-employed or part-time workers to claim PUA benefits. 15 USC § 2102(a)(3)(A)(ii)(II). States had the authority to administer the PUA program but had to do so in compliance with state unemployment law. 15 USC §§ 9021(f)(1) and 9023(b)(1). The CARES Act expired the week ending December 26, 2020. 15 USC § 9021(c)(1)(A).

[2] The Michigan Compensation Appellate Commission is now the Unemployment Insurance Appeals Commission. Executive Order No. 2019-13.

The federal government extended and amended the CARES Act with the Continued Assistance for Unemployed Workers (CAUW) Act on December 27, 2020. Among other additional requirements, the CAUW Act required PUA claimants filing new claims or continuing existing claims beyond December 26, 2020, to self-certify that their unemployment was specifically attributable to one of the enumerated COVID-19-related reasons. 15 USC § 9021(c)(1); *See* Department of Labor 01/08/2021 Unemployment Insurance Program Letter (UIPL) No. 16-20, Change 4, p 5 (Attachment 1). In addition, states were required to re-examine existing PUA claims to determine if claimants were eligible for additional weeks. *Id.* Finally, claimants were entitled to the appeals procedures available under state unemployment law. 15 USC § 9021(c)(5)(A).

C. Because Plaintiffs have failed to exhaust their administrative remedies, this Court lacks subject matter jurisdiction to entertain this action.

If the Legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, a court cannot exercise jurisdiction. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50 (2000) (in a declaratory action, plaintiffs' failure to exhaust administrative remedies resulted in dismissal due to lack of subject matter jurisdiction). The Michigan Supreme Court has stated that "administrative law dictates that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency." *Citizen for Common Sense*, 243 Mich at 52 (citing *Judges of the 74th Judicial District v Bay Co*, 385 Mich 710, 727 (1971)).

Here, the Legislature has made clear that the remedy for claimants challenging the Agency's administrative decision is through the administrative review process and not through an original action in this Court. Of note, the Supreme Court's last review of the Agency's

authority to review decisions within the confines of the MES Act made its way to the Supreme Court via administrative review and not by original action. *See Department of Licensing and Regulatory Affairs/Unemployment Insurance Agency v Frank Lucente*, ___ Mich ___ (2021) and *Department of Talent and Economic Development/Unemployment Insurance Agency v Michael Herzog*, ___ Mich ___ (2021) (Attachment 2.) As such, because Plaintiffs have not exhausted their administrative remedies regarding the Agency's alleged extrajudicial decisions, this Court lacks jurisdiction to review the merits of their complaint.

II. Plaintiffs' complaint fails to state any viable due process claims against the Agency.

A. Where notice and opportunity to be heard is available, a due process challenge must fail.

There are three factors for consideration of whether a due process violation has occurred:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v Eldridge*, 424 US 319, 333–335 (1976).

State action that takes protected property from its owner must comport with due process. *Sidun v Wayne County Treasurer,* 481 Mich 503, 509 (2008). A fundamental requirement of due process in such proceedings is "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, quoting *Mullane v Central Hanover Bank & Trust Co,* 339 US 306, 314 (1950). Thus, a claim alleging a deprivation of property without due process should do more than allege the deprivation of property. What makes a due-process claim unique—indeed, the core of a due-

process claim—is that the claimant was deprived of notice of an action or proposed action, *and* an opportunity to present evidence and be heard.

Plaintiffs' complaint contains no allegations whatsoever that any of the named Plaintiffs did not receive notice or that the notice they received did not satisfy due process. Nor do they deny that they are able to protest the Agency (re)determinations and receive a full hearing.

Here, both state and federal law provide Plaintiffs with an opportunity to be heard. They received Agency decisions advising them of the status of their unemployment benefits and providing the full panoply of appellate rights available. This is all that due process requires. Thus, Plaintiffs' due process claims should fail.

B. Plaintiffs fail to plead a viable due process claim regarding the Agency's alleged "extrajudicial" adjudications.

Plaintiffs contend that the Agency issued a redetermination beyond the one-year time-period under § 32a and this, ipso facto, violated their due process. (Complaint, ¶¶ 162-171.) But, even assuming the notices were improperly issued beyond one year, this does not, in and of itself, establish a due process violation. "The violation of applicable state statutes, or of applicable administrative rules and regulations, *ipso* facto, does not amount to a constitutional violation." *York v Detroit*, 438 Mich 744, 762 (1991).

Further, the Agency has statutory authority to seek restitution for benefit overpayments for three years from the date claimants first receive benefits. MCL 421.62(a). In fact, state law requires the Agency to issue a determination assessing restitution when it determines that a claimant was overpaid unemployment benefits. Id. The Agency must issue the restitution determination on an issue within three years from when the claimant first received benefits in the benefit year at issue. *Id*. This restitution provision specifically applies to the recovery of

improperly paid benefits and is distinct from §§ 32 and 32a of the MES Act, which relate to initial eligibility determinations and subsequent protests.

Here, there is no question the Agency sought to recover benefit overpayments within three years from the date Plaintiffs first received benefits. In circumstances where the Agency initiates a review of past-paid benefits and determines that the claimant received a benefit overpayment, the Agency is required to issue an original determination as described in § 62(a). MCL 421.62(a). Since the MES Act provides the Agency with three years to issue a determination requiring restitution, Plaintiffs' complaint fails to state a claim.

1. Issuing a determination or redetermination does not deprive Plaintiffs of a liberty or property interest.

Plaintiffs Saunders and Davis, the only claimants who allege they received an untimely redetermination, were not deprived of an identifiable liberty or property interest when the Agency mailed its alleged "extrajudicial" decisions. In due process claims involving monetary damages, an actionable harm giving rise to a cause of action occurs when claimants are *actually deprived* of property. *Bauserman v Unemployment Insurance Agency*, 503 Mich 169, 190 (2019). There is no reason to depart from this rule in the present case because the Plaintiffs here also seek money damages and the complaint itself alleges a deprivation of property.

Similarly, Plaintiffs ask this Court to overlook the fact that neither Saunders nor Davis have been deprived of any property yet, citing *Goldberg v Kelly*, 397 US 254 (1970), for the *proposition* that Plaintiffs Saunders and Davis have a statutory property interest in any benefits paid to them by the Agency. (Complaint, ¶ 117.) But *Goldberg* offers no support here.

In *Goldberg*, the question before the United States Supreme Court was whether a state can terminate public assistance benefits without first affording the opportunity for an evidentiary

hearing. *Goldberg,* 397 US at 255. The Court concluded that due process generally requires an evidentiary hearing prior to terminating public assistance benefits, but nonetheless acknowledged that "some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing." *Id*., at 264. Of note, the *Goldberg* holding that welfare benefits were a property interest was superseded by statute after Congress passed the Responsibility and Work Opportunity Reconciliation Act, which provided that an individual did not have any entitlement to welfare assistance. 42 USC 601(b).

On December 27, 2020, the federal government tried to mitigate abuse of the PUA program by amending the CARES Act to require documentation to substantiate employment or self-employment. 15 USC 9021(a)(3)(A)(2)(iii). Shortly thereafter, the DOL issued guidance requiring claimants to provide substantiating documentation within 21 or 90 days of the application or when directed by the state agency. 01/08/2021 UIPL 16-20, Change 4, pp 5, III-2 (Attachment 1). For claimants who failed to submit documentation verifying self-employment, the Agency could cease benefit payments and were required to send notice of benefit overpayment. 01/08/2021 UIPL 16-20, p I-12 (Attachment 1).

This change in law (shifting from self-certification to proof of labor attachment) nine months after the initial passage of the CARES Act made it extremely difficult for the Agency to comply with statutory time limits. In addition, the Legislature made no changes to the MES Act to allow for implementation of the CARES Act. For example, while monetary determinations for state claims are defined under the MES Act (§ 32), there are no statutory provisions in the CARES Act to cover the definition of PUA monetary determinations. During a time when the state and the Agency were adjusting to chaotic and stressful times, the Agency was attempting

the herculean effort of implementing a massive change in unemployment law within a statutory framework that was designed for benefit claims lasting 20 weeks.

Under applicable law, Plaintiffs Saunders and Davis are unable to connect the issuance of a determination or redetermination to the deprivation of a property interest. In fact, neither can point to any property deprivation—the complaint does not allege that the Agency has collected even a small portion of the overpayments from them. Although Plaintiff Davis claims her benefits were cut off without explanation, the factual allegations in her complaint are insufficient to support a cause of action on this ground alone. As noted earlier, certain circumstances can arise where the Agency is permitted to stop benefit payments prior to an administrative hearing. Moreover, Plaintiff Davis does not allege that the Agency has a policy or custom of ceasing benefit payments to all claimants prior to an administrative hearing. As such, their due process claim must fail.

2. If the Agency mistakenly sent § 32a redeterminations instead of original determinations under § 62(a) to recover benefit overpayments, this does not rise to the level of a constitutional violation.

The Agency has jurisdiction to seek restitution for benefit overpayments within three years from the date claimants first receive benefits. MCL 421.62(a). In fact, state law requires the Agency to issue a determination assessing restitution when it determines that a claimant was overpaid unemployment benefits. *Id.* When proceeding under § 62(a), the Agency must issue the restitution determination on an issue within three years after a claimant first received benefits. *Id*. This restitution provision specifically applies to the recovery of improperly paid benefits and is distinct from §§ 32 and 32a of the MES Act, which relate to initial eligibility determinations and subsequent protests.

Here, there is no question the Agency sought to recover benefit overpayments within three years from the date Plaintiffs first received benefits. In circumstances where the Agency initiates review of past-paid benefits and determines that the claimant received a benefit overpayment, the Agency is required to issue an original determination as described in § 62(a). MCL 421.62(a).

Further, *assuming arguendo,* that this redetermination was issued in connection with Plaintiff Saunders' first monetary determination under § 32a, the complaint's supporting facts do not show how this rises to a violation of her constitutional rights. Mistakes attributable to mere negligence are not generally regarded as constitutional deprivations. *Marlin v City of Detroit*, 205 Mich App 335, 340 (1994). As noted, simply demonstrating a statutory violation does not equate to a constitutional violation. *York,* 438 Mich at 762.

Moreover, Plaintiff Saunders is not without remedy—she can ask the Agency to void the redetermination and issue a restitution determination in accordance with § 62(a), or she can appeal the redetermination to an administrative law judge and challenge the Agency's statutory authority through the appropriate process.

C. Plaintiffs fail to plead a viable due process claim regarding their belief they are entitled to a restitution waiver for the Agency's alleged error in paying them PUA benefits.

1. The waiver of overpaid benefits is governed by federal and state law.

The Agency is permitted to waive improperly paid state unemployment payments if the payments were not obtained fraudulently. MCL 421.62(a). Waiver is allowed under three circumstances: (1) if an employer or claimant provides incorrect wage information, (2) if the claimant meets certain statutory poverty guidelines, or (3) if the payments were the result of

agency "administrative or clerical" error. MCL 421.62(a). Agency error does not include a change in judgment at the administrative or judicial level. MCL 421.62(a).

Regarding PUA benefits, the DOL first provided the states with guidance regarding overpayment waivers in May 2021. 05/05/2021 UIPL No. 20-21 (Attachment 3). The DOL gave states the discretion to either rely on DOL guidance or the states' own law in determining whether to waive overpayments. *Id.* at p 6. The DOL updated its guidance regarding PUA overpayment waivers on February 7, 2022. 02/07/2022 UIPL No. 20-21, Change 1 (Attachment 4). The DOL acknowledged that it could reasonably take states *up to a year*, or until February 2023, to process overpayment waivers. *Id.* at p 5.

2. The grant or denial of a waiver does not constitute a constitutional deprivation.

Plaintiffs are confusing a statutory violation with a constitutional violation. The Michigan Constitution provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art I, § 17. A threshold question is "whether the interest allegedly infringed by the challenged government action . . . comes within the definition of 'life, liberty or property." *Dep't of Health & Human Servs v Rasmer (In re Estate of Rasmer)*, 501 Mich 18, 43 (2017), citing *Bonner v Brighton,* 495 Mich 209, 225 (2014). Even assuming a waiver is improperly denied, this does not rise to the level of a deprivation of property. It is merely the declination of waiving a debt. While not binding, a New Mexico Court of Appeals noted that a claimant does not have a vested right in a waiver of money owed, so it cannot constitute a claim for a constitutional deprivation. *Millar v NM Dep't of Workforce Solutions*, 304 P3d 427, 432 (2013). (Attachment 5.)

3. Plaintiffs fail to demonstrate they are entitled to an overpayment waiver as a matter of law.

Plaintiffs assert, in a conclusory manner, that they are entitled to an overpayment waiver due to agency error. (Complaint, ¶¶ 41–42.) Conclusory allegations are insufficient, as the complaint must be supported by factual assertions. *Wolfenbarger v Wright*, 336 Mich App 1, 16 (2021). Each Plaintiff notes that they were originally determined eligible for benefits and later determined ineligible for benefits. (Complaint, ¶¶ 37–41, 44–45, 55–57, 68–71.) But, they do not identify what they contend constituted Agency error. As noted above, Agency error does not include a change in judgment at the administrative or judicial level. MCL 421.62(a).

Further, Plaintiffs assert that there is no process or procedure for Plaintiffs to seek overpayment waiver due to undefined "agency error." (Complaint, ¶ 108.) However, while there may not be a specific form available, this does not prevent a claimant from seeking a waiver. Plaintiffs have not asserted that they attempted to seek overpayment waivers and were denied the ability to do so. Their failure to act does not equate with a denial of process in violation of the Michigan Constitution.

4. Because the Agency has until February 2023 to implement PUA waivers, Plaintiffs' waiver claim is not ripe.

The ripeness doctrine "focuses on the timing of the action." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553 (2017). It mandates that "an actual injury be sustained," and "[a] claim is not ripe if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615–616 (2008).

The Agency is reviewing the recently released DOL guidance. 02/07/2022 UIPL No. 20-21, Change 1 (Attachment 4). While the Agency is hoping to implement a waiver *program* as

quickly as possible in accordance with federal guidance, the DOL reasonably expects states to take up to a year to do so. 02/07/2022 UIPL No. 20-21, Change 1, p 5 (Attachment 4). As such, any claim by Plaintiffs that they have not been granted a waiver is premature and not ripe for adjudication.

D. Plaintiffs fail to plead a viable due process claim regarding their belief that the Agency is barred from engaging in collection activity prior to the finality of an administrative decision.

Plaintiffs allege due process violations related to collection of debts assessed by the Agency. (Complaint, ¶¶117–128, 151–161, 185–189.) Plaintiffs Varga, Shephard, and Larke state that they were assessed restitution for overpaid benefits after being found ineligible, and that they were subject to collection before the ineligibility determinations were final. *Id*.

1. Due process does not require a stay of collection during a pending appeal.

Due process "requires notice and an opportunity to be heard in a meaningful time and manner." *Springer v City of Warren*, 308 Mich App 477, 483 (2014). It is a "flexible concept, the essence of which requires fundamental fairness." *Al-Maliki v LaGrant*, 286 Mich App 483, 485 (2009). However, due process does not mandate a stay on collection or monetary impact to parties during an ongoing appeal process. Our Michigan Supreme Court discussed this at length in *McAvoy v H.B. Sherman Co*, 401 Mich 419, 439–441 (1977). There, the Court considered whether a provision of the workers compensation statute requiring an employer to pay benefit payments to an injured worker during an appeal of the workers compensation award violated the employer's due process rights. *Id.* at 437–439. The Court held that the Legislature's decision not to stay payments pending an appeal was not a violation of due process where the employer had

the opportunity to be heard prior to the initial decision, and still had appeal rights. *Id.* at 339–340.

Our Supreme Court has continued to hold that the Legislature may "exert substantial control over the mechanics of how administrative decisions are to be appealed," including "time frames for filing an appeal, . . . *whether a party may obtain a stay pending appeal*, and . . . the controlling standard of review." *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 94 (2011), citing *McAvoy*, 401 Mich at 443 (emphasis added). The principle that collection while an appeal is pending is not against due process should be very familiar to this Court, as not even the Michigan court rules require stays on all judgment collection while a case is pending appeal. See MCR 7.108; MCR 7.209; and MCR 7.305(I).

2. Plaintiffs do not allege a valid claim for a due process violation based on the Agency's collection practices.

Plaintiffs Varga, Shephard, and Larke first allege that the Agency violates their due process rights by not complying with federal law, specifically 26 USC § 6402(f)(3). (Complaint, ¶ 186.) This statute addresses the Agency's ability to collect federal tax refunds owing to a claimant through the Treasury Offset Program. 26 USC § 6402(a). Section 6402(f)(3) requires the Agency to notify persons owing a debt to the Agency that it intends to intercept tax refunds for payment of the debt, and then provide the claimant with 60 days to present evidence that "all or part of such liability is not legally enforceable or is not a covered unemployment compensation debt." 26 USC § 6402(f)(3)(A), (B).

The Agency then must consider such evidence before intercepting tax refunds. 26 USC § 6402(f)(3)(C). Note that this hearing opportunity is distinct from the appeals process detailed in the MES Act—it does not consider the merits of the underlying overpayment determination.

Compare 26 USC § 6402(f)(3) with MCL 421.32a, MCL 421.33, MCL 421.34, and MCL 421.38. Plaintiffs do not state that they failed to receive notice or were denied the opportunity to submit evidence that their debts were not enforceable before their taxes were intercepted. (Complaint, ¶¶ 185–189.) To the contrary, Plaintiff Larke never alleges she had tax refunds intercepted at all. (Complaint, ¶¶ 77–84.) And the complaint indicates Plaintiffs Varga and Shephard received notice months before their tax returns were intercepted, and they never claim that they were denied the opportunity to submit evidence as contemplated in § 6402. (Complaint, ¶¶ 46, 48, 64.)

While they state that they protested and appealed the merits of the Agency's determination finding they were ineligible for benefits, whether they were eligible for benefits is a separate inquiry from whether the debt is enforceable. There is no claim that they sent in any evidence concerning the latter issue as contemplated by § 6402. (Complaint, ¶¶ 43–66.) Section 6402 is also specific to federal tax refund intercepts, 26 USC §6402(a), so it would do nothing to prohibit collection by other means.

In addition, Plaintiffs also allege that their due process rights were violated by the Agency's failure to follow their own collection procedures in §§ 32a and 62(a) of the MES Act and misstate that these sections require exhaustion of all appeals before collection activities can begin. (Complaint, ¶ 187.) Plaintiffs simply misstate these statutory provisions. Section 62(a) is express that when the Agency determines that a claimant was overpaid unemployment benefits, the Agency "shall" issue a determination assessing restitution. MCL 421.62(a). Once the Agency has made such a determination, it may initiate collection of the restitution through various means, including wage garnishment, offset from ongoing unemployment benefits, or tax refund deductions. *Id.*

The MES Act affords claimants multiple levels of administrative protests and appeals following a determination assessing restitution, including a protest to the Agency followed by appeals to an administrative law judge, the Unemployment Insurance Appeals Commission, and into the circuit court and Michigan appellate courts. MCL 421.32a, MCL 421.33, MCL 421.34, and MCL 421.38. Nothing in these sections compels a stay of collection during any appellate process. *Id.* Instead, the MES Act contemplates that once the Agency makes its determination, it may initiate collection. MCL 421.62(a). This statutory scheme is consistent with federal guidance to state unemployment agencies, which provides that state law "*may* prohibit recovery of an overpayment until the overpayment determination, including any appeal, has become final under state law," but it does not have to do so. UIPL 10/05/2015, No. 01-16, p 4 (emphasis added) (Attachment 6). The Michigan legislature exercised its ability to structure the unemployment system to allow for collection once the Agency issues a determination, even if appeals of that determination are ongoing. See *Naftaly*, 489 Mich at 94.

Moreover, even if the Agency engaged in premature collection activity, any such action would not give rise to a due process violation. States are liable for constitutional violations only "in cases where a state 'custom or policy' mandated the official or employee's actions." *Carlton v Dep't of Corrections*, 215 Mich App 490, 505 (1996). This is because a constitutional deprivation "connotes an intentional act of denying something to someone, or, at the very least, a deliberate act to prevent a loss." *Marlin v City of Detroit*, 205 Mich App 335, 339 (1994), quoting *Parratt v Taylor*, 451 US 527, 548 (1981) (concurring opinion). As the Court of Appeals has held, "mere negligence does not work a deprivation in the constitutional sense." *Marlin v City of Detroit*, 205 Mich App 335, 340 (1994). Here, Plaintiffs do not allege any custom or policy of the Agency to uniformly collect from claimants during pending appeals.

(Complaint, ¶¶ 185–189.) In fact, the Agency's policies and procedures generally *do* stay all collection activities against claimants with pending timely appeals, even though the MES Act does not strictly mandate a stay of collection pending legal finality.[3] To the extent there was erroneous collection activity during Plaintiffs Varga's, Shephard's or Larke's pending protests or appeals, it would not give rise to a due process violation.

III. This Court should not exercise its powers to enforce a writ for superintending control or for mandamus as Plaintiffs do not meet the requirements for either.

A. A writ for superintending control is inappropriate where the defendant lacks judicial authority and where adequate remedies exist.

The process of seeking an order of superintending control is "an original civil action designed to require the defendant to perform a clear legal duty." *Beer v City of Fraser Civil Service Comm*, 127 Mich App 239, 243 (1983). A court should exercise superintending control "only in extreme cases and under unusual circumstances." *City of Detroit v General Foods Corp*, 39 Mich App 180, 185 (1972) (quoting 4 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 56). Complaints for superintending control are governed by MCR 3.302. This rule provides that "[i]f superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed." MCR 3.302(D)(2). Superintending control is not intended "as a substitute for an appeal or to evade a statutory prohibition of an appeal." *Public Health Dep't v Rivergate Manor*, 452 Mich 495, 500–501 (1996). The remedy of superintending control is unavailable and prohibited where another adequate remedy is

[3] The Agency voluntarily agreed to update its internal policies and practices to refrain from collection until after 35 days after issuance of a determination assessing restitution, or until all related appeals are completed as part of the settlement of a federal lawsuit in 2017. *See* Settlement agreement in *Zynda v Arwood*, U.S. District Court for the E.D. Michigan Case. No. 2:15-cv-11449, ECF Doc. 51, PageID 1649.

available, such as an appeal. MCR 3.302(B); MCR 3.302(D)(2); see also *Shephard Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 347 (2003).

Superintending court orders enforce the superintending control power of the Court of Claims over lower courts or tribunals. Const, art 6, § 13; MCL 600.6419(a); MCR 3.302(A); and MCR 3.302(D)(1). The Court of Claims has jurisdiction to issue superintending control orders over administrative tribunals of a judicial or quasi-judicial nature. *Beer v City of Fraser Civil Serv Comm*, 127 Mich App 239, 243 (1983). However, not all administrative agencies have judicial or quasi-judicial authority. *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 86 (2013). To determine if an agency's authority is sufficiently judicial in nature, courts must compare the agency's procedures to court procedures to determine if they are similar. *Id*. Quasi-judicial characteristics that are sufficient include, but are not limited to:

- A right to a hearing;
- A right to be represented by counsel;
- The right to submit exhibits; and
- The authority to subpoena witnesses and require parties to produce documents. *Id*.

There is no authority to support a finding that the Agency has judicial or quasi-judicial authority. The Agency's practices, by either statute or rule (*Natural Resources Defense Council,* 300 Mich App at 86), are not akin to a court's practices. The Agency does not have the right to conduct hearings, the parties are not required to be represented by counsel to interact with the Agency, and the parties have no right to submit exhibits. As such, the Agency is not the type of judicial or quasi-judicial authority subject to superintending control by this Court.

B. Plaintiffs fail to allege sufficient facts to support a claim for mandamus.

Mandamus is an extraordinary remedy, *Casimir v Wheatley*, 208 Mich App 19, 22 (1994), that can only be awarded where the party seeking the remedy proves that: (1) she has a clear legal right to the performance sought; (2) the opposing party had a clear legal duty to perform; (3) the act is ministerial in nature; and (4) there is no other remedy through which the relief sought could be obtained. *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683 (1993). In addition, a plaintiff must plead specific allegations to support a mandamus action. It is not enough for a plaintiff to simply state that she has a viable claim; rather, the plaintiff must support the claim with sufficient allegations. "[A] mere statement of conclusions that are not supported by allegations of fact will not suffice to state a cause of action." *Golec v Metal Exch Corp*, 208 Mich App 380, 382 (1995).

Plaintiffs fail to allege any of the criteria for a writ of mandamus. The complaint is devoid of any allegation that Plaintiffs possess a clear legal right to overpayment waivers and a stay of collection. Nor have they demonstrated that the Agency has a clear legal duty to provide either. The Agency has demonstrated that Plaintiffs are entitled to neither under state nor federal law. 26 USC § 6402(f)(3); MCL 421.32a; MCL 421.62(a).

Further, mandamus cannot compel an unlawful act. *State Bd of Edu v Houghton Lake Community* Schools, 430 Mich 658, 667 (1988). The Agency has a duty to act in accordance with the requirements imposed by the controlling administrative statute. See *Attorney General v PSC*, 231 Mich App 76, 78 (1998). Any waiver of overpayment must comply with either the MES Act, federal law, or DOL guidance. Because the Plaintiffs fail to demonstrate that they are entitled to an overpayment waiver or suspension of collection, their mandamus claim must be dismissed.

Plaintiffs also fail to demonstrate that the Agency's acts are ministerial. An act is ministerial if it is legally defined with such certainty that there is no exercise of discretion. *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 286 (2008). Here, the Agency's review of a claimant's request for an overpayment waiver is not ministerial. While the Agency is required to review claims for possible waiver, the conclusion of any review is discretionary. See MCL 421.62(a).

Thus, Plaintiffs' conclusory statements regarding overpayment waiver and suspension of collection are insufficient to establish a viable writ of mandamus before this Court and should be dismissed.

IV. Plaintiffs cannot meet the necessary elements to obtain injunctive relief.

Preliminary injunctions are generally considered to be equitable relief. *Mich AFSCME Council v Woodhaven*-Brownstown *Sch District*, 293 Mich App 143, 145 (2011), citing *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11 (2008). The purpose of a preliminary injunction is to preserve the "status quo" pending resolution of the matter. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 647–648 (2012), citing *Mich AFSCME Council*, 293 Mich App at 145. To obtain this extraordinary form of relief, the moving party bears the burden of proving four traditional elements:

1. The likelihood that the moving part will prevail on the merits of the case;
2. Whether irreparable harm exists;
3. Whether the party seeking an injunction would be harmed more by absence of injunctive relief than the party opposing the relief; and
4. Harm to the public interest. [*Hammel*, 297 Mich App at 648.]

Plaintiffs cannot demonstrate a likelihood of success on the merits of their claims. Their complaint solely asserts state constitutional due process concerns, whereas review of the allegations reflects that they are actually alleging statutory violations, which are not accurately pleaded and do not rise to the level of a constitutional violation.

Further, Plaintiffs cannot identify any irreparable harm. Financial hardship alone is not sufficient to establish irreparable injury. *Pontiac Fire Fighters Union Local 376 v* City *of Pontiac*, 482 Mich 1, 10 (2008). As noted in this motion, Plaintiffs have the full panoply of appellate rights to pursue their unemployment benefits. MCL 421.32a(1) and (2), MCL 421. 33(2), MCL 421. 34, and MCL 421. 38(1), (4).

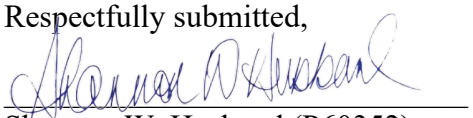
An injunction would cause more harm to the Agency than to the Plaintiffs. As noted, the Agency is already inundated with trying to manage the claims of millions of citizens due to the pandemic. The DOL has provided the Agency with another year to process waivers, yet Plaintiffs seek to have this Court mandate a waiver on an unripe claim and without the expertise related to the implementation of the pandemic unemployment programs. This is why pursuit of administrative remedies is the appropriate course of action for these Plaintiffs.

Because they fail to meet their burden of establishing equitable relief, Plaintiffs' requested relief should be denied.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated herein, Plaintiffs' complaint should be dismissed in its entirety.

Respectfully submitted,



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Dated: March 14, 2022

ATTACHMENT 1

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
	CORRESPONDENCE SYMBOL OUI/DUIO
	DATE January 8, 2021

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 16-20 Change 4

TO: STATE WORKFORCE AGENCIES

FROM: JOHN PALLASCH
Assistant Secretary

SUBJECT: Continued Assistance to Unemployed Workers Act of 2020—Pandemic Unemployment Assistance (PUA) Program: Updated Operating Instructions and Reporting Changes

1. **Purpose.** To provide states with updated guidance for the PUA program, as amended by the Continued Assistance to Unemployed Workers Act of 2020 (Continued Assistance Act) and updated instructions for reporting PUA program activities.

2. **Action Requested.** The U.S. Department of Labor's (Department) Employment and Training Administration (ETA) requests that State Workforce Administrators provide the information in this Unemployment Insurance Program Letter (UIPL) and all attachments to appropriate program and other staff in state workforce systems as they implement the changes to the PUA program and the required reporting of PUA activities as amended by the Continued Assistance Act.

3. **Summary and Background.**

   a. Summary – On December 27, 2020, the President signed into law the Continued Assistance Act, which includes Unemployment Insurance (UI) related provisions that make the following changes to PUA:

      i. extending PUA program authorization until March 14, 2021;
      ii. adding a phaseout period, through weeks beginning on or before April 5, 2021, for individuals who have remaining entitlement to PUA and who are receiving PUA as of the end of the program (March 13, 2021, for states with a Saturday week ending date and March 14, 2021, for states with a Sunday week ending date);
      iii. adding a new limitation on backdating claims filed after December 27, 2020 (the enactment date of the Continued Assistance Act);

RESCISSIONS None	EXPIRATION DATE Continuing

iv. increasing the maximum number of PUA weeks available from 39 weeks to 50 weeks, subject to limitations on the dates in which these additional 11 weeks may be collected;
v. adding a requirement for individuals to submit documentation of employment or self-employment;
vi. establishing the self-certification process for continued claims in statute;
vii. permitting states to waive PUA overpayments under certain conditions;
viii. providing a hold harmless provision for individuals who are currently receiving PUA after having exhausted Pandemic Emergency Unemployment Compensation (PEUC), but who are now eligible to receive additional benefit amounts available on the PEUC claim;
ix. establishing in statute the existing PUA appeals guidance; and
x. adding a requirement for states to verify the identity of PUA applicants.

In addition to the changes made by the Continued Assistance Act, the Department provides further guidance regarding fraud penalties imposed on individuals for PUA overpayments.

ETA has also revised the ETA 902P report to include additional data items for tracking PUA overpayment recovery activities, claim exhaustions, and overpayments resulting from identity theft.

All other PUA program parameters, as provided in Section 2102 of the CARES Act, PUA agreements, UIPL Nos. 16-20; 16-20, Change 1; 16-20, Change 2; and 16-20, Change 3, remain the same.

b. Background – The Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 (Pub. L. 116-136) created the PUA program to provide temporary assistance to individuals who are unemployed, partially unemployed, unable, or unavailable for work due to specified COVID-19 related reasons and who are not eligible for regular state or federal unemployment benefits. The CARES Act authorized PUA through weeks of unemployment ending before December 31, 2020.

Importance of Program Integrity. Addressing improper payments and fraud is a top priority for the Department and the entire UI system. It is critical that states implement UI programs and provisions to ensure that payments are being made to eligible individuals and that states have aggressive strategies and tools in place to prevent, detect, and recover fraudulent payments, with a particular emphasis on imposter fraud by claimants using false identities.

The programs and provisions within the Continued Assistance Act, the Emergency Unemployment Insurance Stabilization and Access Act, and the CARES Act operate in tandem with the fundamental eligibility requirements of the Federal-State UI program. These requirements include that an individual file certifications with respect to each week of unemployment that is paid and that an individual be able to work and available for work except as specifically provided for in statute. In addition, the Continued Assistance

Act includes new program integrity requirements for the PUA and PEUC programs with which states must comply.

Some states remain in the midst of managing extraordinary workloads due to the effects of the spread of COVID-19. During this time, there is a heightened need for states to maintain a steadfast focus on UI functions and activities that ensure program integrity and the prevention and detection of improper payments and fraud across all programs operated within the UI system.

UIPL No. 23-20, published on May 11, 2020, discusses program integrity for the UI system. UIPL No. 28-20, published on August 31, 2020, provides states with funding to assist with efforts to prevent and detect fraud and identity theft and recover fraud overpayments in the PUA and PEUC programs.

States play a fundamental role in ensuring the integrity of the UI system. While states have been provided some flexibilities as a result of the COVID-19 pandemic, those flexibilities are generally limited to emergency temporary actions as needed to respond to the spread of COVID-19. States must ensure that individuals only receive benefits in accordance with federal and state law.

ETA strongly encourages states to utilize the tools, resources, and services of the UI Integrity Center, funded by the Department and operated in partnership with the National Association of State Workforce Agencies. One of the key assets to support addressing fraud is the Integrity Data Hub (IDH), which includes a variety of data sets to prevent and detect fraud based on identity theft at the time of application, including an identity verification solution. ETA also encourages states to consult with the UI Integrity Center on data analytics and to prioritize IDH hits, as well as on other tools and solutions available through the private sector that complement the IDH. In UIPL No. 28-20, the Department explained its expectation that states connect to the IDH no later than March 31, 2021 and encouraged states to use their share of the funding provided through that UIPL to support IDH connection as soon as possible. There is also a range of other tools on the market that states should consider when combating fraud and ensuring program integrity.

4. **Guidance on Changes to PUA in the Continued Assistance Act.** An overview of key changes to the PUA program is provided below.

The Agreement Implementing the Relief for Workers Affected by Coronavirus Act that was signed by each state in March 2020, remains in effect along with the modifications and extensions required as a result of these updated provisions. When determining the appropriate course of action in administering the PUA program, states should first consult Section 2102 of the CARES Act, as amended by the Continued Assistance Act, and the subsequent operating instructions provided by the Department. Where the CARES Act, as amended, and the operating instructions are silent, states should refer to the Disaster Unemployment Assistance (DUA) regulations at 20 C.F.R. Part 625. All other PUA program

parameters, as provided in Section 2102 of the CARES Act, PUA agreements, UIPL Nos. 16-20; 16-20, Change 1; 16-20, Change 2; and 16-20, Change 3, remain the same.

Detailed instructions for implementing the amendments are included in Attachment I, Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions and Attachment II, Handbook 401 Instructions for ETA 902 Pandemic Unemployment Assistance. Attachment III provides a matrix of eligibility requirements and benefit availability dependent on the claim filing date. Attachment I, Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions is structured to enable states to know what guidance is new, what is modified, and what has not changed.

a. **Changes to Program Dates and Benefit Duration.**

i. **Extension of Program.** Section 201(a) of the Continued Assistance Act extends PUA authorization through weeks of unemployment ending on or before March 14, 2021. This means that for states where weeks of unemployment end on a Saturday, the last week payable is the week ending March 13, 2021, and for states with weeks ending on Sunday, the last week payable is the week ending March 14, 2021. Refer to section C.14. of Attachment I to this UIPL for additional detail.

ii. **Phaseout Period.** Section 201(a)(3) of the Continued Assistance Act provides a phaseout period for individuals receiving PUA as of the end of the program (March 13, 2021, for states with a Saturday week ending date and March 14, 2021, for states with a Sunday week ending date), who have not yet exhausted their PUA entitlement. These individuals may continue to collect PUA for any week in which they have remaining entitlement and are otherwise eligible, except that no PUA is payable for any week beginning after April 5, 2021 (April 10, 2021 for states with a Saturday week ending date and April 11, 2021 for states with a Sunday week ending date). Refer to section C.5. of Attachment I to this UIPL for additional detail. States may not accept any new PUA claims for weeks of unemployment after March 13, 2021 for states with a Saturday week ending date and March 14, 2021, for states with a Sunday week ending date.

iii. **New Limitations on Backdating.** As discussed in Question 4 of Attachment I to UIPL No. 16-20, Change 1, individuals filing for PUA must have their claims backdated to the first week during the Pandemic Assistance Period (PAP) that the individual was unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in Section 2102(a)(3)(A)(ii)(I) of the CARES Act. However, Section 201(f) of the Continued Assistance Act limits the availability of backdating for claims that are filed after December 27, 2020 to no earlier than December 1, 2020. Refer to section C.15. of Attachment I to this UIPL for additional detail.

iv. **Modification to Benefit Duration.** The maximum number of weeks of PUA benefits is modified to increase from 39 weeks to 50 weeks. The number of weeks available continues to be reduced by any weeks of regular UC and Extended Benefits (EB) that the individual receives during the PAP. Individuals may only collect these additional 11 weeks of benefits with respect to weeks of unemployment beginning on or after December 27, 2020. Refer to section C.17. of Attachment I to this UIPL for additional detail.

v. **Notification Requirements.** States must re-determine existing PUA claims to reflect the additional weeks of potential eligibility. States must also identify each individual with a PUA claim on file and advise these individuals that they are potentially eligible for additional PUA benefits. States must provide these individuals with instructions for reopening their PUA claims (if the individual has stopped collecting PUA). Refer to section C.28 of Attachment I of this UIPL for additional detail.

b. **New Requirement for Individuals to Submit Documentation of Employment or Self-Employment.** Section 241 of the Continued Assistance Act, creates a new requirement for individuals to submit documentation substantiating employment or self-employment. Refer to section C.2. of Attachment I to this UIPL for additional detail.

i. **Filing New Applications for PUA.** Individuals filing a new PUA application on or after January 31, 2021 (regardless of whether the claim is backdated), are required to provide documentation within 21 days of application or the date the individual is directed to submit the documentation by the State Agency, whichever is later. The deadline may be extended if the individual has shown good cause for not submitting documentation under state UC law within 21 days.

ii. **Filing Continued Claims for PUA.** Individuals who applied for PUA before January 31, 2021 and receive a payment of PUA on or after December 27, 2020 (regardless of which week ending date is being paid), are required to provide documentation substantiating employment or self-employment, or the planned commencement of employment or self-employment, within 90 days of application or when directed to submit the documentation by the State Agency, whichever is later. The deadline may be extended if the individual has shown good cause under state UC law.

c. **Continued Eligibility Requirements.** Individuals must provide a self-certification that their unemployment, partial unemployment, or inability or unavailability to work is specifically attributable to one or more of the COVID-19 related reasons specified in section 2102(a)(3)(A)(ii)(I)(aa) through (kk) of the CARES Act and must identify that specific reason for each week that PUA is claimed. This applies with respect to weeks beginning on or after January 26, 2021 (30 days after the enactment of the Continued Assistance Act).

Additionally, in the case of states that made a good faith effort to implement the PUA program prior to the effective date of this provision, an individual will not be denied benefits for the weeks ending prior to January 26, 2021, solely for failing to submit a weekly self-certification. Refer to section C.7. of Attachment I to this UIPL for additional detail.

d. **Overpayment Waiver Authority.** Section 201(d) of the Continued Assistance Act permits a state to waive repayment of a PUA overpayment if the state determines that: i) the overpayment was without fault on the part of the individual and ii) that repayment would be contrary to equity and good conscience. Refer to section C.21.b. of Attachment I to this UIPL for additional detail.

e. **Hold Harmless Provision for Individuals who are Provided Additional Benefit Amounts on a Previous PEUC claim.** Under the CARES Act, an individual must have exhausted all entitlement to regular UC, PEUC, and EB before filing for PUA. However, section 201(e) of the Continued Assistance Act provides a "hold harmless" provision for an individual who previously exhausted PEUC and is now receiving PUA, but as a result of Section 206(b) of the Continued Assistance Act becomes eligible for additional amounts of PEUC beginning on or after December 27, 2020. Refer to section C.6. of Attachment I to this UIPL for additional detail.

f. **Requirement to Verify Identity**. Section 242 of the Continued Assistance Act requires that states must include procedures for identity verification or validation for timely payment, to the extent reasonable and practicable, by January 26, 2021 (30 days after the enactment of the Continued Assistance Act) to ensure that they have an adequate system for administering the PUA program. Refer to section C.3. of Attachment I to this UIPL for additional details.

g. **Technical Correction for the Commonwealth of Northern Mariana Islands (CNMI).** Section 265 of the Continued Assistance Act provides that a Commonwealth Only Transitional Worker (CW-1) shall be considered a qualified alien for purposes of eligibility under the PUA and FPUC programs. This change primarily impacts claims in the Commonwealth of the Northern Mariana Islands. Refer to section C.8. of Attachment I to this UIPL for additional details.

h. **Appeals Processes.** Section 201(c) of the Continued Assistance Act provides that individuals may appeal their rights on any PUA determination or redetermination made by the state and that all levels of appeals filed in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands shall be carried out by the applicable state that made the determination or redetermination and shall be conducted in the same manner and to the same extent as the state would conduct appeals of determinations and redeterminations regarding rights to regular compensation under state law.

With respect to any appeals filed in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, Republic of the Marshall Islands, and the Republic of Palau, all levels of appeals shall be carried out by the applicable entity within the territory in the same manner and to the same extent as appeals of regular unemployment compensation conducted under the unemployment compensation law of Hawaii. Refer to section C.20. of Attachment I to this UIPL for additional detail.

5. **Fraud Penalties for PUA Overpayments.** Consistent with the requirements of Section 251 of the Trade Adjustment Assistance Extension Act of 2011 (TAAEA), Pub. L. 112-40 (2011), if a state determines that it made an erroneous PUA payment to an individual due to fraud committed by the individual, the state must apply a minimum 15 percent penalty on such individual. Refer to Section C.21 of Attachment I to this UIPL for additional detail.

6. **Changes to the PUA Activity Report, ETA 902P.** ETA has revised the ETA 902P report to include additional data items that will be used to assess state overpayment recovery efforts for the PUA program, inform policy makers about the program, determine the effectiveness of identity theft prevention efforts, and assess additional program integrity needs. Please refer to Section E of Attachment I to this UIPL for additional detail.

7. **Inquiries.** We encourage states to contact the Department for technical assistance. Please direct inquiries to covid-19@dol.gov, with a copy to the appropriate ETA Regional Office.

8. **References.**

- Continued Assistance to Unemployed Workers Act of 2020 (Continued Assistance Act);
- Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 (Pub. L. 116-136), Title II, Subtitle A;
- Section 251 of the Trade Adjustment Assistance Extension Act of 2011 (TAAEA), Pub. L. 112-40;
- Section 303(a)(1), (3), and (11) of the Social Security Act;
- 5 C.F.R. Subpart C § 845.303 - Standards for Waiver of Overpayments;
- 20 C.F.R. Part 625 -Disaster Unemployment Assistance;
- UIPL No. 09-21, *Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) – Summary of Key Unemployment Insurance (UI) Provisions*, issued December 30, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3831;
- UIPL 28-20, *Addressing Fraud in the Unemployment Insurance (UI) System and Providing States with Funding to Assist with Efforts to Prevent and Detect Fraud and Identity Theft and Recover Fraud Overpayments in the Pandemic Unemployment Assistance (PUA) and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, August 31, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8044;

- UIPL No. 23-20, *Program Integrity for the Unemployment Insurance (UI) Program and the UI Programs Authorized by the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Federal Pandemic Unemployment Compensation (FPUC), Pandemic Unemployment Assistance (PUA), and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, issued May 11, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4621;
- UIPL No. 16-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020—Pandemic Unemployment Assistance (PUA) Program Operating, Financial, and Reporting Instructions*, issued April 5, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4628;
- UIPL No. 16-20, Change 1, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020—Pandemic Unemployment Assistance (PUA) Program Reporting Instructions and Questions and Answers*, issued April 27, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5899;
- UIPL No. 16-20, Change 2, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020—Pandemic Unemployment Assistance (PUA) Program Additional Questions and Answers*, issued July 21, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5479;
- UIPL No. 16-20, Change 3, *Eligibility of Individuals who are Caregivers for Pandemic Unemployment Assistance in the Context of Scholl Systems Reopening*, issued August 27, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3849; and
- UIPL 03-20, *Minimum Disaster Unemployment Assistance (DUA) Weekly Benefit Amount: January 1 - March 31, 2020* issued December 12, 2019, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3675.

9. Attachments.

- Attachment I: Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions;
- Attachment II: UI Report Handbook No. 401, ETA 902P – Pandemic Unemployment Assistance;
- Attachment III: Processing PUA Claims Based on the Claim Filing Date;
- Attachment IV: PUA Provisions under the Consolidated Appropriations Act, 2021. Division N, Title II, Subtitle A, Chapter I, Continued Assistance to Unemployed Workers Act of 2020.

Pandemic Unemployment Assistance (PUA) Implementation and Operating Instructions
Revised January 8, 2021

The following Implementation and Operating Instructions are structured to enable states to know what guidance is new, what is modified, and what is unchanged.

A. Introduction (updated reference to Continued Assistance Act)

On March 27, 2020, the President signed Public Law (Pub. L.) 116-136, the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. Section 2102 created a new federal program called Pandemic Unemployment Assistance (PUA) and provided funding to states for the administration of the program. On December 27, 2020, the President signed, the Consolidated Appropriations Act, 2020, including Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act), which amended the CARES Act and included certain changes to the PUA program. Under the new law, the maximum number of weeks available for the PUA program increases from 39 weeks to 50 weeks of benefits. These benefits are payable to individuals who are not eligible for regular UC, EB, or PEUC. This includes individuals who have exhausted all rights to such benefits, as well as individuals who are self-employed, seeking part-time employment, lacking sufficient work history, or who are otherwise not qualified for regular unemployment compensation (UC), EB, and Pandemic Emergency Unemployment Compensation (PEUC) under Section 2107 of the CARES Act, and who otherwise meet the eligibility requirements of Section 2102 of the CARES Act. The costs of the federal benefit and of program administration are 100% federally funded.

This guidance has been updated to include amendments made by the Continued Assistance Act and clarifications provided in Change 1, 2, and 3 to Unemployment Insurance Program Letter (UIPL) No. 16-20. Additionally, please note the new information below regarding overpayment fraud penalties and interest. Unless otherwise specified here, all other PUA program provisions, as provided in Section 2102 of the CARES Act, UIPL Nos. 16-20; 16-20, Change 1; 16-20, Change 2; and 16-20, Change 3, remain the same. The Agreement Implementing the Relief for Workers Affected by Coronavirus Act (hereinafter the Agreement) that the Department of Labor and states signed in March 2020 also remains in effect, along with the modifications and extensions required by these updated provisions. As set forth in Section XI of the Agreement, a state may terminate the Agreement with thirty days' written notice if it chooses to no longer administer one or more provisions specified in Section XIV, which includes the state's agreement to administer the PUA program.

B. Definitions (updated as noted below)

This Section contains the definitions of terms used throughout this document, using definitions in 20 C.F.R. 625.2 and in Section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (EUCA). References to 5 U.S.C. Chapter 85 relate to Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX).

1. "CARES Act" means Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), including Title II Subtitle A, The Relief for Workers Affected by Coronavirus Act.
2. "Additional compensation" means compensation totally financed by a state and payable under a state law by reason of conditions of high unemployment or by reason of other special factors, and when so payable, includes compensation payable pursuant to 5 U.S.C. Chapter 85.
3. "Agreement" means the agreement between a state and the U.S. Department of Labor (Department) to administer the PUA Program. Under the Agreement, the state agency makes payments of PUA as the Department's agent. PUA payments must be made in accordance with the CARES Act, including any applicable amendments, as interpreted by the Department in these instructions and any other instructions issued by the Department.
4. "Applicable state" means, with respect to an individual, the state from which the individual is receiving compensation.
5. "Applicable state law" means the unemployment compensation law of the applicable state for an individual.
6. "Benefit year" means, with respect to an individual, the benefit year as defined in the applicable state law.
7. "Compensation" shall have the meaning provided in 20 C.F.R. 265.2(d).
8. "COVID-19" means the 2019 Novel Coronavirus or 2019-nCoV.
9. "COVID-19 Public Health Emergency" means the public health emergency declared by the Secretary of Health and Human Services on January 27, 2020, with respect to the 2019 Novel Coronavirus.
10. "Covered Individual" (**updated to include documentation requirement under Section 241 of the Continued Assistance Act**) means an individual who: (i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under Section 2107 of the CARES Act, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or Pandemic Emergency Unemployment Compensation under Section 2107, (ii) self-certifies that the individual is unemployed, partially unemployed, or unable or unavailable to work because of a listed COVID-19 reason in Section 2102(a)(3)(A)(ii) of the CARES Act (as described in subsection C.1. below), and (iii) provides required documentation of employment/self-employment within the applicable period of time (as described in subsection C.2. below).
11. "Department" means the U.S. Department of Labor.

12. "Extended compensation" means compensation payable to an individual for weeks of unemployment in an extended benefit period, under those provisions of the state law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970 (Pub. L. 91-373), and when so payable includes additional compensation and compensation payable pursuant to 5 U.S.C. Chapter 85. Extended compensation is referred to as Extended Benefits or EB.
13. "Federal Pandemic Unemployment Compensation" means the compensation payable under Section 2104 of the CARES Act and is referred to as FPUC.
14. "Pandemic Unemployment Assistance" means the compensation payable under Section 2102 of the CARES Act and is referred to as PUA.
15. "Pandemic Emergency Unemployment Compensation" means compensation payable under Section 2107 of the CARES Act and is referred to as PEUC.
16. "Regular compensation" means compensation payable to an individual under any state law or the unemployment compensation plan of a political subdivision of a state and, when so payable, includes compensation payable pursuant to 5 U.S.C. Chapter 85 (parts 609 and 614 of this chapter), but not including extended compensation or additional compensation.
17. "Secretary" means the U.S. Secretary of Labor.
18. "State" means the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.
19. "State agency" means the agency of the state which administers its state law, and for Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, it means the agency designated in the Agreements entered into with the Department.
20. "State law" means the unemployment compensation law of a state, approved by the Secretary under Section 3304 of the Federal Unemployment Tax Act (FUTA). (26 U.S.C. § 3304(a)).
21. "Week" means a week as defined in the applicable state law.
22. "Week of unemployment" is defined as used in 20 C.F.R. 625.2(w).

Note: Except as otherwise provided in Section 2102 of the CARES Act, as amended by the Continued Assistance Act, or to the extent there is a conflict between Section 2102, as amended, and 20 C.F.R. Part 625, 20 C.F.R. Part 625 shall apply to Section 2102 as if the term "COVID-19 public health emergency" were substituted for the term "major disaster" each place it appears in 20 C.F.R. Part 625 and the term "pandemic" were substituted for the term "disaster" each place it appears in 20 C.F.R. Part 625.

C. Operating Instructions

1. Eligibility (**updated as noted below to reflect changes from the Continued Assistance Act and includes clarifications to guidance provided in UIPL Nos. 16-20, Change 1; 16-20, Change 2; and 16-20, Change 3**). Section 2102 of the CARES Act provides for payment of PUA to "covered individuals." A "covered individual" is someone who meets each of the following three conditions:

   Condition #1: The individual is not eligible for regular UC, EB, or PEUC. This includes an individual who has exhausted all rights to such benefits, as well as an individual who is self-employed, seeking part-time employment, lacking sufficient work history, or who is otherwise not qualified for regular UC, EB, or PEUC. Self-employed individuals include independent contractors and gig economy workers.

   Condition #2: The individual must self-certify that he or she is otherwise able and available to work within the meaning of applicable state law, except that the individual is unemployed, partially unemployed, or unable or unavailable to work because of a listed COVID-19 reason in Section 2102(a)(3)(A)(ii) of the CARES Act, as described below.

   Condition #3 (**new**): Section 241 of the Continued Assistance Act requires that an individual must provide documentation substantiating employment or self-employment, or the planned commencement of employment or self-employment, if he or she files a new application for PUA on or after January 31, 2021, or, if the individual applied for PUA before January 31, 2021 and receives PUA benefits on or after December 27, 2020 (the enactment date of the Continued Assistance Act). This requirement is described in further detail in Section C.2. below.

   PUA is generally not payable to individuals who have the ability to telework with pay, or who are receiving paid sick leave or other paid leave benefits. However, an individual receiving paid sick leave or other paid leave benefits for less than his or her customary work week may still be eligible for a reduced PUA weekly benefit amount (WBA). The state must treat any paid sick leave or other paid leave received by a claimant in accordance with state law. Similarly, if an individual has been offered the option of teleworking with pay and does telework with pay but is working and earning less than the individual customarily worked/earned due to a COVID-19 related reason identified in Section 2102(a)(3)(A)(ii)(aa) through (kk) of the CARES Act, the individual may be eligible for a reduced PUA WBA. Income from such work would be treated in accordance with state law.

   Under Condition #1, an individual "lacking sufficient work history" means an individual: 1) with a recent attachment to the labor force (meaning that he or she worked at some

point from the start of the applicable tax year to the date of filing – refer to C.2. for additional information on required documentation), 2) who does not have sufficient wages in covered employment to establish a claim under regular UC, and 3) who is unemployed or partially unemployed or unable or unavailable to work because of one of the COVID-19 related reasons identified under Section 2102 of the CARES Act. Examples of workers which may be seen as "lacking sufficient work history" include workers for certain religious entities, Peace Corps workers, AmeriCorps participants, and Fulbright program participants who are working, provided they satisfy Conditions #2 and #3 as described above. Individuals who had a bona fide offer to start working on a specific date and were unable to start due to one of the COVID-19 related reasons identified under Section 2102 of the CARES Act are also considered individuals with a recent attachment to the labor force.

Additional details for Condition #2. As described under Condition #2, an individual must self-certify that he or she is otherwise able to work and available for work, as provided under state law, except that the individual is unemployed, partially unemployed, unable to work or unavailable for work due to at least one of the following categories described below. These categories are set forth in Section 2102(a)(3)(A)(ii)(I)(aa) through (kk) of the CARES Act.

Included for each of the categories are illustrative examples and explanations of circumstances that fall under each category. Additional examples are also provided in UIPL Nos. 16-20, Change 1; 16-20, Change 2, and 16-20, Change 3. Examples and explanations for each of the categories under items (aa) through (jj) of Section 2102(a)(3)(A)(ii)(I) of the CARES Act are not an exhaustive list of all examples within each category. If states consider other qualifying circumstances, such circumstances must align with one of the (aa)-(jj) reasons and be applied in a manner consistent with the examples below. Additionally, the Secretary, in his authority to approve additional items under Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act, has approved one additional circumstance under which an individual may satisfy Condition #2.

aa. <u>The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis</u>. Examples may include:

- An individual who has to quit his or her job as a direct result of COVID-19 because the individual has tested positive for COVID-19 or has been diagnosed with COVID-19 by a qualified medical professional, and continuing work activities, such as through telework, is not possible by virtue of such diagnosis or condition;
- An individual who has to quit his or her job due to coming in direct contact with someone who has tested positive for COVID-19 or has been diagnosed by a medical professional as having COVID-19, and, on the advice of a qualified medical health professional is required to resign from his or her position in order to quarantine.

bb. A member of the individual's household has been diagnosed with COVID-19. For example:

- A member of the individual's household has been diagnosed as having COVID-19 by a qualified medical professional or a member of the individual's household has tested positive for COVID-19 and the individual is unable to work as a result.

cc. The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19. For example:

- An individual is "providing care" for a family member or a member of the individual's household if the provision of care requires such ongoing and constant attention that the individual's ability to perform other work functions is severely limited. An individual who is assisting a family member who is able to adequately care for him or herself is not "providing care" under this category.

dd. A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work. For example:

- An individual has "primary caregiving responsibility" for a child or other person in the household if he or she is required to remain at home to care for the child or other person.
- This includes an individual whose job allows for telework, but for whom the provision of care to the child or other person with a closed school or other facility requires such ongoing and constant attention that it is not possible for the individual to perform work at home.

ee. The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency. For example:

- An individual who is unable to reach his or her place of employment because doing so would require the violation of a state or municipal order restricting travel that was instituted to combat the spread of COVID-19.

ff. The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19. For example:

- An individual who has been advised by a qualified medical professional that he or she may be infected with COVID-19 and that he or she therefore should self-quarantine. For example, an individual had direct contact with another person who has tested positive for COVID-19 or been diagnosed with COVID-19 by a

qualified medical professional and is advised by a health care provider to self-quarantine to prevent further possible spread of the virus. Such circumstances would render the individual unable to reach his or her place of employment.

- An individual whose immune system is compromised by virtue of a serious health condition and is therefore advised by a health care provider to self-quarantine in order to avoid the greater-than-average health risks that the individual might face if he or she were to become infected by COVID-19.

gg. The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency. Examples include, but are not limited to:

- An individual is unable to reach his or her job because doing so would require the violation of a state or municipal order restricting travel that was instituted to combat the spread of COVID-19 or the employer has closed the place of employment.
- An individual does not have a job because the employer with whom the individual was scheduled to commence employment has rescinded the job offer as a direct result of the COVID-19 public health emergency.

hh. The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19. For example:

- An individual whose head of household previously contributed the majority of financial support to the household died as a direct result of COVID-19, and the individual is now the person in the household expected to provide such financial support.

ii. The individual has to quit his or her job as a direct result of COVID-19 (**example expanded**). For example:

- An individual was diagnosed with COVID-19 by a qualified medical professional, and although the individual no longer has COVID-19, the illness caused health complications that render the individual objectively unable to perform his or her essential job functions, with or without a reasonable accommodation. States should also note that, for purposes of item (ii), an individual does not have to quit his or her job as a direct result of COVID-19 if paid sick leave or other paid leave benefits are available to the individual. Generally, an employee "has to quit" within the meaning of this Section only when ceasing employment is an involuntary decision compelled by the circumstances identified in this Section.

jj. The individual's place of employment is closed as a direct result of the COVID-19 public health emergency (**examples added/updated**). Some examples include, but are not limited to the following:

- If a business is shut down due to an emergency declaration or due to necessary social distancing protocols, the resulting unemployment of affected individuals would be considered a direct result of COVID-19. While a government-mandated closure is not necessary to satisfy this category, the claimant must be able to self-certify that the business was closed "as a direct result of the COVID-19 public health emergency."
- If a business has multiple parts and one or some of those parts is shut down due to restrictions imposed by COVID-19, affected staff from the parts of the business that shut down may be eligible for PUA. For example, a business may include both a restaurant and a brewery. If the individual's place of employment is the restaurant and the restaurant is shut down because of the COVID-19 pandemic, even if the brewery continues to operate, the individual who was employed in the restaurant may be eligible for PUA. An individual who is working reduced hours while his or her place of employment continues to operate does not satisfy the conditions to self-certify under item (jj).

kk. The individual meets any additional criteria established by the Secretary for unemployment assistance under this Section (**approved criteria clarified**).

To date, the Secretary has approved one additional criterion under item (kk): Self-employed individuals (including independent contractors and gig workers) who experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency, even absent a suspension of services, may self-certify under item (kk).

When states are developing the list of items (aa) through (kk) to include on their self-certification forms, states may use the following verbiage for item (kk): "I am self-employed (including an independent contractor or gig worker) and experienced a significant reduction of services because of the COVID-19 public health emergency."

States are reminded that for each week of PUA claimed, states must ensure that an individual completes a self-certification form (either paper or online) that includes the following. (*See* UIPL 16-20, Change 1, Question 45).

- The identification of the specific applicable COVID-19 related reason(s) under Section 2102(a)(3)(A)(ii)(I) of the CARES Act, and
- A notice advising the individual that intentional misrepresentation on the self-certification is fraud.

Additionally, states are also required to take reasonable and customary precautions to deter and detect fraud. Refer to Section C.21. of this Attachment for additional details on

tools to combat fraud. While Condition #2 relies on self-certification to verify that an individual is covered under the PUA program, when investigating the potential for fraud and improper payments, the state has, and is encouraged to use, this authority to request supporting documentation about this COVID-19 related reason. 20 C.F.R. 625.14(h) refers to the Secretary's "Standard for Fraud and Overpayment Detection" found in Sections 7510 *et seq*. of the *Employment Security Manual* (20 C.F.R. Part 625 Appendix C). The authority to request supporting documentation for fraud prevention is separate from the documentation requirement outlined in Section 241 of the Continued Assistance Act as discussed in Condition #3 above. States may request supporting documentation at any point during an investigation for potential fraud or improper payments.

States should bear in mind that many of the qualifying circumstances described in Section 2102(a)(3)(A)(ii) of the CARES Act are likely to be of limited duration and eligibility for PUA requires that the individual is otherwise able to work and available for work within the meaning of applicable state law. For example, an individual who has been advised to self-quarantine by a health care provider because of the individual's exposure to a person who has tested positive for COVID-19 and is therefore unable to reach his or her place of employment for purposes of item (ff) may be able to return to his or her place of employment within two weeks of the exposure if he or she has not exhibited symptoms of COVID-19 or tested positive for COVID-19. Similarly, a school is not closed as a direct result of the COVID-19 public health emergency, for purposes of item (dd), after the date the school year was originally scheduled to end, as described in more detail in UIPL No. 16-20, Change 3. As such, the expectation is that states will continue to assess an individual's ability to work and availability for work each week in which the individual is collecting PUA.

2. Requirement to submit documentation substantiating employment or self-employment (Section 241 of the Continued Assistance Act) (**new**). Section 241(a) of the Continued Assistance Act creates a new requirement for individuals to submit documentation to substantiate their employment or self-employment, or planned commencement of employment or self-employment.

   Anyone that receives a payment of PUA on or after December 27, 2020, (the enactment date of the Continued Assistance Act) will be required to submit documentation substantiating employment or self-employment, or the planned commencement of employment or self-employment. This includes any individual who receives any payment of PUA on or after December 27, even if the payment is for a week of unemployment that occurred before December 27, 2020. The deadline for providing such documentation depends on when the individual filed the initial PUA claim.

   - *Filing New Applications for PUA on or after January 31, 2021*. Individuals filing a new PUA application on or after January 31, 2021 (regardless of whether the claim is backdated), are required to provide documentation within 21 days of application or the date the individual is directed to submit the documentation by

the State Agency, whichever is later. The deadline may be extended if the individual has shown good cause under state UC law within 21 days.

- *Filing Continued Claims for PUA.* Individuals who have an existing PUA claim as of December 27, 2020, (the enactment date of the Continued Assistance Act) OR who file a new initial PUA claim before January 31, 2021, and who receive PUA on or after December 27, 2020, must provide documentation within 90 days of the application date or the date the individual is instructed to provide such documentation by the state agency (whichever date is later). The deadline may be extended if the state finds that the individual has shown good cause under state UC law for failing to submit the documentation within 90 days.

This documentation demonstrates a recent attachment to the labor force and serves as an important tool against fraud by requiring the individual to submit documentation to prove eligibility, rather than have such documentation automatically added to the file based on agency records. As such, states may not rely solely on agency records to satisfy this condition – the individual must submit documentation to the agency to be entitled to benefits.

a. *Type of acceptable documentation.* The requirements to submit documentation substantiating employment or self-employment and to submit documentation for a higher WBA are distinct. As described in Section C of Attachment I and in Attachment II to UIPL No. 16-20, Change 1, an individual is already required to submit documentation substantiating wages if the individual is to receive a WBA that is higher than the state minimum WBA. However, the documentation that an individual submits in support of a higher WBA may also be used to satisfy the documentation requirement to substantiate employment or self-employment.

   An individual who has not submitted documentation in support of a higher WBA must still provide documentation substantiating employment or self-employment. While documentation to support a higher WBA must demonstrate earnings during the entire look-back period, documentation to substantiate employment or self-employment need only demonstrate the existence of employment or self-employment at some point between the start of the applicable tax year and the date of filing.

   In general, proof of employment includes, but is not limited to, paycheck stubs, earnings and leave statements showing the employer's name and address, and W-2 forms when available. Proof of self-employment includes, but is not limited to, state or Federal employer identification numbers, business licenses, tax returns, business receipts, and signed affidavits from persons verifying the individual's self-employment. Proof of employment with organizations such as the Peace Corps, AmeriCorps, and educational or religious organizations includes, but is not limited to, documentation provided by these organizations and signed affidavits from persons verifying the individual's attachment to such organizations. Proof of the planned commencement of employment includes, but is not limited to, letters offering employment, statements/affidavits by individuals (with name and contact

information) verifying an offer of employment. Proof of the planned commencement of self-employment includes, but is not limited to, business licenses, state or Federal employer identification numbers, written business plans, or a lease agreement. Individuals must present the proof of employment and the state may verify the proof submitted using records the state may have available, such as wage records or state revenue records.

b. *Period during which documentation must substantiate employment or self-employment.* Such documentation must demonstrate proof of employment or self-employment (or the planned commencement of such employment or self-employment) at some point between the start of the applicable taxable year and the date of filing. For example, an individual filing a claim effective December 27, 2020, must submit documentation that substantiates employment or self-employment which occurred between January 1, 2019 (the start of the applicable tax year) and December 27, 2020. An individual filing a claim effective January 3, 2021, must submit documentation that substantiates employment or self-employment which occurred between January 1, 2020 (the start of the applicable tax year) and January 3, 2021.

   Unlike the documentation requirement to receive a higher WBA, documentation to substantiate employment or self-employment need not cover the entire period in which an individual was working. States have discretion to determine if the documentation an individual submits substantiates an individual's employment, self-employment, or planned commencement of employment or self-employment.

c. *Failure to Comply.* Individuals who do not provide documentation substantiating employment/self-employment (or planned employment/self-employment) within the required timeframe, as described above, are not eligible for PUA. For DUA, if the individual fails to submit documentation substantiating employment or self-employment, the state must establish an overpayment for the entire DUA claim, per 20 C.F.R. 625.6(e)(2). However, as provided in Section 241(b)(2) of the Continued Assistance Act, for PUA, if the individual fails to submit such documentation, the state may only establish an overpayment for those weeks of unemployment ending on or after December 27, 2020 (the enactment date of the Continued Assistance Act).

   For example, an individual has a PUA claim effective on November 1, 2020, and files and is paid for weeks of unemployment ending November 7, 2020 through weeks ending January 9, 2021. Because the individual received a payment for PUA after December 27, 2020, the state must notify the individual on January 4, 2021 about the requirement to provide documentation substantiating employment/self-employment (or planned employment/self-employment) within 90 days (by April 4, 2021). If, in that timeframe, the individual fails to provide documentation or fails to show good cause to have the deadline extended, an overpayment must be established for all of the weeks paid beginning with the week ending January 2, 2021. This is because the individual cannot be deemed ineligible for a week of unemployment ending before the date of enactment solely for failure to submit documentation.

As another example, an individual files an initial PUA claim on February 4, 2021 and the claim is backdated to an effective date of December 13, 2020. On February 8, 2021, the state notifies the individual of the requirement to provide documentation substantiating employment/self-employment (or planned employment/self-employment). Because the initial claim was filed after January 31, 2021, the individual must provide such documentation within 21 days (or by February 28, 2021). If, in that timeframe, the individual fails to provide documentation or fails to show good cause to have the deadline extended, an overpayment must be established for all of the weeks paid beginning with the week ending January 2, 2021. This is because the individual cannot be ineligible for a week of unemployment ending before the date of enactment solely for failure to submit documentation.

The consequences of failing to provide documentation substantiating employment or self-employment are different from circumstances where the individual fails to submit documentation supporting calculation of a higher WBA. If the individual fails to provide documentation supporting a higher WBA, as described in Question 20 of Attachment I to UIPL No. 16-20, Change 1, the individual's WBA will be reduced based on whichever is higher – the record of wages already on file or the minimum PUA WBA. Under these circumstances, the state would only establish an overpayment for the difference between the higher WBA and the lower WBA.

d. *Notification Requirements.* States must notify individuals filing new PUA claims on or after January 31, 2021, and individuals filing PUA continued claims on or after December 27, 2020 (the enactment date of the Continued Assistance Act), of the requirement to provide documentation to substantiate their employment or self-employment (or planned commencement of employment or self-employment). Such notice must include the applicable deadline and the ability to show good cause on or before the deadline for extending such deadline, and the disqualification for failure to provide required documentation, including the potential for an overpayment of benefits paid. States may refer to Attachment III of UIPL 09-21 for sample language.

3. Verification of Identity (Section 242(a) of the Continued Assistance Act) (**new**). Section 242(a) of Continued Assistance Act modifies Section 2102(f)(1) of the CARES Act. For states to have an adequate system for administering the PUA program, states must include procedures for "identity verification or validation and for timely payment, to the extent reasonable and practicable" by January 26, 2021, which is 30 days after December 27, 2020 (enactment of the Continued Assistance Act). States that previously verified an individual's identity on a UC, EB, or PEUC claim within the last 12 months are not required to re-verify identity on the PUA claim, though the Department encourages the state to take additional measures if the identity is questioned. Individuals filing new PUA initial claims that have not been through the state's identity verification process must have their identities verified to be eligible.

The Department strongly encourages states to use the Identity Verification (IDV) solution offered by the UI Integrity Center as part of its Integrity Data Hub (IDH) as one method to meet this requirement. This IDV solution offers states advanced fraud risk scoring to

maximize front-end ID verification, aiding states in assessing whether an individual is using a false, stolen, or synthetic ID. It is available to states at no cost and is a secure, robust, centralized, multi-state data system that allows participating state UI agencies to submit claims for cross matching and analysis to support the prevention and detection of improper payments, fraud, and ID theft.

There is also a range of other tools on the market that states may consider to satisfy this requirement for identity verification. States are also strongly encouraged to explore implementation of complementary and rigorous forms of identity verification solutions.

The Department will provide states with additional administrative funding to support state costs to implement PUA identity verification processes and solutions and to continue work to address fraud in both the PUA and PEUC programs.

4. Determining Exhaustees (**no change**). A PUA claimant ceases to be an exhaustee of regular UC, PEUC, and EB when he or she can establish a valid new benefit year. If an individual is no longer an exhaustee of regular UC, EB, or PEUC, the individual will not meet the definition of a covered individual and may not receive PUA benefits. Therefore, at each quarter change, the state must check to determine if an individual meets the state's requirements to establish a new benefit year. If individuals can establish a new benefit year, they are no longer eligible for PUA. In these cases, the claimants should be advised that they are no longer eligible for PUA and that they may file a regular UC, PEUC or EB claim.

5. Phaseout Period (Section 201(a) of the Continued Assistance Act) (**new**). Individuals receiving PUA as of the end of the program (March 13, 2021 for states with a Saturday week ending date and March 14, 2021, for states with a Sunday week ending date), who have not yet exhausted their PUA entitlement may continue to collect PUA for any week in which they have remaining entitlement and are otherwise eligible, except that no PUA is payable for any week beginning after April 5, 2021 (April 10, 2021 for states with a Saturday week ending date and April 11, 2021 for states with a Sunday week ending date).

   Individuals are identified as "receiving" PUA if they have a PUA claim on file as of March 14, 2021 **and** are eligible for PUA with respect to week ending March 13, 2021 (or March 14, 2021, for states with a Sunday week ending date).

   Similar to the guidance in section C.15. of this UIPL on backdating, if an individual filed a regular UC claim on or before March 14, 2021, and the state later determines that the individual is not eligible for regular UC, the state must use the date the claimant filed the regular UC claim as the date of filing for the PUA claim For example, if the individual filed a regular UC application on March 1, 2021, and the state determined the claimant was not eligible for regular UC on March 20, 2021, the PUA application must be deemed to have been filed on March 1, 2021, and the claimant may be eligible for the phaseout period, provided they are also eligible for the payment of PUA with respect to week

ending March 13, 2021 (or March 14, 2021 for states with a Sunday week ending date). However, if for example, the individual first files a PUA claim on March 23, 2021, and the state backdates the claim and the individual met PUA eligibility requirements for the week ending March 13, 2021, the individual would not qualify for the phaseout because the individual did not have a PUA claim on file as of March 14, 2021.

In states where the week of unemployment ends on a Saturday, the last payable week of PUA for individuals who are eligible to participate in the phaseout period is the week ending April 10, 2021. In states where the week of unemployment ends on a Sunday, the last payable week of PUA for individuals who are eligible to participate in the phaseout period is the week ending April 11, 2021.

Instructions for accepting new applications after March 14, 2021 to be backdated to the program dates will be forthcoming in additional guidance.

6. Hold Harmless for Proper Administration (Section 201(e) of the Continued Assistance Act) (**new**). Generally, an individual must have exhausted all entitlement to regular UC, PEUC, and EB before filing for PUA. However, Section 201(e) of the Continued Assistance Act provides a "hold harmless" provision for an individual who previously exhausted PEUC and is now receiving PUA, but as a result of Section 206(b) of the Continued Assistance Act, becomes eligible for additional amounts of PEUC beginning on or after December 27, 2020. States may continue paying PUA to an individual currently receiving PUA who is newly eligible to receive PEUC due to the additional weeks of PEUC. This flexibility is allowed for an appropriate period of time as determined by the Secretary of Labor.

   The Department considers four weeks of unemployment commencing on or after the date of enactment of the Continued Assistance Act an appropriate period of time for states to implement the additional amounts of PEUC and move an individual from his or her PUA claim back to PEUC. For states with a Saturday week ending date, this means that the week ending January 23, 2021 should be the last week that an individual is paid PUA before moving to the augmented PEUC claim and not the PUA claim (week ending January 24, 2021 for states with a Sunday week ending date).

   During this time, an individual may remain eligible for PUA notwithstanding the fact that the individual now has additional entitlement to PEUC. Recognizing the unique circumstances states face and the number and complexity of UI programmatic changes that states must swiftly implement, should a state determine that it will not be able to transition individuals from PUA back to PEUC in that timeframe, the state must contact the appropriate ETA Regional Office to determine the earliest date that the state will be able to implement this transition.

   Individuals may not receive payments under both the PUA and PEUC programs for the same week of unemployment. Any PUA payments made with respect to weeks of unemployment during this implementation period do not need to be moved from the PUA to PEUC claim. This will not affect the individual's entitlement amounts to the

additional PEUC benefits. Should the individual later exhaust PEUC and resume filing against his or her PUA claim, such weeks of PUA will be deducted from the individual's overall PUA entitlement.

7. Continued Eligibility Requirements (Section 263 of the Continued Assistance Act) (**new**). Section 263 of the Continued Assistance Act requires individuals to recertify each week that he or she remains an individual described in Section 2102(a)(3)(A)(ii) of the CARES Act.

   The Department interprets the use of the term "recertification" to mean the identification of the specific COVID-19 reason under Section 2102(a)(3)(A)(ii)(I)(aa) through (kk) of the CARES Act that applies to a claimant's situation for each week that PUA is claimed. This amendment to Section 2102 of the CARES Act aligns with the requirement in Question 45 of Attachment I to UIPL 16-20, Change 1, that individuals are required to identify the specific COVID-19 related reason specified in Section 2102(a)(3)(A)(ii)(I)(aa) through (kk) of the CARES Act for each week that PUA is claimed.

   In short, to comply with the requirements in Section 263 of the Continued Assistance Act, all states must ensure that, with respect to weeks of unemployment beginning on or after January 26, 2021 (30 days after the enactment date of the Continued Assistance Act), their continued claim forms contain a self-certification process for PUA claimants to identify the specific COVID-19 related reason under Section 2102(a)(3)(A)(ii)(I)(aa) through (kk) of the CARES Act for which they are unemployed, partially unemployed, or unable or unavailable to work. For states with a Saturday week ending date, this begins with ending February 6, 2021. For states with a Sunday week ending date, this begins with week ending February 7, 2021.

   For continued claims filed with respect to weeks ending before January 26, 2021 (January 30, 2021, for states with a Saturday week ending date and January 31, 2021 for states with a Sunday week ending date), if a state made a good faith effort to implement the PUA program, an individual will not be denied benefits solely for failing to submit a weekly recertification.

   In general, states will be determined to have made a good faith effort to implement Section 2102 of the CARES Act, in accordance with rules similar to those in 20 C.F.R. 625.6, when the state confirmed the individual is a covered individual at the time of the initial application or by the first week of eligibility. The Department may also consider other factors, including those listed below. Part of a good faith effort includes the proper calculation of the PUA WBA in accordance with 20 C.F.R. 625.6 (see Question 2 of Attachment I to UIPL No. 16-20, Change 2). The Department will evaluate "good faith effort" in implementing Section 2102 of the CARES Act and identify any retroactive action needed on a state by state basis.

Examples of factors that the Department may consider in assessing whether or not the state made a good faith effort to implement Section 2102 include, but are not limited to, the following:

- The extent to which the state required individuals to self-certify that they were unemployed, partially unemployed, or unable or unavailable to work because of an identified COVID-19 related reason under Section 2102(a)(3)(A)(ii)(I) of the CARES Act either on its initial PUA application or as part of the individual's first continued claim certification (the first week of eligibility),
- If a state paraphrased its description of the statute's COVID-related reasons (the (aa) through (kk), the extent to which the state's paraphrasing reasonably captured the intent of the reasons, and
- The extent to which the states' implementation of the self-certification requirement in Section 2102 of the CARES Act may have resulted in potentially eligible individuals not receiving benefits (*e.g.*, states that failed to provide the option for item (kk) may require some retroactive action).

8. Eligibility of CW-1 Visa holders in the Commonwealth of the Northern Mariana Islands (CNMI) (Section 265 of the Continued Assistance Act) (**new**). The eligibility of Commonwealth Only Transitional Workers (CW-1) for federal public benefits, such as DUA or PUA, is governed by the Public Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Workers who fit into one of the categories of "qualified aliens" under PRWORA, as defined in 8 U.S.C. §1641, are potentially eligible for federal public benefits. Section 265 of the Continued Assistance Act defines CW-1 Visa holders to be qualified aliens under Section 431 of PRWORA for purposes of eligibility under Section 2102 or 2104 of the CARES Act (PUA and FPUC, respectively).

   Therefore, CW-1 workers may receive PUA and FPUC if they meet all PUA eligibility requirements beginning with claims filed after December 27, 2020 (*i.e.*, claim effective dates beginning on or after January 3, 2021).

9. State PUA Agreements with the Department (**modified**). The PUA program is administered through voluntary agreements between states and the Department. The program is available in all 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, provided the state/territory signs an agreement with the Department. The Agreement that the Department of Labor and states signed in March 2020 also remains in effect with the modifications and extensions of these updated provisions. As set forth in Section XI of the Agreement, a state may terminate the Agreement with thirty day's written notice if it chooses to no longer administer one or more provisions specified in Section XIV, which includes the state's agreement to administer the PUA program.

10. Termination of PUA Agreement (**technical changes to align with the PUA Agreement**). As provided in Section III of the Agreement, the Department reserves the right to terminate this Agreement immediately if it determines that the State does not have an adequate system for administering such assistance, including because the State is not adequately ensuring that individuals receiving benefits under the PUA Program are eligible for such benefits. If a state's agreement is terminated by the Department for failure to have an adequate system for administering the PUA program, the state must immediately stop any PUA payments.

    Either party, upon thirty days written notice, may terminate the PUA Agreement. Under these circumstances, the PUA period will end 30 days after the date one of the parties to the agreement notifies the other party of its election to terminate the PUA agreement. No PUA payments may be made with respect to weeks of unemployment that begin after the date the termination of the Agreement is effective. However, PUA is payable for weeks of unemployment ending on or before such termination date.

11. Agreements between States (**no change**). One state that has entered into an agreement with the Department to operate a PUA program may choose to enter into an agreement with another state that has an agreement with the Department to operate the program on behalf of the other state.

12. Processing PUA Claims (**no change**).

    a. *Applicability of State Law Provisions*. Under Section 2102(h) of the CARES Act, 20 C.F.R. Part 625 applies to the administration of this program except as otherwise provided in Section 2102. Consistent with 20 C.F.R 625.11, the terms and conditions of the state law of the applicable state for an individual which apply to claims for, and the payment of, regular compensation apply to the payment of PUA to individuals. The provisions of the applicable state law that apply to claims for PUA include, but are not limited to:

        - Claim Filing and Reporting;
        - Information and Due Process to individuals;
        - Notices to individuals and employers, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to PEUC;
        - Determinations, redeterminations, appeals, and hearings;
        - Disqualification, including disqualifying income provisions;
        - Ability to work and availability for work, absent a COVID-19 related circumstance listed above;
        - The Interstate Benefit Payment Plan; and
        - The Interstate Arrangement for Combining Employment and Wages.

b. *Claims for PUA*. In processing claims for PUA, states must verify that individuals have no regular UC entitlement. If the individual is not eligible for regular UC because there are insufficient covered wages or the individual has an active UC claim with a definite or indefinite disqualification, then a state does not need to require the individual to file a regular UC initial claim. However, the state must have an established process whereby the individual's ineligibility for regular UC is documented on the application.

   If the individual's eligibility for regular UC is questionable (for example, there are wages in the base period, but no claim is filed, or a job separation that has not been adjudicated), then the state must first require the individual to file a regular UI initial claim. If the individual is subsequently disqualified, then the state may consider the individual for PUA eligibility.

13. PUA Work Search Requirements. As previously stated in Question #47 (Attachment I, UIPL No. 16-20, Change 1), work search requirements should be applied to PUA as appropriate. The applicable state UC laws related to continued claims are applicable to PUA claims, including work search. However, states may use the emergency flexibility described in UIPL No. 13-20 to temporarily modify or suspend work search requirements as needed to respond to the spread of COVID-19.

14. Establishment of the Effective Date of PUA claims – Beginning and Ending Dates of the PUA Program, including Claim Effective Dates (Section 201(a) of the Continued Assistance Act) (**updated to reflect the extension of the PUA Program**). Under Section 2102 of the CARES Act, states may begin making PUA payments after their agreement with the Secretary is signed. For most states, this occurred on March 28, 2020. Under Section 201 of the Continued Assistance Act, the period of applicability for the PUA program is extended to weeks of unemployment ending on or before March 14, 2021, unless the individual meets the requirements for phaseout payments (Refer to C.5. above). In states where the week of unemployment ends on a Saturday, the last payable week of PUA is the week ending March 13, 2021. In states where the week of unemployment ends on a Sunday, the last payable week of PUA is the week ending March 14, 2021.

15. Backdating Requirements and Limitations (Section 201(f) of the Continued Assistance Act) (**new**). As discussed in Question 4 of Attachment I to UIPL No. 16-20, Change 1, individuals filing for PUA must have their claim backdated to the first week during the Pandemic Assistance Period (PAP) in which the individual was unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in Section 2102(a)(3)(A)(ii)(I) of the CARES Act. Section 201(f) of the Continued Assistance Act provides a limitation on backdating for claims filed after December 27, 2020 (the enactment date of the Continued Assistance Act).

    - *PUA initial claims filed on or before December 27, 2020 (the enactment date of the Continued Assistance Act).* Initial PUA claims filed on or before this date

may be backdated no earlier than the week that begins on or after February 2, 2020, the first week of the PAP.

- *PUA initial claims filed after December 27, 2020 (the enactment date of the Continued Assistance Act).* Initial PUA claims filed after this date may be backdated no earlier than December 1, 2020 (a claim effective date of December 6, 2020 for states with a Saturday week ending date and a claim effective date of December 7, 2020, for states with a Sunday week ending date).

If an individual filed a regular UC claim on or before December 27, 2020, and the state later determines that the individual is not eligible for regular UC, the state should use the date the claimant filed the regular UC claim as the date of filing for the PUA claim, so long as the individual met the requirements for PUA as of that date. For example, if the individual filed a regular UC application on October 4, 2020 and the state determined the claimant was not eligible for regular UC on January 15, 2021, the PUA application will be deemed to have been filed on October 4, 2020 and the PUA claim will be backdated to that date.

16. Establishment of PUA Weekly Benefit Amount (Section 241 of the Continued Assistance Act) (**updated to reflect changes from the Continued Assistance Act and clarifications provided in UIPL Nos. 16-20, Change 1**).

a. *Self-Attestation for establishing PUA WBA* (**new/reminder**). As provided for in 20 C.F.R. 625.6, states must establish the PUA WBA immediately upon the filing of the PUA claim based on documentation submitted, state wage records, or the claimant's self-attestation of wages/income earned during the base period for the PUA claim.

When the state establishes the PUA WBA based on the claimant's self-attestation of wages, the state must advise the claimant to submit proof to substantiate the wages used to establish the PUA claim within 21 days. Refer to Question 2 of Attachment I to UIPL No. 16-20, Change 2, for details on calculating the WBA based on an individual's self-attestation.

If the claimant fails to provide proof to substantiate the higher WBA within 21 days, states must recalculate any PUA claim that was originally established based on a claimant's self-attestation. In no case shall the state recalculate the PUA WBA lower than the PUA minimum WBA as outlined in UIPL No. 03-20.

NOTE: Providing documentation to support the calculation of a higher WBA is a separate requirement from the new requirement to provide documentation substantiating employment or self-employment as outlined in Section C.2. above.

b. *Calculation of WBA* (**updated to confirm use of UIPL No. 03-20 for all PUA claims, a change to the FPUC payment information, and a reminder to use gross income for employment covered by the regular UI program and net income for**

self-employment when calculating the WBA). While there is no minimum monetary requirement for an individual to qualify for PUA, states must consider wages earned in the prior tax year to determine if the individual qualifies for a WBA that is higher than the state minimum PUA WBA. Section 2102(d) of the CARES Act requires the state to pay individuals the WBA under the UC law of the state where the covered individual was employed plus the FPUC payment in effect for the week being paid. The minimum WBA may not be less than the minimum WBA in 20 C.F.R. 625.6 before the amount of FPUC under Section 2104 of the CARES Act is added.

If an individual is self-employed or would not otherwise qualify for regular UC under a state's UC law, the individual's PUA WBA is calculated as provided in 20 C.F.R. 625.6 and is increased by the FPUC payment in effect for the weeks of unemployment being paid. If a self-employed individual or an individual who is "lacking sufficient work history" had earnings for the prior tax year that would result in a lower WBA than the minimum DUA WBA that is outlined UIPL No. 03-20 for the minimum DUA benefit, the individual's WBA must be the minimum amount listed in the UIPL.

All PUA claims within the PAP will use the minimum DUA WBA as published in UIPL No. 03-20. If an individual lives in a territory that does not have UC under its law, the individual's PUA WBA is calculated as provided in 20 C.F.R. 625.6.

When calculating the WBA, states must use the gross income for employment covered by the regular UC program and net income for self-employment. Refer to Attachment II of UIPL No. 16-20, Change 1, for additional detail.

c. *WBA payable* (**no change**).

- *Total Unemployment.* The WBA payable to an individual for a week of total unemployment is equal to the individual's most recent WBA (including any dependents' allowances) for the applicable PAP.

- *Partial and Part-Total Unemployment.* To determine the amount payable for a week of partial or part-total unemployment, the state will calculate the payment amount in accordance with the state law applicable to such a week of unemployment.

d. *Base Period for PUA Claims* (**new**). The base period to be utilized in computing the PUA WBA is the most recent tax year that has ended for the individual (whether an employee or self-employed) prior to the first week in which the individual certifies that his or her unemployment, partial unemployment, inability to work or unavailability for work was due to at least one of the reasons outlined in Section 2102(a)(3)(A)(ii)(I)(aa) through (kk) of the CARES Act.

For example, if an individual files a new PUA claim effective January 3, 2021, the state would consider income from tax year 2020. If an individual files a new PUA claim effective December 27, 2020, the state would consider income from tax year 2019. Refer to Question 19 of UIPL No. 16-20, Change 1, for examples of acceptable documentation when the prior year's income tax return is not available.

17. Establishment of PUA Maximum Entitlement (Number of weeks of PUA) – Additional Weeks Available (Section 201(b) of the Continued Assistance Act) (**updated**). The maximum number of weeks of PUA benefits is increased from 39 weeks to 50 weeks, minus any weeks of regular UC and EB that the individual receives with respect to the PAP. Individuals may only collect these additional 11 weeks of benefits for weeks of unemployment beginning on or after December 27, 2020 (the enactment date of the Continued Assistance Act), which means the week ending January 2, 2021 for states with a Saturday week ending date and January 3, 2021 for states with a Sunday week ending date.

    Individuals who establish PUA eligibility with respect to weeks of unemployment beginning on or after December 27, 2020 (the enactment date of the Continued Assistance Act) will have the duration established at 50 weeks, minus any weeks of regular UC and EB received during the applicable PAP.

    Individuals who established PUA eligibility with respect to a week of unemployment beginning before December 27, 2020, must have their PUA claim augmented by 11 weeks (which represents the difference between the new number of 50 weeks minus the initial number of 39 weeks) for weeks of unemployment beginning on or after December 27, 2020.

    If an individual files a new PUA claim after December 27, 2020, and is eligible for the claim to be backdated to no earlier than December 1, 2020, the state may establish the claim for 50 weeks of eligibility. However, any weeks of regular UC or EB received for weeks during the PAP (since January 27, 2020) must be subtracted from this amount. Additionally, the 11 extra weeks under the Continued Assistance Act are ONLY payable with respect to a week of unemployment beginning on or December 27, 2020 (the enactment date of the Continued Assistance Act) (*i.e.,* these additional benefits can only be paid for weeks of unemployment ending on or after January 2, 2021).

    Additionally, as provided for in the CARES Act, during the period in which a state is triggered "on" to a high unemployment period (HUP) under EUCA, the PUA duration is extended for additional weeks as well. This only applies to states whose law provides for the optional Total Unemployment Rate (TUR) trigger and whose TUR meets the thresholds necessary to provide for a HUP. If the state's maximum duration for regular UC is 26 weeks, then all PUA claims must be augmented for 7 weeks during the HUP (this is equal to 80 percent of the regular UC duration available during periods of high unemployment minus 50 percent of the regular UC duration available during regular EB periods). If the state's maximum duration for regular UC is less than 26 weeks, then the

PUA augmentation during a HUP will be less than 7 weeks. For example, states with a maximum duration of 20 weeks of regular UC may pay up to an additional 6 weeks of PUA during a HUP.

18. Other PUA Operational Instructions (**updated**). When determining the appropriate course of action in administering the PUA program, states should first consult Section 2102 of the CARES Act, as amended by the Continued Assistance Act of 2020, and the subsequent operating instructions provided by the Department. Where the CARES Act, as amended, and the operating instructions are silent, states should refer to the DUA regulations at 20 C.F.R. Part 625. All other PUA program parameters, as provided in Section 2102 of the CARES Act, UIPL Nos. 16-20; 16-20, Change 1; 16-20, Change 2; and 16-20, Change 3, remain the same.

19. Secretary's Standard (**no change**). The procedures for reporting and filing claims for PUA must be consistent with these instructions and the Secretary's "Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services" (Employment Security Manual, Part V, Sections 5000 et. seq.).

20. Determination of Entitlement: Notices to Individuals (**no change, except as noted below**).

    a. *Determination of Initial Claim*. When an individual files an initial claim for PUA the state agency must determine promptly the eligibility of the individual and, if eligible, the weekly and maximum amounts of PUA payable. If denied PUA, the individual must be issued an appealable determination.

    b. *Determination of Weekly Claims*. The state agency must promptly, upon the filing of a claim for a payment of PUA for a week of unemployment, determine whether the individual is entitled to a payment of PUA for such week, and, if entitled, the amount of PUA to which the individual is entitled to and issue a prompt payment.

    c. *Redetermination*. An individual filing a PUA initial claim or weekly certification has the same rights to request a reconsideration of a determination as are provided for in the applicable state law for regular compensation.

    d. *Notices to Individual*. The state agency must give written notice to the individual of any determination or redetermination of an initial claim and all weekly claims. Each notice must include such information regarding rights to reconsideration or appeal, or both, using the same process that is used for redeterminations of regular compensation.

    e. *Promptness*. Full payment of PUA when due must be made as soon as administratively feasible.

f. *Secretary's Determination Standard*. The procedures for making determinations and redeterminations and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals claiming PUA must be consistent with the Secretary's "Standard for Claim Determinations—Separation Information" (Employment Security Manual (ESM), Part V, Sections 6010 et seq.). In processing claims, states must comply with Section 6013 of the ESM about conducting an investigation and Section 6014 of the ESM concerning gathering separation information from employers when the claim involves separation from an employer.

g. *Appeal and Hearing*.

- *Applicable State Law* (**revised**). To ensure that appeals and hearings are held promptly, the applicable state law provisions concerning the right of appeal and fair hearing from a determination or redetermination of entitlement to regular compensation shall apply to determinations and redeterminations of eligibility for or entitlement to PUA.

  Additionally, Section 201(c) of the Continued Assistance Act, establishes in statute the Department's previous guidance from Section 13.g. of Attachment I to UIPL No. 16-20. States must continue to process PUA appeals in the same manner and to the same extent as the state would conduct appeals of determinations or redeterminations regarding rights to regular UC. Additionally, with respect to any appeal filed in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau, appeals must be carried out by the applicable entity in the same manner and to the same extent as those conducted under the UC law of Hawaii. Any decision issued on appeal or review before December 27, 2020, (the enactment date of the Continued Assistance Act) is not affected by this provision. The Department intends to work individually with Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau to support implementation of these provisions.

- *Rights of Appeal and Fair Hearing*. The right of appeal and opportunity for a fair hearing for claims for PUA must be consistent with these instructions and with Sections 303(a)(1) and 303(a)(3) of the Social Security Act (SSA) (42 U.S.C. 503(a)(1) and 503(a)(3)).

- *Promptness of Appeals Decisions.*

  - Decisions on appeals under the PUA Program must accord with the "Standard for Appeals Promptness—Unemployment Compensation" in 20 C.F.R. Part 650.

- Any applicable state law provision allowing the advancement or priority of UC cases on judicial calendars, or otherwise intended to provide for the prompt payment of UC when due, must apply to proceedings involving entitlement to PUA.

21. Fraud and Overpayments (**updated to reflect the Continued Assistance Act and other guidance**).

a. Identity Theft and Imposter Claims (**new**). If the state determines that a PUA claim was filed by an individual who is not the owner of the Social Security number that was used to file the claim, the state must deny the entire PUA claim. Additionally, the state may not augment the PUA claim and may not send any notification of potential entitlement with regard to such claim.

b. Fraud. An individual commits fraud if he or she knowingly has made or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of PUA to which such individual was not entitled.

- *Disqualification Periods* (**updated**). The provisions set out in 20 C.F.R. 625.14 apply with respect to PUA overpayments to the same extent and in the same manner as in the case of DUA. 20 C.F.R. 625.14(i). This Section sets the disqualification period for PUA and requires that the disqualification be based on when the fraud occurs.

    1. If the fraud was in connection with the initial application (for example, the individual says he or she quit the job because of COVID-19 and the state determines the individual was fired for reasons not related to COVID-19), the individual would be disqualified for the entire PAP.

    2. If the fraud occurred during the continued claim series, the disqualification would apply to the week the fraud occurred, plus the next two compensable weeks for PUA that immediately follow that week. If the individual is not otherwise entitled to PUA following the week of fraud, then the disqualification would be assessed on the first two weeks in which the individual once again becomes eligible for PUA.

- *Fraud Penalties* (**new/updated**). States must apply a 15 percent penalty to an individual's overpayment when the state determines that it made an erroneous PUA payment to an individual due to fraud the individual committed. See Section 251 of the Trade Adjustment Assistance Extension Act of 2011 (TAAEA), Pub. L. 112-40 (2011). Section 251(a)(2) of the TAAEA requires assessing a 15 percent penalty in these circumstances to any "unemployment compensation program of the United States." "Unemployment compensation

program of the United States" is defined, in relevant part under the TAAEA, as including "any other Federal program providing for the payment of unemployment compensation." PUA is one such program.

UIPL No. 02-12 provides that Section 251(b) of the TAAEA also requires, as a condition of administering "any" Federal UC program, that a state assess penalties against individuals determined to be overpaid under these programs due to fraud in the same manner as the state assesses and deposits these penalties under state law implementing Section 303(a)(11), SSA, with respect to UC paid out of the state's unemployment fund. The 15 percent penalty amount is the minimum amount required; states may impose a greater penalty.

- *Tools for Combatting Fraud* (**new**). The state should use the crossmatches and tools described in Section 4.b. of UIPL No. 23-20 to monitor for suspicious activity on PUA claims, as it does for regular UC. States are required to share information with the Department's Office of Inspector General (OIG), and the Department strongly encourages states to collaborate with the UI Integrity Center (Center). The Center, funded by the Department and operated by the National Association of State Workforce Agencies, provides states with the IDH which includes the IDV module, Suspicious Actor Repository (SAR), suspicious e-mail domains, Multi-State Cross-Match (MSCM), foreign internet protocol (IP) address detection, and the Fraud Alert system. The Center has provided states with new tools to support data mining to detect fraud. The Center also identifies, organizes, shares, and supports promising and innovative integrity practices and provides state-specific consulting, mentoring, and technical assistance.

  If a state has reasonable suspicion of fraudulent activity on a claim, then the state may request supporting documentation to address the concern. Requests for supporting documentation and a state's investigative and adjudicative practices should be done in alignment with the processes described in UIPL No. 01-16 to ensure due process is afforded to the individual.

c. *Overpayments* (**changes as noted below**). A PUA overpayment occurs when an individual has received a PUA payment to which he or she is not entitled.

   1. *Opportunity for a Hearing*. A State may not require repayment of a PUA overpayment until it determines that the payment was an overpayment, the individual was provided notice of the determination, the individual had an opportunity for a fair hearing, and the determination is final.

   2. *Authority to Waive Overpayments* (**new**). Section 201(d) of the Continued Assistance Act amends Section 2102(d) of the CARES Act and authorizes states to waive the repayment if the state determines that the payment of PUA was without fault on the part of any such individual and such repayment would be contrary to equity and good conscience. This waiver authority

applies to overpayments that meet this criteria at any time since the PUA program began.

The waiver provision is permissive. Therefore the state may choose not to waive the PUA overpayment. A state may also, if a state has an existing UC law that provides for the waiver of overpayments for equity and good conscience, apply its own definition of the terms "equity and good conscience" in applying the waiver.

If a state UC law provides for the waiver of overpayments but does not include a provision defining "equity and good conscience" the state must use the following provisions for equity and good conscience, when assessing whether an individual overpayment may be waived.

- It would cause financial hardship to the person from whom it is sought;
- The recipient of the overpayment can show (regardless of his or her financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment either he/she has relinquished a valuable right or changed positions for the worse; or
- Recovery could be unconscionable under the circumstances.

States that choose to waive overpayments under Section 201(d) of the Continued Assistance Act must notify all individuals with a non-fault overpayment of their ability to request a waiver. The notification must include how to request the waiver.

Waiver determinations must be made on the facts and circumstance of each individual claim, blanket waivers are not permissible. For example, states cannot waive overpayments due to administrative error for a group of individuals before first assessing and documenting why each individual meets the state's waiver requirements. The Department will monitor each state's process for waivers when monitoring program implementation.

3. *Recovery Provisions* (**new**). If the overpayment amount is not subject to waiver, the State agency must recover the amount of PUA to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular UC paid by the State.

4. *Benefit Offsets* (**updated**). States must offset benefits from other unemployment programs, as described below, to recover PUA overpayments. A state has significant flexibility in the way it implements the offset requirement. While a state must attempt to recover the full amount of the overpayment, a state may limit the amount that will be deducted from each payment as noted on page 4 of UIPL No. 05-13, *Work Search and Overpayment Offset Provisions Added to Permanent Federal Unemployment*

Compensation Law by Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012.

- Recovery by Cross-Program Offsets. A state must recover PUA overpayments from any additional PUA payments to which the individual is entitled and from any other UC payable under state or Federal law administered by the state agency (including FPUC and PEUC from the CARES Act, and any other assistance or allowance payable with respect to a week of unemployment under any other state or Federal law).

  Additionally, PUA payments must be reduced to recover overpayments from any state and federal unemployment benefit programs, if the state has a cross-program offset agreement in place under Section 303(g)(2), SSA (42 U.S.C. §503(g)(2)).

- Recovery by Interstate Reciprocal Overpayment Recovery Arrangement (IRORA). If a state has an Interstate Reciprocal Overpayment Recovery Arrangement in effect with the National Association of State Workforce Agencies, the state must offset any state or Federal benefits to repay PUA overpayments in another state. These instructions supersede the prior instructions that PUA benefits could only be offset to recover other PUA overpayments in another state.

- Limitation on offset amounts. A state may not offset more than 50 percent from the PUA payment to recover overpayments from any state or Federal unemployment benefit program.

22. Effect of Other UI-Related Programs on Eligibility for PUA (**updated**).

a. *Trade Readjustment Allowances (TRA).* PUA is payable only if the individual is not eligible for or has exhausted TRA (basic, additional, or completion). Eligibility for DUA (and accordingly PUA) requires that the individual NOT be eligible for "compensation" as defined at 20 C.F.R. 625.4(i). The definition of "compensation" at 20 C.F.R. 625.2(d) includes TRA. See UIPL No. 14-20, Change 1, Attachment I, Question 7. Therefore, to be eligible for PUA, an individual must have exhausted their entitlement to TRA.

b. *Disaster Unemployment Assistance (DUA).* If an individual is eligible for DUA with respect to a week of unemployment under Section 410 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, (42 U.S.C. 5177), the individual is not eligible to receive PUA for that week. This is because eligibility for both PUA and DUA is based on the reason for an individual's unemployment. If an individual's unemployment is directly caused by a major disaster, then the individual's unemployment is not due to a COVID-19 reason and the individual would not qualify for PUA.

Conversely, if the reason for the individual's unemployment is because of a listed COVID-19 related reason in Section 2102(a)(3)(A)(ii)(I) of the CARES Act, the individual's unemployment is not a direct result of a major disaster and the individual would not qualify for DUA. See UIPL No. 14-20, Change 1, Attachment I, Question 16.

23. Effect of State Additional Compensation (also known as Additional Benefits or AB) **(no change**). Section 2102 of the CARES Act and, by reference, DUA regulations at 20 C.F.R. Part 625 require that an individual have no rights to regular UC, EB, or additional compensation in order to meet the eligibility requirements for PUA.

24. Effect of Federal Pandemic Unemployment Compensation (FPUC) (**updated to reflect changes from the Continued Assistance Act**). Section 2102 of the CARES Act provides that FPUC payments provided under Section 2104 of the CARES Act must be added to the PUA WBA. With respect to weeks of unemployment beginning after the state signed the Agreement and ending on or before July 31, 2020. Section 203 of the Continued Assistance Act made modifications to the FPUC payment dates and amounts payable. FPUC payments are reauthorized for weeks of unemployment beginning after December 26, 2020, and ending on or before March 14, 2021.

25. Record Maintenance and Disposal of Records (**no change**). The state must maintain PUA payment data as required by the Department.

    a. *Record Maintenance*. Each state will maintain records on the administration of the PUA program and will make all such records available for inspection, examination, and audit by such federal officials, employees as the Department may designate, or as may be required by the law. Reference ET Handbook No. 401, UI Report Handbook for details.

    b. *Disposal of Records*. The electronic/paper records created in the administration of the PUA program must be maintained by the state for three years after final action (including appeals or court action) on the payments, or for less than the three-year period if copied by micro photocopy or by an electronic imaging method. At the end of the three-year period, the PUA records shall be transferred to state accountability under the conditions for the disposal of records that apply to UCFE and UCX records, as explained in Chapter X of ET Handbook No. 391 (1994 Edition) (OMB No. 1205-0179) and Chapter I of ET Handbook No. 384 (1994 Edition) (OMB No. 1205-0176).

26. Disclosure of Information (**no change**). Information in records made and maintained by the state agency in administering the PUA program must be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to regular compensation, and the entitlement of individuals thereto, may be disclosed under provisions of the applicable state law meeting the requirements of 20 C.F.R. Part 603. As provided under 20 C.F.R. 603.4(b), the

confidentiality requirements do not apply when such information is being provided in the aggregate, provided it cannot be combined with other publicly available information to reveal any such identifying particulars about an individual or the individual's past or present employer.

27. Inviolate Rights to PUA (**no change**). The rights of individuals to PUA must be protected in the same manner and to the same extent as the rights of persons to regular UC are protected under the applicable state law. Such measures must include protection of individuals from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to PUA. In the same manner and to the same extent, individuals must be protected from discrimination and obstruction in regard to seeking, applying for, and receiving PUA.

28. Notifications (**changes as noted below**).

    a. *Identification and Notification of Potentially Eligible Claimants* (**updated**). The state must identify individuals who are potentially eligible for PUA and provide them with appropriate written notification of their potential entitlement to PUA, including filing instructions. This includes notifying claimants who were found ineligible for regular UC.

    States must also identify each individual with a PUA claim on file and advise these individuals that they are potentially eligible for additional PUA benefits. States must provide these individuals with instructions for reopening their PUA claims (if the individual has stopped collecting PUA). States may include these instructions in the monetary redetermination notice or a separate notice. In addition to this individual notification, states may also want to post the availability of additional PUA benefits on their websites or other social media.

    Additionally, if the state determines that a PUA claim was filed by an individual that did not own the identity, the state may not send any notification of potential entitlement to the individual. See C.21. above.

    States are not required to take a new PUA application for an individual with an existing PUA claim, whether the individual is in active claim filing status or not at the time he or she requests to resume filing. However, states must ensure that individuals remain eligible for PUA, including checking for entitlement to regular UC, PEUC, and EB and requesting a self-certification that the individual's unemployment, partial unemployment, or inability or unavailability to work is specifically attributable to one or more of the COVID-19 related reasons specified in section 2102(a)(3)(A)(ii)(I)(aa) through (kk) of the CARES Act. This self-certification may be done at the time the individual returns to resume collecting PUA or as part of the continued claim process before payment is released. States must document its evaluation of the individual's eligibility for UC in the state's system.

b. *Interstate Claims.* PUA is payable to individuals filing under the Interstate Benefit Payment Plan in the same manner and to the same extent that benefits are payable to intrastate claimants. The liable state is responsible for identifying and notifying all potentially eligible interstate claimants of their potential eligibility, including filing instructions.

c. *Notification of Media.* To assure public knowledge of the PUA program's status, the state must notify all appropriate news media having coverage throughout the state of the beginning and any extensions of the PUA program. This includes the extension of the PUA program to March 14, 2021 and the availability of up to an additional 11 weeks of benefits.

D. Financial Information and Instructions (updated):

1. Payment to States. Requesting PUA Benefit Funds—Under Section 2102(f)(2) of the CARES Act, each state that has entered into an agreement with the Secretary to pay PUA, will be paid an amount equal to l00 percent of the amount of PUA paid to eligible individuals by the state under the agreement and in full accordance with the CARES Act and these instructions. States will request funds from the Extended Unemployment Compensation Account through the Automated Standard Application for Payments (ASAP) system. Drawdown requests must adhere to the funding mechanism stipulated in the Treasury-State Agreement executed under the Cash Management Improvement Act of 1990. Requests will be funded in the same manner as all ASAP transactions elected by the states (FEDWIRE or ACH to the state benefit payment account).

   There will be one new line in the ASAP for making drawdowns to pay PUA benefits, refer to #3 below for drawdown instructions. The line will be clearly labeled PANDEMIC UNEMPLOYMENT ASSISTANCE (PUA).

   Section 2102(f)(2)(B) authorizes the Secretary to determine the amounts to be paid to states for processing PUA workloads. Such costs will be based on workload counts reported on the ETA902P report and will incorporate minute per unit factors and salary rates identical to those used in the computation of the regular UC program above base administrative costs.

   Administrative costs will be computed on the ETA 902P report, line 301, column 17. *See* Attachment VI for additional detail. The supplemental budget request process will be used for states to request funds for implementation.

   Augmenting Claims. Augmentations of claims are counted as monetary redeterminations. States will receive administrative funding for monetary redetermination activity related to the augmentation of PUA entitlement that does not meet the definition under ET Handbook No. 401 for an initial, additional or a transitional claim. Such counts should be reported in the comments section of the ETA902P report and labeled "Monetary Redeterminations = "#######"".

Consistent with treatment of monetary redeterminations on the UI-3 report, five minutes per redetermination will be funded. The National Office will compute the additional reimbursement associated with these counts by applying the same hours and salary rate information used in the monthly administrative cost formula on line 301, column 17.

2. PUA Accounting Obligational Authority. The Grant Officer will assign a separate line on the UI program notices of obligational authority for PUA administrative grant funds, and a separate sub-account for PUA will be set up in the Payment Management System for states to draw down PUA administrative funds.

   Administrative Fund Accounting—Because of the separate appropriation for PUA administrative funds and the availability of these funds until expended, states must track and report PUA administrative expenditures and obligations separately from the regular UI program. Therefore, states must establish a separate fund ledger and must submit a separate ETA 9130 for the PUA program. States must include any PUA administrative expenditures and obligations incurred in March 2020 in their June 30, 2020, PUA ETA 9130 report.

3. Time Distribution. To ensure that PUA costs are tracked separately, states must charge time used for all PUA activities to the appropriate UI functional activity codes as outlined in Appendix E to ET Handbook No. 410 under the separate PUA fund ledger; however, states must combine regular and PUA staff year usage data in Section A of the UI-3 worksheet.

4. Accounting for PUA Payments (Benefits). PUA advances to the states' Unemployment Trust Fund (UTF) accounts and disbursements for PUA benefit payments will be reported on the monthly ETA 2112. Do not use a separate form for this report. (*See* Reporting Instructions.) Accurate reporting of advances, reimbursements and payments is important due to the monthly reconciliation of balances with Department of Labor records.

5. Processing Refunds. There are two scenarios for returning funds to the program line for PUA.

   a. The most likely scenario will be when the state has funds in its state benefit payment account and must return those funds to the Extended Unemployment Compensation Account. This should be completed as a negative amount posted to the appropriate line in ASAP. To accomplish this, the total draw for the day in ASAP must be greater than the negative balance posted to the appropriate line.

   b. The second scenario is when a state actually has the funds in its Federal UI account that are required to be returned to the appropriate program line. This should be accomplished by the state processing a book transfer transaction that accomplishes a transfer from its UI account to the appropriate program under the Extended Unemployment Compensation Account.

E. Reporting Instructions

1. ETA 2112. PUA benefit payment activity must be reported in the aggregate on the regular ETA 2112 report.

    a. Line 23c. Pandemic Unemployment Assistance. Report in columns C and E the amount of Federal funds received as advances or reimbursement for PUA.
    b. Line 42c. PUA Activity. Enter in columns C and F the net amount for which the Federal government is liable for PUA.

2. States are reminded that if a regular program initial claim is taken when verifying that a claimant is not eligible for regular UI before proceeding with a PUA claim, the state must record and report that as only a PUA initial claim and the regular program initial claim must not be reported. Regular program initial claims taken to verifying that a PUA claimant is not eligible for regular UI should be excluded from the regular State UI initial claims reported on the ETA538, ETA539, and ETA5159 reports.

    Similarly, states are reminded that as they work through backlogs, backdated continued claims processed should be reported in the ETA 538 and ETA 539 reports reflecting the weeks of unemployment for which the backdated claims were claimed. States should revise previous ETA 539 reports to include the backdated claims and avoid reporting multiple weeks of backdated claims for single claimants in the same week.

3. ETA 902 (**changes as noted below)**. ETA has revised the ETA 902P report to include additional data items for tracking of overpayment recovery activities, PUA claim final payments, and a section for overpayment activity related to identity theft. This guidance supersedes the reporting instructions provided in Attachment VI to UIPL No. 16-20.

    The ETA 902P now includes the following additional data cells:

    Section A, Application and Payment Activities

    Columns 14, 15, and 16, Overpayments. The Overpayments header for columns 14, 15, and 16 has been renamed to Overpayments Established.

    Column 18, Final Payments. Enter the number of final payments made to claimants for PUA. A final payment for PUA is defined as the last PUA payment a claimant receives during the pandemic assistance period because the claimant has exhausted their entitlement to the program. Excluded from the definition is the last payment to an individual if, but for the end of the pandemic assistance period, the individual would otherwise be entitled to further PUA benefits. Final payments should be reported based on the augmented 50-week PUA availability.

Section C, Overpayment Activity (all activity EXCEPT Identity Theft) and Administration

Column 16A Overpayment Recoveries. In column 16A, Amount, enter in line 301, the total amount of all PUA recoveries collected for the reporting period. In line 302, provide a sub-breakout of the amount of recoveries involving fraud. States must begin including this information in subsequent ETA 902P report submissions.

Section D, Overpayment Activity Related to Identity (ID) Theft

Column 19, 20, and 21, ID Theft Overpayments Established. In column 19, Cases, line 401, enter the number of ID theft cases established, including willful misrepresentation (fraud) determined during the report period as an ID theft overpayment. In line 402 provide a sub-breakout of the number of ID theft cases determined as ID theft fraud cases. In column 20, Weeks, enter in line 401 the number of weeks of PUA overpaid in connection with the ID theft cases reported in column 19; enter the number of weeks of ID theft fraud overpayments included in line 402. In column 21, Amount, enter in line 401, the amount overpaid represented by ID theft cases reported in column 19. Provide a sub-breakout of the amount involving ID theft fraud in line 402. Do not include overpayments established as a result of failure to report issues where the claimant did not respond or failed to provide sufficient information to verify identity.

Column 21A, ID Theft Overpayment Recoveries. In column 21A, Amount, enter in line 401, the total amount of all PUA ID theft recoveries collected for the reporting period. Provide a sub-breakout of the amount of ID theft recoveries involving fraud in line 402.

Timeline for submitting new reporting components. Any ETA 902P report submitted after the publication of this UIPL must include the additional components. For ETA 902P reports previously submitted for prior months, states may submit amended reports, for each month, containing the following:

- PUA overpayment recovery data in column 16A;
- PUA ID Theft Overpayments Established data in columns 19, 20, and 21; and,
- PUA ID theft overpayment recovery data in column 21A.

Alternatively, states have the option of including cumulative amounts for all prior months, in the Comments section of the next ETA 902P report submission for:

- PUA overpayment recoveries;
- PUA ID theft overpayment Cases, Weeks, and Amount(s); and,
- PUA ID theft overpayment recoveries.

Comments Section: Report the number of monetary redeterminations related to the augmentation of PUA claims that do not meet the definition under ET Handbook No. 401

for an initial, additional or a transitional claim. Such counts should be reported in the comments section of the ETA902P report and labeled "Monetary Redeterminations = "#######"".

Refer to Attachment II of this UIPL for the revised report template and instructions about this reporting.

Attachment II to UIPL No. 16-20 Change 4

ETA 902P – PANDEMIC UNEMPLOYMENT ASSISTANCE ACTIVITIES
Section IV-4

A. Facsimile of Form

ETA 902P – PANDEMIC UNEMPLOYMENT ASSISTANCE ACTIVITIES

ETA 902P – PANDEMIC UNEMPLOYMENT ASSISTANCE ACTIVITIES (PUA)

STATE:	REGION:	REPORT FOR PERIOD ENDING:

SECTION A. APPLICATION AND PAYMENT ACTIVITIES

CATEGORY	LINE NO.	INITIAL APPS.	NO. DETERM. ELIG.	FIRST PAYMTS.	WKS. CLAIMED	WKS. COMP.	AMOUNT COMP.	FINAL PAYMTS.
		1	2	3	4	5	6	18
Total	101							
Self - Employed	102							

SECTION B. DENIAL AND APPEALS ACTIVITY

CATEGORY	LINE NO.	WKS.OF PUA DENIED	APPEALS FILED		APPEALS DISPOSED		FAVOR OF APPELLANT	
			STATE	R A	STATE	R A	STATE	R A
		7	8	9	10	11	12	13
Total	201							
Self - Employed	202							

SECTION C. OVERPAYMENT ACTIVITY (all activity EXCEPT Identity Theft) AND ADMINISTRATION

CATEGORY	LINE NO.	OVERPAYMENTS ESTABLISHED			OVERPAYMENT RECOVERIES	ADMINISTRATIVE COSTS
		CASES	WEEKS	AMOUNT	AMOUNT	
		14	15	16	16A	17
Total	301					
Fraud	302					

SECTION D. OVERPAYMENT ACTIVITY RELATED TO IDENTITY (ID) THEFT					
CATEGORY	LINE NO.	ID THEFT OVERPAYMENTS ESTABLISHED			ID THEFT OVERPAYMENT RECOVERIES
		CASES	WEEKS	AMOUNT	AMOUNT
		19	20	21	21A
Total	401				
Fraud	402				

Comments:

OMB No.: NA **OMB Expiration Date**: NA **OMB Burden Minutes**: NA

OMB Burden Statement: Section 2116(a), Division B, Title II of the CARES Act states that "Chapter 35 of Title 44, United States Code, (commonly referred to as the "Paperwork Reduction Act of 1995") shall not apply to the amendments made by this subtitle." Therefore these reporting instructions do not require additional OMB approval and the submission of this information is required to obtain or retain benefits under the SSA 303(a)(6).

B. Purpose

The ETA 902P report contains monthly data on Pandemic Unemployment Assistance (PUA) activities provided by the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 (Pub. Law 116-136), enacted on March 27, 2020. PUA is a temporary Federal program created under the CARES Act to provide relief for workers affected by the coronavirus who do not qualify for other Federal benefits such as regular unemployment insurance or extended benefits.

C. Scope and Duration of the Report

1. The first report shall be sent in the month following the date the state agreement to participate in the PUA program, and later reports shall be sent each month that PUA activity continues to occur, such as for payments made for weeks in the pandemic assistance period (PAP) issued as a result of appeals.
2. Reports should be submitted monthly through the end of the Pandemic Assistance Period and until all payment and appeals activity is complete.

D. Due Date and Transmittal

Reports shall be submitted electronically each month providing PUA activities performed during the preceding calendar month. Reports are due in the National Office on the 30th of the month following the month to which data relate. South

Pacific Island jurisdictions must submit hardcopy reports, as there is no electronic submittal method available to them at this time.

For South Pacific Island jurisdictions via email to UI-Reports@uis.doleta.gov. If mailed, one copy should be sent to the National Office addressed as follows:

U.S. Department of Labor, ETA
Attn: Pandemic Unemployment Assistance
Coordinator/Program Specialist
Division of Unemployment Insurance Operations

Frances Perkins Building
200 Constitution
Avenue, N.W.
Washington, D.C. 202l0

One copy should also be sent to the San Francisco ETA Regional Office.

E. General Reporting Instructions

1. In all instructions, reference to State UI (UC) claims will include UCFE, UCX, TRA, RRA (Railroad), EB, and any other program included and/or defined under 20 C.F.R. 625.2(d).

2. Self-employed applicants are those who have filed an initial request for PUA and for whom it was determined that their primary reliance for income is on their performance of services in their own business or farm. These individuals include independent contractors, gig economy workers, and workers for certain religious entities.

Payments of UI made to replace erroneously paid PUA should not be reported on the ETA 902P, but should be reported on the appropriate UI reports, i.e., ETA 5159.

F. Definitions

1. Effective Date of an Initial Application. (**updated**) Refer to Section C.15 of this UIPL for information on effective dates of PUA claims.

2. Eligible. (**updated**) Meets qualifications for receiving Pandemic Unemployment Assistance, as specified in Section 2102 of the CARES Act. If an individual is eligible for UC, EB, and PEUC, such individual is not eligible for PUA and should not be counted in any PUA Activities report.

3. Fraud. An overpayment for which material facts to the determination or payment of a claim are found to be knowingly misrepresented or concealed (*i.e.*, willful misrepresentation) by the claimant in order to obtain benefits to which the individual is not legally entitled. All states have definitions for

fraud and impose disqualifications for fraudulent misrepresentation to obtain or increase benefits.

4. Identity (ID) Theft. The crime of obtaining and using the personal or financial information of another individual to file or attempt to file a claim for UI benefits.

5. Identity Theft Overpayment (cases) Established. Any single issue involving an ID theft overpayment that has been determined for a claimant within a single calendar month and for which: 1) a formal notice of determination has been issued, or 2) a formal notice of determination has not been issued, since ownership of the ID theft overpayment has not been assigned, due to a state's inability to identify the individual responsible for generating the ID theft overpayment. An ID theft overpayment that covers one or more weeks (or partial weeks) of benefits shall be counted as one ID theft case if all weeks of ID theft overpayments are included in the same notice of determination. An ID theft overpayment covering consecutive weeks of benefits that span two months should be reported for the month in which the notice of determination is issued, or if no notice of determination is issued, report when the investigation reaches conclusion. This does not include overpayments established as a result of failure to report issues where the claimant did not respond or failed to provide sufficient information to verify identity.

6. Overpayments (cases) Established. Any single issue involving an overpayment that has been determined for a claimant within a single calendar month and for which a formal notice of determination has been issued. An overpayment that covers one or more weeks (or partial weeks) of benefits shall be counted as one case if all weeks of overpayments are included in the same notice of determination. An overpayment covering consecutive weeks of benefits that span two months should be reported for the month in which the notice of determination is issued. Overpayments Established includes all overpayment EXCEPT those involving identity theft. An overpayment should be reported here if such overpayment is established as a result of failure to report issues where the claimant did not respond or failed to provide sufficient information to verify identity.

G. Item by Item Instructions

1. Report Period Ended. Enter the month, last day of the month, and four digit year to which the data relate; e.g., 01/31/2020.

2. State. Enter the two-letter Federal Information Processing Standards (FIPS) State Alpha Code (identical to the two-letter U.S. Postal Service abbreviation) of the state or South Pacific Island jurisdiction as it appears in FIPS Publication 5-2. The National Institute of Standards and Technology issued the FIPS publication on May 28, 1987.

3. Section A. Application and Payment Activities.

   a. Column 1, Initial Applications. Enter the number of initial applications for PUA taken during the report period. This will equal the number of initial applications that were completed and/or number of applications entered into an automated system through an electronic/telephone claims taking system during the report period. Do not include individuals eligible for UC where it may have been necessary, due to the filing environment, to accept initial claims for both programs.

   b. Column 2, Number Determined Eligible. Enter the number of individuals determined eligible for PUA during the report period. Do not include individuals eligible for UC where it may have been necessary, due to the filing environment, to accept initial claims for both programs.

   c. Column 3, First Payments. Enter the number of payments which represent, for any individual, the first week for which assistance is paid in the pandemic assistance period.

   d. Column 4, Weeks Claimed. Enter the total number of weeks for which PUA is claimed during the report period whether or not PUA is actually paid. If claims are filed weekly, the number of weeks will equal the number of weekly received during the report period. If claims are filed other than weekly claims, the number of weeks will equal the number of weeks during the report period.

   e. Column 5, Weeks Compensated. Enter the number of weeks of unemployment for which PUA was paid during the report period. A week of unemployment compensated is any week of unemployment for which PUA funds are paid, regardless of amount.

   f. Column 6, Amount Compensated. Enter the amount of PUA funds represented by the weeks reported in column 5.

   g. Column 18, Final Payments. Enter the number of final payments made to claimants for PUA. A final payment for PUA is defined as the last PUA payment a claimant receives during the pandemic assistance period because the claimant has exhausted their entitlement to the program. Excluded from the definition is the last payment to an individual if, but for the end of the pandemic assistance period, the individual would otherwise be entitled to further PUA benefits.

4. Section B. Denial and Appeals Activity.

   a. Column 7, Weeks of PUA Denied. Enter the number of weeks of unemployment where a PUA payment was denied for which an individual,

except for the reason of the denial, would have been eligible to receive a PUA payment.

NOTE: For columns 8 through 13, the entries refer to the number of cases received or disposed of during the report period by authority (i.e., first level state appeals authority and the second level state higher authority). All cases, including cases disposed of before reaching the appeals authority, should be included. Definitions of case, authority, disposal, etc., are those developed for the PUA program where found or, when these do not exist, are those used in the state UI program.

b. Columns 8 and 9, Appeals Filed. In columns 8 and 9, distribute, by type of authority, the appeal cases or requests for review received during the month. In addition, provide a sub-breakout of the Total for self-employed individuals in line 202.

c. Columns 10 and 11, Appeals Disposed. Enter in columns 10 and 11 the total number of cases disposed during the month by authority level. In line 202, provide the number of cases disposed of involving self-employed individuals.

d. Columns 12 and 13, Favor of Appellant. Enter in columns 12 and 13 the number of appeal decisions included in columns 10 and 11, which were in favor of the appellant by authority level. In line 202 enter a breakout of self-employed individuals who appealed and had the decision in their favor.

5. Section C. Overpayment Activity and Administration (all activity EXCEPT for Identity Theft).

a. Columns 14, 15, and 16, Overpayments Established. In column 14, Cases, line 301, enter the number of cases established, including willful misrepresentation (fraud) determined during the report period as an overpayment. In line 302 provide a sub-breakout of the number of cases determined as fraud cases. In column 15, Weeks, enter in line 301 the number of weeks of PUA overpaid in connection with the cases reported in column 14; enter the number of weeks of fraud overpayments included in line 302 In column 16, Amount, enter in line 301, the amount overpaid represented by cases reported in column 14. Provide a sub-breakout of the amount involving fraud in line 302.

b. Column 16A Overpayment Recoveries. In column 16A, Amount, enter in line 301, the total amount of all PUA recoveries collected for the reporting period. Provide a sub-breakout of the amount of recoveries involving fraud in line 302.

c. Columns 17, Administrative Costs. This data cell will self-populate and

reflect computed administrative costs based on workload items reported in Section A. and Section B. above. Minute per unit factors reflected in the annual UIPL advisory communicating target allocations for base administrative grants and staff year usage information from the UI-1 report will be used to compute staffing levels needed to process the initial claims (line 101 column 1), weeks claimed (line 101 column 4) and appeals disposed (line 201 column 10) workload. Staff salary rates will reflect the rates used for quarterly above base computations. Staffing costs will be increased by the applicable factor to account for leave, and resulting costs will be increased by 19% to account for overhead.

Time factors and staff salary rates necessary for the computations of administrative costs described above for Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau will be communicated to each territory separately.

6. Section D. Overpayment Activity Related to Identity (ID) Theft.

   a. Columns 19, 20, and 21 ID Theft Overpayments Established. In column 19, Cases, line 401, enter the number of ID theft cases established, including willful misrepresentation (fraud) determined during the report period as an ID theft overpayment. In line 402 provide a sub-breakout of the number of ID theft cases determined as ID theft fraud cases. In column 20, Weeks, enter in line 401 the number of weeks of PUA overpaid in connection with the ID theft cases reported in column 19; enter the number of weeks of ID theft fraud overpayments included in line 402. In column 21, Amount, enter in line 401, the amount overpaid represented by ID theft cases reported in column 19. Provide a sub-breakout of the amount involving ID theft fraud in line 402.

   b. Column 21A ID Theft Overpayment Recoveries. In column 21A, Amount, enter in line 401, the total amount of all PUA ID theft recoveries collected for the reporting period. Provide a sub-breakout of the amount of ID theft recoveries involving fraud in line 402.

H. Checking the Report

1. General Checks. Entries should be made for all required items. If the item is inapplicable, or if applicable but no activity corresponding to the items occurred during the report period, a zero should be entered. A report containing missing data cannot be sent to the National Office, but can be stored on the state's system.

2. Arithmetic Checks.

   a. For columns 1, 2, and 8 through 13, the entries in line 102 and 202 respectively, should be equal to or less than the entries in line 101 or

201.

b. For columns 14 through 16A, the entries in line 302 should be equal to or less than line 301.

c. For columns 19 through 21A, the entries in line 402 should be equal to or less than line 401.

3. Signature. Signature is only required if reports are sent manually to the National Office.

Processing PUA Claims Based on the Claim Filing Date

	SCENARIO 1 **Claim filed on or before December 27, 2020**	**SCENARIO 2** **Claim filed after December 27, 2020 and on or before December 31, 2020**	**SCENARIO 3** **Claim filed on or after January 1, 2021 and before January 31, 2021**	**SCENARIO 4** **Claim filed on or after January 31, 2021**
Pandemic Assistance Period	January 27, 2020 through April 10, 2021 (April 11, 2021 for states with a Sunday week ending date)	January 27, 2020 through April 10, 2021 (April 11, 2021 for states with a Sunday week ending date)	January 27, 2020 through April 10, 2021 (April 11, 2021 for states with a Sunday week ending date)	January 27, 2020 through April 10, 2021 (April 11, 2021 for states with a Sunday week ending date)
Last week payable for states with a Saturday week ending date	March 13, 2021 (unless individual qualifies for the phaseout period)	March 13, 2021 (unless individual qualifies for the phaseout period)	March 13, 2021 (unless individual qualifies for the phaseout period)	March 13, 2021 (unless individual qualifies for the phaseout period)
Earliest possible claim effective date[1]	February 2, 2020	December 6, 2020	December 6, 2020	December 6, 2020
Wages considered for calculating the weekly benefit amount (WBA)	Calendar Year (CY) 2019	CY 2019	If claim is effective on or after January 1, 2021 (*i.e.*, claim effective January 3, 2021 or later for states with a Saturday week ending date), then CY 2020 If claim is effective before January 1, 2021, then CY 2019	If claim is effective on or after January 1, 2021 (*i.e.*, claim effective January 3, 2021 or later for states with a Saturday week ending date), then CY 2020 If claim is effective before January 1, 2021, then CY 2019

[1] The claim must be backdated to the first week during the Pandemic Assistance Period that the individual was unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason listed in section 2102(a)(3)(A)(ii)(i) of the CARES Act.

	SCENARIO 1 Claim filed on or before December 27, 2020	SCENARIO 2 Claim filed after December 27, 2020 and on or before December 31, 2020	SCENARIO 3 Claim filed on or after January 1, 2021 and before January 31, 2021	SCENARIO 4 Claim filed on or after January 31, 2021
Guidance for determining the state's minimum PUA WBA	UIPL No. 03-20	UIPL No. 03-20	UIPL No. 03-20	UIPL No. 03-20
Duration of benefits[2]	39 weeks + 11 weeks which may only be collected for weeks of unemployment ending on or after January 2, 2021	50 weeks	50 weeks	50 weeks
Requirement to submit documentation substantiating employment or self-employment	Yes, if the individual receives a payment of PUA on or after December 27, 2020 (regardless of which week ending date is being paid), documentation is due within 90 days of the application or when directed by the State Agency (whichever is later).	Yes, if the individual receives a payment of PUA on or after December 27, 2020 (regardless of which week ending date is being paid), documentation is due within 90 days of the application or when directed by the State Agency (whichever is later).	Yes, if the individual receives a payment of PUA on or after December 27, 2020 (regardless of which week ending date is being paid), documentation is due within 90 days of the application or when directed by the State Agency (whichever is later).	Yes, documentation is due within 21 days of the initial application or when directed by the State Agency (whichever is later).

[2] Duration must subtract any weeks of regular unemployment compensation (UC) or Extended Benefits (EB) received during the Pandemic Assistance Period. Additionally, if a state is in a High Unemployment Period, the individual's account is to be augmented by up to 7 weeks as discussed in section C.17 of attachment I to this UIPL.

	SCENARIO 1 Claim filed on or before December 27, 2020	SCENARIO 2 Claim filed after December 27, 2020 and on or before December 31, 2020	SCENARIO 3 Claim filed on or after January 1, 2021 and before January 31, 2021	SCENARIO 4 Claim filed on or after January 31, 2021
Documentation substantiating employment or self-employment must represent activity during this time period	CY 2019 to date of filing	CY 2019 to date of filing	If claim is effective on or after January 1, 2021 (*i.e.*, claim effective January 3, 2021 or later for states with a Saturday week ending date), then CY 2020 to date of filing If claim is effective before January 1, 2021, then CY 2019 to date of filing	If claim is effective on or after January 1, 2021(*i.e.*, claim effective January 3, 2021 or later for states with a Saturday week ending date), then CY 2020 to date of filing If claim is effective before January 1, 20201, then CY 2019 to date of filing
If documentation is not provided within the required timeframe, these weeks must be established as an overpayment	Any paid weeks of unemployment ending on or after January 2, 2021	Any paid weeks of unemployment ending on or after January 2, 2021	Any paid weeks of unemployment ending on or after January 2, 2021	Any paid weeks of unemployment ending on or after January 2, 2021

TITLE II-ASSISTANCE TO INDIVIDUALS, FAMILIES, AND BUSINESSES
Subtitle A-Unemployment Insurance
CHAPTER I-CONTINUED ASSISTANCE TO UNEMPLOYED WORKERS

The following Sections are relevant to the Pandemic Unemployment Assistance program.

Subchapter I-Extension of CARES Act Unemployment Provisions

SEC. 201. EXTENSION AND BENEFIT PHASEOUT RULE FOR PANDEMIC UNEMPLOYMENT ASSISTANCE.

IN GENERAL.-Section 2102(c) of the CARES Act (15 U.S.C. 9021(c)) is amended-
(1) in paragraph (1)-
(A) by striking "paragraph (2)" and inserting "paragraphs (2) and (3)"; and
(B) in subparagraph (A)(ii), by striking "December 31, 2020" and inserting "March 14, 2021"; and
(2) by redesignating paragraph (3) as paragraph (4); and
(3) by inserting after paragraph (2) the following:

"(3) TRANSITION RULE FOR INDIVIDUALS REMAINING ENTITLED TO PANDEMIC UNEMPLOYMENT ASSISTANCE AS OF MARCH 14, 2021.-
"(A) IN GENERAL.-Subject to subparagraph (B), in the case of any individual who, as of the date specified in paragraph (l)(A)(ii), is receiving pandemic unemployment assistance but has not yet exhausted all rights to such assistance under this section, pandemic unemployment assistance shall continue to be payable to such individual for any week beginning on or after such date for which the individual is otherwise eligible for pandemic unemployment assistance.
"(B) TERMINATION.- Notwithstanding any other provision of this subsection, no pandemic unemployment assistance shall be payable for any week beginning after April 5, 2021.".

(b) INCREASE IN NUMBER OF WEEKS.-Section 2102(c)(2) of the CARES Act (15 U.S.C. 9021(c)(2)) is amended-
(1) by striking "39 weeks" and inserting "50 weeks; and
(2) by striking "39-week period " and inserting "50-week period".

(c) APPEALS.-
(1) IN GENERAL.-Section 2102(c) of the CARES Act (15 U.S.C. 9021(c)), as amended by subsections (a) and (b), is amended by adding at the end the following:

"(5) APPEALS BY AN INDIVIDUAL.-

"(A) IN GENERAL.-An individual may appeal any determination or redetermination regarding the rights to pandemic unemployment assistance under this section made by the State agency of any of the States.

"(B) PROCEDURE.-All levels of appeal filed under this paragraph in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands-

"(i) shall be carried out by the applicable State that made the determination or redetermination; and

"(ii) shall be conducted in the same manner and to the same extent as the applicable State would con- duct appeals of determinations or redeterminations regarding rights to regular compensation under State law.

"(C) PROCEDURE FOR CERTAIN TERRITORIES.-With respect to any appeal filed in Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, Republic of the Marshall Islands, and the Republic of Palau-

"(i) lower level appeals shall be carried out by the applicable entity within the State;

"(ii) if a higher level appeal is allowed by the State, the higher level appeal shall be carried out by the applicability entity within the State; and

"(iii) appeals described in clauses (i) and (ii) shall be conducted in the same manner and to the same extent as appeals of regular unemployment compensation are conducted under the unemployment compensation law of Hawaii.".

(2) EFFECTIVE DATE.-The amendment made by paragraph (1) shall take effect as if enacted as part of division A of the CARES Act (Public Law 116-136), except that any decision issued on appeal or review before the date of enactment of this Act shall not be affected by the amendment made by paragraph (1).

(d) WAIVER AUTHORITY FOR CERTAIN OVERPAYMENTS OF PANDEMIC UNEMPLOYMENT ASSISTANCE.-Section 2102(d) of the CARES Act (15 U.S.C. 9021(d)) is amended by adding at the end the following:

"(4) WAIVER AUTHORITY.-ln the case of individuals who have received amounts of pandemic unemployment assistance to which they were not entitled, the State shall require such individuals to repay the amounts of such pandemic unemployment assistance to the State agency, except that the State agency may waive such repayment if it determines that-

"(A) the payment of such pandemic unemployment assistance was without fault on the part of any such individual; and

"(B) such repayment would be contrary to equity and good conscience.".

(e) HOLD HARMLESS FOR PROPER ADMINISTRATION.-ln the case of an individual who is eligible to receive pandemic unemployment assistance under section 2102 the CARES Act (15 U.S.C. 9021) as of the day before the date of enactment of this Act and on the date of enactment of this Act becomes eligible for pandemic emergency unemployment

compensation under section 2107 of the CARES Act (15 U.S.C. 9025) by reason of the amendments made by section 206(b) of this subtitle, any payment of pandemic unemployment assistance under such section 2102 made after the date of enactment of this Act to such individual during an appropriate period of time, as determined by the Secretary of Labor, that should have been made under such section 2107 shall not be considered to be an overpayment of assistance under such section 2102, except that an individual may not receive payment for assistance under section 2102 and a payment for assistance under section 2107 for the same week of unemployment.

(f) LIMITATION.-ln the case of a covered individual whose first application for pandemic unemployment assistance under section 2102 of the CARES Act (15 U.S.C. 9021) is filed after the date of enactment of this Act, subsection (c)(l)(A)(i) of such section 2102 shall be applied by substituting "December 1, 2020" for "January 27, 2020".

(g) EFFECTIVE DATE.-The amendments made by subsections (a), (b), (c), and (d) shall apply as if included in the enactment of the CARES Act (Public Law 116-136), except that no amount shall be payable by virtue of such amendments with respect to any week of unemployment commencing before the date of the enactment of this Act.

SEC. 203. EXTENSION OF FEDERAL PANDEMIC UNEMPLOYMENT COMPENSATION.

(a) IN GENERAL.-Section 2104(e) of the CARES Act (15 U.S.C. 9023(e)) is amended to read as follows:

"(e) APPLICABILITY.-An agreement entered into under this section shall apply-

(1) to weeks of unemployment beginning after the date on which such agreement is entered into and ending on or before July 31, 2020; and

"(2) to weeks of unemployment beginning after December 26, 2020 (or , if later, the date on which such agreement is entered into), and ending on or before March 14, 2021.".

(b) AMOUNT.-

(1) IN GENERAL.-Section 2104(b) of the CARES Act (15 U.S.C. 9023(b)) is amended-

(A) in paragraph (l)(B), by striking "of $600" and inserting "equal to the amount specified in paragraph (3)"; and

(B) by adding at the end the following new paragraph:

"(3) AMOUNT OF FEDERAL PANDEMIC UNEMPLOYMENT COMPENSATION.-

"(A) IN GENERAL.- The amount specified in this paragraph is the following amount:

"(i) For weeks of unemployment beginning after the date on which an agreement is entered into under this section and ending on or before July 31, 2020, $600.

"(ii) For weeks of unemployment beginning after December 26, 2020 (or, if later, the date on which such agreement is entered into), and ending on or before March 14, 2021, $300.".

(2) TECHNICAL AMENDMENT REGARDING APPLICATION TO SHORT-TIME COMPENSATION PROGRAMS AND AGREEMENTS.-Section 2104(i)(2) of the CARES Act (15 U.S.C. 9023(i)(2)l is amended-

(A) in subparagraph (Cl, by striking "and" at the end;

(B) in subparagraph (D), by striking the period at the end and inserting"; and"; and

(C) by adding at the end the following:

"(E) short-time compensation under a short-time compensation program (as defined in section 3306(v) of the Internal Revenue Code of 1986).".

SEC. 206. EXTENSION AND BENEFIT PHASEOUT RULE FOR PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION.

(a) IN GENERAL.-Section 2107(g) of the CARES Act (15 U.S.C. 9025(g)) is amended to read as follows:

"(g) APPLICABILITY.-

"(1) IN GENERAL.-Except as provided in paragraphs (2) and (3), an agreement entered into under this section shall apply to weeks of unemployment-

"(A) beginning after the date on which such agreement is entered into; and

"(B) ending on or before March 14, 2021.

"(2) TRANSITION RULE FOR INDIVIDUALS REMAINING ENTITLED TO PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION AS OF MARCH 14, 2021.-ln the case of any individual who, as of the date specified in paragraph (l)(B), is receiving Pandemic Emergency Unemployment Compensation but has not yet exhausted all rights to such assistance under this section, Pandemic Emergency Unemployment Compensation shall continue to be payable to such individual for any week beginning on or after such date for which the individual is otherwise eligible for Pandemic Emergency Unemployment Compensation.

"(3) TERMINATION.-Notwithstanding any other provision of this subsection, no Pandemic Emergency Unemployment Compensation shall be payable for any week beginning after April 5, 2021.".

(b) INCREASE IN NUMBER OF WEEKS.-Section 2107(b)(2) of the CARES Act (15 U.S.C. 9025(b)(2)) is amended by striking "13" and inserting "24".

(c) COORDINATION RULES.-

(1) COORDINATION OF PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION WITH REGULAR COMPENSATION.-Section 2107(b) of the CARES Act (15 U.S.C. 9025(b)) is amended by adding at the end the following:

"(4) COORDINATION OF PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION WITH REGULAR COMPENSATION.-

"(A) IN GENERAL.-If-

"(i) an individual has been determined to be entitled to pandemic emergency unemployment compensation with respect to a benefit year;

"(ii) that benefit year has expired;

"(iii) that individual has remaining entitlement to pandemic emergency unemployment compensation with respect to that benefit year; and

"(iv) that individual would qualify for a new benefit year in which the weekly benefit amount of regular compensation is at least $25 less than the individual's weekly benefit amount in the benefit year referred to in clause (i), then the State shall determine eligibility for compensation as provided in subparagraph (B).

"(B) DETERMINATION OF ELIGIBILITY.-For individuals described in subparagraph (A), the State shall determine whether the individual is to be paid pandemic emergency unemployment compensation or regular compensation for a week of unemployment using one of the following methods:

"(i) The State shall, if permitted by State law, establish a new benefit year, but defer the payment of regular compensation with respect to that new benefit year until exhaustion of all pandemic emergency unemployment compensation payable with respect to the benefit year referred to in subparagraph (A)(i).

"(ii) The State shall, if permitted by State law, defer the establishment of a new benefit year (which uses all the wages and employment which would have been used to establish a benefit year but for the application of this subparagraph), until exhaustion of all pandemic emergency unemployment compensation payable with respect to the benefit year referred to in subparagraph (A)(i).

"(iii) The State shall pay, if permitted by State law-

"(I) regular compensation equal to the weekly benefit amount established under the new benefit year; and

"(II) pandemic emergency unemployment compensation equal to the difference between that weekly benefit amount and the weekly benefit amount for the expired benefit year.

"(iv) The State shall determine rights to pandemic emergency unemployment compensation without regard to any rights to regular compensation if the individual elects to not file a claim for regular compensation under the new benefit year.".

(2) COORDINATION OF PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION WITH EXTENDED COMPENSATION.-

(A) INDIVIDUALS RECEIVING EXTENDED COMPENSATION AS OF THE DATE OF ENACTMENT.- Section 2107(a)(5) of the CARES Act (15 U.S.C. 9025(a)(5)) is amended-

(i) by striking "RULE.-An agreement" and inserting the following: "RULES.-

"(A) IN GENERAL.-Subject to subparagraph (B), an agreement"; and

(ii) by adding at the end the following:
"(B) SPECIAL RULE.-ln the case of an individual who is receiving extended compensation under the State law for the week that includes the date of enactment of this subparagraph (without regard to the amendments made by subsections (a) and (b) of section 206 of the Continued Assistance for Unemployed Workers Act of 2020), such individual shall not be eligible to receive pandemic emergency unemployment compensation by reason of such amendments until such individual has exhausted all rights to such extended benefits.".
(B) ELIGIBILITY FOR EXTENDED COMPENSATION.- Section 2107(a) of the CARES Act (15 U.S.C. 9025(a)) is amended by adding at the end the following:

"(8) SPECIAL RULE FOR EXTENDED COMPENSATION.-At the option of a State, for any weeks of unemployment beginning after the date of the enactment of this paragraph and before April 12, 2021, an individual's eligibility period (as described in section 203(c) of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note)) shall, for purposes of any determination of eligibility for extended compensation under the State law of such State, be considered to include any week which begins-
"(A) after the date as of which such individual exhausts all rights to pandemic emergency unemployment compensation; and
"(B) during an extended benefit period that began on or before the date described in subparagraph (A).".

(d) EFFECTIVE DATE.-

(1) IN GENERAL.-Except as provided in paragraph (2), the amendments made by this section shall apply as if included in the enactment of the CARES Act (Public Law 116-136), except that no amount shall be payable by virtue of such amendments with respect to any week of unemployment commencing before the date of the enactment of this Act.

(2) COORDINATION RULES .- The amendments made by subsection (c)(l) hall apply to individuals whose benefit years, as described in section 2107(b)(4)(A)(ii) of the CARES Act, expire after the date of enactment of this Act.

Subchapter IV-Improvements to Pandemic Unemployment Assistance to Strengthen Program Integrity

SEC. 241. REQUIREMENT TO SUBSTANTIATE EMPLOYMENT OR SELF-EMPLOYMENT AND WAGES EARNED OR PAID TO CONFIRM ELIGIBILITY FOR PANDEMIC UNEMPLOYMENT ASSISTANCE.

(a) IN GENERAL.-Section 2102(a)(3)(A) of the CARES Act (15 U.S.C. 9021(a)(3)(A)) is amended-

(1) in clause (i), by striking "and" at the end;

(2) by inserting after clause (ii) the following:

"(iii) provides documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment not later than 21 days after the later of the date on which the individual submits an application for pandemic unemployment assistance under this section or the date on which an individual is directed by the State Agency to submit such documentation in accordance with section 625.6(e) of title 20, Code of Federal Regulations, or any successor thereto, except that such deadline may be extended if the individual has shown good cause under applicable State law for failing to submit such documentation; and".

(b) APPLICABILITY.—

(1) IN GENERAL.—Subject to paragraphs (2) and (3), the amendments made by subsection (a) shall apply to any individual who files a new application for pandemic unemployment assistance or claims pandemic unemployment assistance for any week of unemployment under section 2102 of the CARES Act (15 U.S.C. 9021) on or after January 31, 2021.

(2) SPECIAL RULE.—An individual who received pandemic unemployment assistance under section 2102 of the CARES Act (15 U.S.C. 9021) for any week ending before the date of enactment of this Act shall not be considered ineligible for such assistance for such week solely by reason of failure to submit documentation described in clause (iii) of subsection (a)(3)(A) of such section 2102, as added by subsection (a).

(3) PRIOR APPLICANTS.—With respect to an individual who applied for pandemic unemployment assistance under section 2102 of the CARES Act (15 U.S.C. 9021) before January 31, 2021, and receives such assistance on or after the date of enactment of this Act, clause (iii) of subsection (a)(3)(A) of such section shall be applied by substituting ‘‘90 days’’ for ‘‘21 days’’.

SEC. 242. REQUIREMENT FOR STATES TO VERIFY IDENTITY OF APPLICANTS FOR PANDEMIC UNEMPLOYMENT ASSISTANCE.

(a) IN GENERAL.—Section 2102(f) of the CARES Act (15 U.S.C. 9021(f)) is amended—

(1) in paragraph (1), by inserting ‘‘, including procedures for identity verification or validation and for timely payment, to the extent reasonable and practicable’’ before the period at the end; and

(2) in paragraph (2)(B), by inserting ‘‘and expenses related to identity verification or validation and timely and accurate payment’’ before the period at the end.

(b) APPLICABILITY.—The requirements imposed by the amendments made by this section shall apply, with respect to agreements made under section 2102 of the CARES Act, beginning on the date that is 30 days after the date of enactment of this Act.

SEC. 263. CONTINUING ELIGIBILITY FOR CERTAIN RECIPIENTS OF PANDEMIC UNEMPLOYMENT ASSISTANCE.

(a) IN GENERAL.—Section 2102(c) of the CARES Act (15 U.S.C. 9021(c)), as amended by section 201, is further amended by adding at the end the following:

''(6) CONTINUED ELIGIBILITY FOR ASSISTANCE.—As a condition of continued eligibility for assistance under this section, a covered individual shall submit a recertification to the State for each week after the individual's 1st week of eligibility that certifies that the individual remains an individual described in subsection (a)(3)(A)(ii) for such week.''.

(b) EFFECTIVE DATE; SPECIAL RULE.—

(1) IN GENERAL.—The amendment made by subsection (a) shall apply with respect to weeks beginning on or after the date that is 30 days after the date of enactment of this section.

(2) SPECIAL RULE.—In the case of any State that made a good faith effort to implement section 2102 of division A of the CARES Act (15 U.S.C. 9021) in accordance with rules similar to those provided in section 625.6 of title 20, Code of Federal Regulations, for weeks ending before the effective date specified in paragraph (1), an individual who received Pandemic unemployment assistance from such State for any such week shall not be considered ineligible for such assistance for such week solely by reason of failure to submit a recertification described in subsection (c)(5) of such section 2102.

ATTACHMENT 2

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED July 30, 2021

S T A T E O F M I C H I G A N

SUPREME COURT

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS/UNEMPLOYMENT INSURANCE AGENCY,

Appellee,

v No. 160843

FRANK LUCENTE,

Claimant-Appellant,

and

DART PROPERTIES II, LLC,

Employer-Appellee.

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY,

Appellee,

v No. 160844

MICHAEL HERZOG,

Claimant-Appellant,

and

CUSTOM FORM, INC.,

Employer-Appellee.

BEFORE THE ENTIRE BENCH

MCCORMACK, C.J.

In these cases we consider the process the defendant Unemployment Insurance Agency (the Agency) must follow when it seeks to establish that a claimant received benefits to which they were not entitled—an overpayment. Relatedly, we consider the process the Agency must follow to establish that the claimant committed fraud when the Agency seeks to impose penalties for that fraud.

Frank Lucente and Michael Herzog, the appellants, applied for and received unemployment benefits. Each found new employment before their benefits expired. Only "unemployed" individuals are eligible to receive benefits, but they continued to claim benefits while employed full-time.

The Agency issued decisions finding that the appellants received benefits they were not entitled to receive. The Agency also found, in separate decisions, that the appellants had intentionally misrepresented or concealed their employment status—that they had committed fraud. The Agency identified these decisions as "redeterminations."

The Agency now acknowledges that it should have issued original "determinations" and not "redeterminations." Characterizing its error as a mere mislabeling, the Agency argues that its mistake does not provide grounds for setting aside the "redeterminations" because the decisions adequately apprised the appellants of the Agency's various findings and did not prevent the appellants from pursuing administrative appeals of those decisions.

We conclude otherwise. Allowing the Agency to begin at the "redetermination" step would deprive unemployment claimants of their statutory right to protest an allegation of benefit fraud and have the Agency review that decision before the claimant files an administrative appeal. The Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, provides claimants with the right to protest an unfavorable determination *and* the right to appeal any redetermination. Because the Agency never issued a "determination" in these cases on the issue of fraud, the result urged by the Agency would render meaningless the claimant's right to protest. For that reason, we hold that the Agency must begin by issuing an original "determination" when it seeks to establish that a claimant engaged in fraud. Failure to do so is grounds for invaliding a "redetermination" finding fraud and imposing associated fines and penalties. Likewise, we conclude that the Agency should have issued original "determinations" on the issue of the appellants' ineligibility. When the Agency begins with a "redetermination" that a claimant received benefits during a period of ineligibility and owes restitution as a result, the Agency denies the claimant their right to protest the finding of ineligibility. For these reasons we reverse the judgment of the Court of Appeals.

I. THE STATUTORY PROCESS

The statutory provisions that govern the timelines and procedures the Agency must follow when it evaluates a claim for unemployment benefits, including review for overpayments and benefit fraud, are not especially user-friendly. But understanding this statutory process is the first step to understanding the parties' disagreements.

Subsection 32(a) of the MESA directs the Agency to "promptly examine claims," "make a determination on the facts," and "promptly notif[y]" the "claimants and other interested parties . . . of the determination and the reasons for the determination." MCL 421.32(a).

The MESA does not define the term "determination," but the act tells us in what circumstances a "determination" can be made. In the context of a claim for benefits, a "determination" is an official decision by the Agency that involves agency fact-finding and application of law (the MESA) to those facts. See *Black's Law Dictionary* (11th ed) (defining "determination" as "[t]he act of deciding something officially").

The MESA requires the Agency to issue a specific type of determination when an application for benefits is filed. This is the "monetary determination," and it is described in § 32(b):

> The unemployment agency shall mail to the claimant, to each base period employer or employing unit, and to the separating employer or employing unit, a monetary determination. The monetary determination shall notify each of these employers or employing units that the claimant has filed an application for benefits and the amount the claimant reported as earned with the separating employer or employing unit, and shall state the name of each employer or employing unit in the base period and the name of the separating employer or employing unit. The monetary determination shall also state the claimant's weekly benefit rate, the amount of base period wages paid by each base period employer, the maximum benefit amount that could be charged to each employer's account or experience account, and the

> reason for separation reported by the claimant. The monetary determination shall also state whether the claimant is monetarily eligible to receive unemployment benefits. Except for separations under section 29(1)(a), no further reconsideration of a separation from any base period employer will be made unless the base period employer notifies the unemployment agency of a possible disqualifying separation within 30 days of the separation in accordance with this subsection. Charges to the employer and payments to the claimant shall be as described in section 20(a). New, additional, or corrected information received by the unemployment agency more than 10 days after mailing the monetary determination shall be considered a request for reconsideration by the employer of the monetary determination and shall be reviewed as provided in section 32a. [MCL 421.32(b) (emphasis added).]

The monetary determination will indicate whether the claimant is "monetarily eligible"; that is, whether the claimant's base-period[1] wages are sufficient. See *id*. The (somewhat misnamed) monetary determination will also include *non*-monetary information: namely, the claimant's reported reason for separation from employment from the separating employer and, if applicable, any other base-period employer. See *id*.

The MESA does not require the Agency to issue any additional "determinations" in connection with an application for benefits unless the claimant's reported reason(s) for separation are disputed by an employer, see *id*., "the claimant's most recent base period or benefit year separation was for a reason other than the lack of work," MCL 421.32(c), or if there is a disqualification[2] issue related to a base-period employer, see *id*. Together,

[1] The "base period" refers to the period of time in which wages earned by the claimant are considered to determine whether the claimant satisfies the wage threshold for unemployment benefits. See MCL 421.27; MCL 421.45.

[2] Non-monetary "eligibility" requirements are described in § 28 of the MESA. See MCL 421.28(1) ("An unemployed individual is eligible to receive benefits with respect to any week only if the unemployment agency finds all of the following . . . ."); see also MCL 421.48 (defining "unemployed").

Subsections (a) through (c) facilitate the expeditious resolution of whether the applicant is due unemployment benefits.

If the claimant's application for benefits is approved, they will be allowed to claim (certify for) benefits. See MCL 421.27(a)(1) ("When a determination, redetermination, or decision is made that benefits are due an unemployed individual, the benefits become payable . . . and continue to be payable . . . if the individual continues to be unemployed and to file claims for benefits, until the determination, redetermination, or decision is reversed [or] a determination, redetermination, or decision on a new issue holding the individual disqualified or ineligible is made . . . ."). As part of the certification process, the claimant is required to answer questions about their continuing entitlement to receive benefits.

Sometimes a claimant is paid a benefit they were not entitled to receive. The MESA directs the Agency to recover these overpayments. See MCL 421.62(a) and (d).[3] The

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Comparatively, "disqualification" from benefits is described in § 29 and is distinct from eligibility. MCL 421.29. A disqualification can arise from things such as the claimant leaving work without good cause attributable to the employer ("voluntary quit"), see MCL 421.29(1)(a); the claimant being discharged for work-related misconduct, see MCL 421.29(1)(b); or the claimant refusing an offer of suitable work, see MCL 421.29(1)(c). A claimant who is disqualified from receiving benefits must fulfill certain requalifying requirements such as working for a certain period before again becoming entitled to benefits. See MCL 421.29(2) and (3).

[3] Section 62 has been amended since the decisions here at issue. While the changes are not critical to our analysis, the prior versions are reprinted here. In November 2010 (applicable to appellant Lucente) § 62 provided in relevant part:

> (a) If the commission determines that a person has obtained benefits to which that person is not entitled, the commission may recover a sum equal to the amount received by 1 or more of the following methods: . . . The commission shall not recover improperly paid benefits from an individual

more than 3 years, or more than 6 years in the case of a violation of section 54(a) or (b) or sections 54a to 54c, after the date of receipt of the improperly paid benefits unless: (1) a civil action is filed in a court by the commission within the 3-year or 6-year period, (2) the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits, or (3) the commission issued a determination requiring restitution within the 3-year or 6-year period. . . .

(b) . . . [I]f the commission determines that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits, whether or not the person obtains benefits by or because of the intentional false statement, misrepresentation, or concealment of material information, the person shall, in addition to any other applicable penalties, have his or her rights to benefits for the benefit year in which the act occurred canceled as of the date the commission receives notice of, or initiates investigation of, a possible false statement, misrepresentation, or concealment of material information, whichever date is earlier, and wages used to establish that benefit year shall not be used to establish another benefit year. . . .

(c) Any determination made by the commission under this section is final unless an application for a redetermination is filed with the commission in accordance with section 32a.

(d) The commission shall take the action necessary to recover all benefits improperly obtained or paid under this act, and to enforce all penalties under subsection (b). [MCL 421.62, as amended by 1995 PA 125.]

In October 2017 (applicable to appellant Herzog), § 62 provided as follows:

(a) If the unemployment agency determines that a person has obtained benefits to which that person is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest by 1 or more of the following methods: . . . . The unemployment agency shall issue a determination requiring restitution within 3 years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement. Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall not initiate administrative or court action to recover improperly paid benefits from an individual more than 3 years after the date that the last determination, redetermination, or decision establishing

MESA also directs the Agency to impose administrative fines and other penalties if the claimant makes a false statement or fails to disclose material information in connection with a claim. MCL 421.54(b) ("[A] claimant . . . who makes a false statement or representation knowing it to be false, or knowingly and willfully with intent to defraud fails

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> restitution is final. Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall issue a determination on an issue within 3 years from the date the claimant first received benefits in the benefit year in which the issue arose, or in the case of an issue of intentional false statement, misrepresentation, or concealment of material information in violation of section 54(a) or (b) or sections 54a to 54c, within 3 years after the receipt of the improperly paid benefits unless the unemployment agency filed a civil action in a court within the 3-year period; the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits; or the unemployment agency issued a determination requiring restitution within the 3-year period. . . .
>
> (b) For benefit years beginning on or after October 1, 2000, if the unemployment agency determines that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits, whether or not the person obtains benefits by or because of the intentional false statement, misrepresentation, or concealment of material information, the person shall, in addition to any other applicable interest and penalties, have his or her rights to benefits for the benefit year in which the act occurred canceled as of the date the claimant made the false statement or misrepresentation or concealed material information, and wages used to establish that benefit year shall not be used to establish another benefit year. . . .
>
> (c) Any determination made by the unemployment agency under this section is final unless an application for a redetermination is filed in accordance with section 32a.
>
> (d) The unemployment agency shall take the action necessary to recover all benefits improperly obtained or paid under this act, and to enforce all interest and penalties under subsection (b). . . . [MCL 421.62, as amended by 2016 PA 522.]

to disclose a material fact, to obtain or increase a benefit . . . is subject to administrative fines and is punishable as provided in this subsection . . . ."); MCL 421.62(b) (cancellation of benefits); MCL 421.62(d).

If a claimant or employer disagrees with any "determination" made by the Agency, the MESA provides them with the right to request a "review of [the] determination." This is known as a "protest," and it is described in MCL 421.32a(1):[4]

> Upon application by an interested party for review of a determination, upon request for transfer to an administrative law judge for a hearing filed with the unemployment agency within 30 days after the mailing or personal service of a notice of determination, or upon the unemployment agency's own motion within that 30-day period, the unemployment agency shall review any determination. After review, the unemployment agency shall in its discretion issue a redetermination affirming, modifying, or reversing the prior determination and stating the reasons for the redetermination, or may transfer the matter to an administrative law judge for a hearing. If the unemployment agency issues a redetermination, it shall promptly notify the interested parties of the redetermination. The redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge pursuant to section 33.

In order to be timely, a protest must be made "within 30 days after the mailing or personal service of [the] notice of determination[.]" MCL 421.32a(1).[5] The Agency can

[4] As amended by 2017 PA 232. Slightly different versions were in effect during the time periods relevant to these cases; the changes to the statute were of a housekeeping nature and not relevant to our analysis. See 1996 PA 503 and 2011 PA 269.

[5] If the Agency denies a protest on timeliness grounds, the protesting party can appeal that decision to an administrative law judge (ALJ). If the ALJ determines there was "good cause" for the late protest, the appeal from the denial will be treated as though the protesting party is appealing a redetermination that affirmed the underlying determination. See MCL 421.33 ("With respect to an appeal from a denial of redetermination, if the administrative law judge finds that there was good cause for the issuance of a redetermination, the denial

also review a prior determination *in the absence of a protest* so long as it does so within the same 30-day period. *Id*. In either situation, the Agency "shall review [the] determination" and either (i) issue a "redetermination" that affirms, modifies, or reverses the determination, or (ii) transfer the matter for an administrative hearing. *Id*.

Agency-initiated review of a prior determination can occur outside the 30-day period. See MCL 421.32a(2). Like review under § 32a(1), this review can result in the Agency issuing a "redetermination" that affirms, modifies, or reverses the prior decision or the Agency transferring the matter for a hearing. *Id*. There must be "good cause" for Agency-initiated review under § 32a(2), and the Agency cannot initiate review more than one year from "the date of mailing or personal service of the original determination on the disputed issue . . . ." *Id*.[6]

A claimant or employer who disagrees with a redetermination can appeal the decision to an administrative law judge (ALJ). See MCL 421.32a(1) and (3); MCL 421.33. A redetermination that is not appealed "within 30 days after the mailing or personal service of [the] notice of the redetermination" becomes final. MCL 421.32a(1) and (3); see also MCL 421.33 On appeal, the ALJ "shall decide the rights of the interested parties and shall notify the interested parties of the decision, setting forth the findings of fact upon which the decision is based, together with the reasons for the decision." MCL 421.33(1). Appeals

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shall be a redetermination affirming the determination and the appeal from the denial shall be an appeal from that affirmance.").

[6] The one-year limitation applied at all times relevant here. Public Act 232 of 2017 extended this limitation to 3 years if the "original determination involved a finding of fraud . . . ." MCL 421.32a(2), as amended by 2017 PA 232.

can be taken from the ALJ's decision to the Michigan Compensation Appellate Commission (MCAC)[7] and then from the MCAC to the circuit court. MCL 421.34; MCL 421.38.

With this understanding of the MESA, we turn to the disputed questions.

II. BASIC FACTS AND PROCEDURAL HISTORY

Claimant-appellants Frank Lucente and Michael Herzog filed applications for unemployment insurance benefits. The Agency determined that benefits were due, and the appellants began the every-other-week process of certifying for benefits.

Both appellants became employed full-time after the initial approval of their claims. This new employment made them ineligible to receive further benefits. See MCL 421.28(1) ("An *unemployed* individual is eligible to receive benefits with respect to any week . . . ."). But they continued to claim benefits and, in doing so, provided inaccurate responses to certification questions concerning their new employment. As a result, the Agency continued to provide benefits as though the appellants were unemployed.

Eventually the Agency discovered the overpayments and suspected fraud. The Agency issued documents entitled "Notice[s] of Redetermination." Two notices were issued to each appellant. One of the notices described the appellant's new employment and explained that it made the appellant ineligible to receive the already-paid benefits. The other notice alleged that the appellant had intentionally concealed their new employment from the Agency (on the basis of the answers provided while certifying). The notices

[7] The MCAC has since been replaced, in relevant part, by the Unemployment Insurance Appeals Commission. See Executive Reorganization Order No. 2019-13.

further explained that the appellants had the right to *appeal* these "redeterminations" under § 33 and provided instructions on how to exercise that right. The Agency also mailed each appellant a separate document that stated the appellants' repayment obligations: restitution for the overpayment and financial penalties for the fraud.

Both sets of notices were issued within a year of the benefit payments at issue but more than 30 days after the last payment.[8] The appellants appealed both of the "redeterminations," as the MESA allows. MCL 421.33.[9]

In *Lucente*, the ALJ affirmed both of the Agency's November 30, 2010 redeterminations following a hearing at which Lucente testified, but the MCAC reversed. Regarding the finding of ineligibility due to full-time employment, the MCAC concluded that the November 30, 2010 redetermination was not a valid "redetermination" unless the payment of benefits was considered an original determination that Lucente was unemployed for those weeks. See MCL 421.32(f) ("The issuance of each benefit check shall be considered a determination by the unemployment agency that the claimant receiving the check was covered during the compensable period, and eligible and qualified

[8] The notices in *Lucente* were issued on or around November 30, 2010. The corresponding overpayments (totaling $4,794) and fraud penalties ($18,276) were for benefits that Lucente received in the benefit weeks ending February 20, 2010 through June 19, 2010.

The notices in *Herzog* were issued on October 11, 2017. The corresponding overpayments (totaling $1,810) and fraud penalties ($7,240) were for benefits that Herzog received in the benefit weeks ending October 15, 2016, through November 12, 2016.

[9] Lucente appealed the November 30, 2010 redeterminations in 2016. The Agency denied those appeals as untimely because they were not filed within the 30-day period described in MCL 421.32a. The ALJ agreed with Lucente that there was "good cause" for his late appeals. See note 5 of this opinion. Herzog's appeals were timely.

for benefits."). The MCAC further reasoned that the redetermination (if in fact it was a "redetermination") wasn't issued within 30 days of any benefit check and the Agency had failed to establish (or even assert) "good cause" for reviewing a prior determination outside the 30-day window for a timely protest.[10] See MCL 421.32a(1) and (2). The MCAC suggested that the Agency could have addressed the alleged ineligibility in an original "determination" that covered all the benefit weeks at issue but that its failure to do so required the commission to set aside the ALJ's decision finding Lucente ineligible.

In a separate opinion that addressed the alleged fraud, the MCAC similarly concluded that the Agency's failure to issue an original "determination" on the issue of fraud was grounds for setting aside that "redetermination." In addressing the Agency's contention that the benefit check could serve as the original determination for the fraud decision, see MCL 421.32(f), the MCAC explained that an allegation of intentional misrepresentation "does not relate to whether or not the claimant was eligible or qualified during any period of time."

In *Herzog*, the ALJ issued an order setting aside both "redeterminations" prior to the scheduled hearing. The order cited the Agency's failure to issue original "determinations" on eligibility and fraud. The MCAC affirmed in a single opinion that adopted the ALJ's factual findings and conclusions of law.

In each case the Agency appealed the MCAC's decisions in the circuit court, which affirmed the MCAC.

[10] The issue of "good cause" for Agency-initiated review beyond the 30-day period was not addressed at the administrative hearing or in the ALJ's written decision.

The Agency sought leave to appeal in the Court of Appeals, which granted the applications, consolidated the appeals, and in a published opinion "conclude[d] that in each consolidated case, the circuit court did not apply the correct legal principles when it affirmed the decisions of the MCAC." *Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, 330 Mich App 237, 266; 946 NW2d 836 (2019).[11]

The panel held that the Agency's identification of its decisions as "redeterminations" was not grounds for setting aside the decisions. *Id*. at 259-260, 264, 266. The panel reasoned that the appellants hadn't suffered any prejudice as a result of the Agency's failure to first issue determinations because the redeterminations adequately described the reason for the appellants' ineligibility and the alleged fraud (their full-time employment and failure to disclose it), stated the relevant time period, informed the appellants what they owed in restitution and penalties, and explained that the appellants could appeal the "redeterminations." *Id*.

Addressing the claimants' argument that the Agency must issue a "redetermination" within 30 days of the underlying determination, the panel held that in both cases the Agency was *not* proceeding under § 32a but rather § 62; thus, the Agency wasn't constrained by the time limit for issuing "redeterminations." *Id*. at 257-258, 263.

[11] The Court of Appeals consolidated these two cases along with a similar appeal involving a third claimant. The Court of Appeals' analysis and conclusion with respect to the third claimant was substantially the same as these cases. That claimant did not apply for leave to appeal in this Court.

We granted the appellants' joint application for leave to appeal to decide two issues:

> whether the Court of Appeals erred in its analysis of §§ 32, 32a, and 62 of the Michigan Employment Security Act of 1936 (MESA), MCL 421.1 *et seq*., when it held that: (1) the Unemployment Insurance Agency is not required to comply with the time requirements set forth in § 32a when seeking to recoup payment of fraudulently obtained benefits under § 62 of the Act; and (2) the label that the agency used on its decisions was not determinative of its ability to seek to recoup improperly obtained benefits. [*Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, 505 Mich 1127, 1127 (2020).]

III. APPLICABLE STANDARDS OF REVIEW

In reviewing administrative adjudication decisions, our task is " 'to determine whether the lower court[s] applied correct legal principles and whether [they] misapprehended or misapplied the substantial evidence test to the agency's factual findings[.]' " *Hodge v US Sec Assoc, Inc*, 497 Mich 189, 194; 859 NW2d 683 (2015) (citation omitted). Whether an administrative agency exceeded its scope of authority or misapplied the law are questions of law that are reviewed de novo. See *In re Reliability Plans of Electric Utilities for 2017-2021*, 505 Mich 97, 118; 949 NW2d 73 (2020). Questions of statutory interpretation are also reviewed de novo. *Id*.

IV. DISCUSSION

The appellants present two reasons for reinstating the MCAC's decisions.

The first concerns timeliness. Quoting the first sentence of MCL 421.32(f)—"[t]he issuance of each benefit check shall be considered a determination by the unemployment agency that the claimant receiving the check was covered during the compensable period, and eligible and qualified for benefits"—the appellants argue that the decisions finding they received benefits while working full-time were "redeterminations" of the earlier

payments (and not mislabeled "determinations") and therefore subject to the time limitations in § 32a. And because the Agency didn't assert "good cause" for Agency-initiated review beyond the 30-day protest period, the "redeterminations" finding them ineligible (not "unemployed") were untimely. See MCL 421.32a(2). Regarding the "redeterminations" finding fraud, the appellants claim these "redeterminations" are untimely for the same reason and, further, that the Agency cannot impose penalties for fraud unless there is a valid "redetermination" finding them not entitled to the benefit, and there was not.

The Court of Appeals rejected this first argument because it concluded that the Agency was proceeding under § 62, not § 32a, and that the "Notice[s] of Redetermination" were properly characterized as timely (but mislabeled) determinations under § 62. *Lucente*, 330 Mich App at 257-258, 263-264.

Accepting the Court of Appeals' recharacterization of the Agency's process as having taken place under § 62 and mislabeled "redeterminations" instead of "determinations," the appellants next argue that the Agency's use of "redeterminations" wasn't simply a labeling oversight with no substantive consequences. By issuing "redeterminations," the argument goes, the Agency skipped a step that the MESA requires—original determinations on the appellants' ineligibility and the alleged fraud—depriving the appellants of their right to file a protest and have the Agency review its decisions before any appeals.

In other words, the appellants accuse the Agency of having its cake and eating it too. Either the decisions are untimely "redeterminations," or the Agency failed to follow the statutory process for making a valid "determination."

A. SECTION 62 REQUIRES THE AGENCY TO ISSUE ORIGINAL "DETERMINATIONS" ON OVERPAYMENTS AND FRAUD

Starting with § 62.

MCL 421.62(a) has long permitted the Agency to recover already-paid benefits when the Agency "*determines* that a person has obtained benefits to which that person is not entitled . . . ." MCL 421.62(a), as amended by 1995 PA 125; MCL 421.62(a), as amended by 2016 PA 522. And § 62(b) provides that when the Agency "*determines* that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits," the person shall have their right to benefits canceled "in addition to any other applicable penalties," e.g., the penalties for fraud described in MCL 421.54. MCL 421.62(a), as amended by 1995 PA 125; see also MCL 421.62(a), as amended by 2016 PA 522. Significantly, this language refers to the Agency making a "determination" that the claimant received an overpayment or engaged in fraud.

A "determination" under § 62 is distinguishable from a "redetermination" under § 32a. And the MESA plainly contemplates the issuance of the former before the latter. As § 62(c) states, "any *determination* made . . . under this section [62] is final unless an application for a *redetermination* is filed in accordance with section 32a." (Emphasis added.)

In light of this language, and mindful of the different protest and appeal processes described in §§ 32a and 33, we believe the Agency must issue an original "determination" that either requires restitution for an overpayment or assesses penalties for fraud. To the extent these appellants' arguments can be construed as requiring the Agency to first make

a "redetermination" on these issues under § 32a, that interpretation is incompatible with the text of § 62.

Our conclusion is reinforced by the MESA's various time constraints for Agency action. During the periods here at issue, § 62(a) conditioned the Agency's ability to recover an overpayment on its issuing a "determination requiring restitution" within three years "after the date of receipt of the improperly paid benefits[.]" MCL 421.62(a), as amended by 1995 PA 125;[12] see also MCL 421.62(a), as amended by 2016 PA 522. This is in conflict with the much shorter time limits for making a "redetermination" under § 32a. That is, if the Agency must first make a "redetermination" of the benefit payment before making a "determination" that the claimant received a benefit to which they were not entitled (i.e., a "determination requiring restitution"), then the three-year limit described in § 62(a) is effectively nullified by the much shorter time limits described in § 32a.

For these reasons, we agree with the Court of Appeals that § 62 authorizes the Agency to make original *determinations* imposing restitution for an overpayment or penalties for fraud. See *Lucente*, 330 Mich App at 258 ("To impose on the Agency, when proceeding under § 62, the additional procedural and time requirements of § 32a would create requirements not imposed by the Legislature."). But our agreement with the Court of Appeals' judgment ends there.

[12] This version of the MESA gave the Agency up to six years to make a determination under § 62(a) if the case involved fraud under § 54. This separate six-year-for-fraud time limit was eliminated before the decisions in Herzog's case. See 2016 PA 522.

B. A DECISION REQUIRING RESTITUTION OR ALLEGING FRAUD CANNOT BEGIN WITH A "REDETERMINATION" UNDER § 32a

We next consider the appellants' argument that the Agency did *not* mislabel its decisions as "redeterminations" and that the true mistake relates to the timeliness of the decisions.

This argument is premised on statutory language that is now located at § 32(f). This subsection provides in full:

> The issuance of each benefit check shall be considered a determination by the unemployment agency that the claimant receiving the check was covered during the compensable period, and eligible and qualified for benefits. A chargeable employer, upon receipt of a listing of the check as provided in section 21(a), may protest by requesting a redetermination of the claimant's eligibility or qualification as to that period and a determination as to later weeks and benefits still unpaid that are affected by the protest. Upon receipt of the protest or request, the unemployment agency shall investigate and redetermine whether the claimant is eligible and qualified as to that period. If, upon the redetermination, the claimant is found ineligible or not qualified, the unemployment agency shall proceed as described in section 62. In addition, the unemployment agency shall investigate and determine whether the claimant obtained benefits for 1 or more preceding weeks within the series of consecutive weeks that includes the week covered by the redetermination and, if so, shall proceed as described in section 62 as to those weeks. [MCL 421.32(f), as amended by 2013 PA 144.][13]

Focusing on the phrase "eligible and qualified for benefits," the appellants urge that the "Notice[s] of Redeterminations" here are properly viewed as *untimely* "redeterminations" of the "determination" created by the benefit payment.

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[13] Public Act 229 of 2020 added the following language at the end of § 32(f): "Notwithstanding any other provision of this act, for benefits charged after March 15, 2020 but before January 1, 2021, an employer has 1 year after the date a benefit payment is charged against the employer's account to protest that charge." See also 2020 PA 258 (substituting "January 1, 2021" with "April 1, 2021").

We address this argument with respect to each "redetermination" separately—that these appellants were not "unemployed" and owe restitution for the overpayments, and that they committed fraud and are subject to fines and penalties.

1. A BENEFIT CHECK IS NOT A "DETERMINATION" ON THE ISSUE OF FRAUD

Starting with the "redeterminations" accusing the appellants of fraud and imposing fines and penalties under §§ 54 and 62(b). As the MCAC rightly pointed out in *Lucente*, the issue of fraud "does not relate to whether or not the claimant was eligible or qualified during any period of time." Whether a claimant satisfies the eligibility criteria described in § 28(1) (or might be disqualified under § 29) is distinct from whether the claimant has "*willfully* violate[d] or *intentionally* fail[ed] to comply with any of the provisions of [the MESA]," MCL 421.54(a), or whether the claimant has "[made] a false statement or representation *knowing it to be false*, or [has] *knowingly and willfully with intent to defraud* fail[ed] to disclose a material fact," MCL 421.54(b). The latter involves a culpable mental state; the former does not.

Our precedent supports this understanding of the MESA. In *Royster v Employment Security Comm*, 366 Mich 415; 115 NW2d 106 (1962), the plaintiff filed a claim for unemployment benefits with the benefit year commencing on January 12, 1958. On March 6, 1959, more than a year after the plaintiff received a benefit check, the employer charged for the benefit discovered that it had paid the plaintiff wages for the same week as the benefit. The Agency later issued a decision finding that the plaintiff had intentionally failed to disclose his earnings for the week ending January 25, 1958, resulting in an overpayment.

Royster, 366 Mich at 417-418. The plaintiff challenged the Agency's decision by arguing that, pursuant to MCL 421.21(a),

> the [Agency's] issuance and providing of a copy of [the] benefit check to the employer constitutes a determination of the charge to the rating account . . . . Then plaintiff stresses that section 32a[14] limits to 1 year, after such mailing

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[14] The relevant statutory provisions of the MESA then in existence provided as follows:

> CLS 1956, § 421.21, as amended by PA 1957, No 311, . . . provides in subdivision (a):
>
> > "The commission shall currently provide each employer with copies of the benefit checks charged against his rating account. Such copies shall show the name and social security account number of the payee, the amount paid, the date of issuance, the week of unemployment for which the check was issued, the name or account number of the chargeable employer, upon request a code designation of the place of employment by the chargeable employer, and such additional information as may be deemed pertinent, and such copies shall constitute a determination of the charge to the rating account. Such determination shall be final unless further proceedings are taken in accordance with section 32a of this act."
>
> CLS 1956, § 421.32a, as amended by PA 1957, No 311 . . . , provides, in part:
>
> > "The commission shall upon application by an interested party filed within 15 days after the mailing of a notice of determination, or may upon its own motion within said period, review any determination and thereafter issue a redetermination affirming, modifying or reversing the prior determination and stating the reasons therefor. The commission shall promptly notify the interested parties of such redetermination which shall become final unless within 15 days after the mailing of a notice thereof an appeal is filed for a hearing on such redetermination before a referee in accordance with the provisions of section 33 of this act: Provided, That the commission may, for good cause, including any administrative clerical error, reconsider any prior

> to the employer, the period within which a commission redetermination of eligibility may be made. Here it did not occur until after [the employer's protest] on February 4, 1959. At that time, says plaintiff, no jurisdiction longer remained in the commission to make a redetermination. [*Id*. at 419-420.]

The employer rejoined that the Agency *did* have jurisdiction, even though its decision issued more than a year after the benefit was paid. Focusing on the statutory phrase "no such reconsideration shall be made after 1 year from the date of mailing of the original determination *on the disputed issue*," see MCL 421.32a(2), the employer contended that "on the disputed issue" referred to the plaintiff's intentional concealment of his earning (fraud), which was not "at issue" when the payment was made. We agreed:

> Chrysler says that the matter of plaintiff's intentional concealment of his earnings for the week ending January 25, 1958, is now the disputed issue but was not at issue at the time when the January 29, 1958, original determination of eligibility was made by giving him a benefit check for $44 and sending Chrysler a copy. Plaintiff responds that the issue, both at the time the original determination was made and after Chrysler's February 4, 1959, protest and request for redetermination, was whether plaintiff was eligible for benefits for the week ending January 25, 1958. To that, Chrysler says that if that view be adopted, then there is always a disputed issue at the time of original determination and issuance of a benefit check and mailing of copy of same to employer, and that, hence, the words "on the disputed issue" are useless and redundant in the statute, because use of the term "original determination" would have sufficed to fix the time for commencement of the 1-year limitation period, to which the modifying quoted words then would add nothing. So, says Chrysler, the presently disputed issue is whether plaintiff intentionally concealed his earnings for the week in question, and that it

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> determination or redetermination after the 15-day period has expired and issue a redetermination affirming, modifying or reversing the prior determination or redetermination, but no such reconsideration shall be made after 1 year from the date of mailing of the original determination on the disputed issue." [*Royster*, 366 Mich at 418-419.]

> became the disputed issue only after [Chrysler's] protest on February 4, 1959.
>
> * * *
>
> *The words "disputed issue," as used in section 32a, refer to a contested issue or a matter in dispute between the employer and the commission. In such disputed matters relief must be requested within 15 days or within 1 year for good cause shown. In our opinion matters not in dispute, such as payments voluntarily made and accepted, do not fall within the restrictions of section 32a.* [*Id*. at 420-421 (quotation marks and citations omitted; emphasis added).]

While the language has changed slightly, the MESA still refers to Agency-initiated "redeterminations" as applying where there is a "disputed issue." See MCL 421.32a(2) ("A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year after the date of mailing or personal service of the original determination *on the disputed issue* . . . .") (emphasis added). As in *Royster*, the issue of fraud was *not* disputed at the time these appellants received benefits; the Agency first alleged fraud when it issued the "Notice[s] of Redetermination."

For these reasons, we disagree with the appellants' characterization of the Agency's fraud decisions as untimely but otherwise valid "redeterminations." The Agency must issue an original "determination" when it is alleging that a claimant engaged in fraud.

2. THE AGENCY WAS REQUIRED TO ISSUE ORIGINAL "DETERMINATIONS" ADDRESSING THE APPELLANTS' INELIGIBILITY

The interplay between § 32(f) and the "redeterminations" finding these appellants ineligible (not "unemployed") presents a more difficult question.

At first glance, the language of § 32(f) would seem to support the view that the payment of benefits is a "determination" that these appellants were "unemployed," because

being "unemployed" is a criterion of eligibility. See MCL 421.28(1). But this is incongruous with other language in the MESA. As already explained, § 62 allows the Agency to issue "determinations" that a claimant received a benefit to which they were not entitled. See MCL 421.62(a). An overpayment necessarily involves the payment of a benefit, so whenever the Agency is issuing a "determination requiring restitution" under MCL 421.62(a) that same decision might be described as the Agency "redetermining" any determination on eligibility that is created by the benefit check pursuant to § 32(f). How should the Agency proceed?

We believe that § 32(f)'s reference to a benefit check as a "determination" is best understood when that provision is read as a whole. Reading past the first sentence, the subsection explains that "[a] chargeable employer, upon receipt of a listing of the check as provided in [MCL 421.21(a)], may protest by requesting a redetermination of the claimant's eligibility or qualification as to that period and a determination as to later weeks and benefits still unpaid that are affected by the protest." But no text in § 32(f) refers to Agency-initiated redeterminations under § 32a. Instead, it is the employer's protest of the benefit-check determination that is the triggering event.

This understanding is reinforced by § 32(f)'s reference to the employer's "receipt of a listing of the check as provided in section 21(a) . . . ." That subsection provides:

> The [Agency] shall currently provide each employer with copies or listings of the benefit checks charged against that employer's account. An employer determined by the agency to be a successor employer shall begin receiving the listings effective for weeks beginning after the mailing of the determination of successorship. The copies or listings shall show the name and social security account number of the payee, the amount paid, the date of issuance, the week of unemployment for which the check was issued, the name or account number of the chargeable employer, upon request a code

> designation of the place of employment by the chargeable employer, and additional information as may be deemed pertinent. The copies or listings shall constitute a determination of the charge to the employer's account. The determination shall be final unless further proceedings are taken in accordance with section 32a.
>
> The [Agency] shall furnish at least quarterly, to each employer, a statement summarizing the total of the benefits charged against the employer's account during the period. If the employer requests, the summary shall be broken down by places of employment.
>
> The [Agency] shall notify each employer, not later than 6 months after the computation date, of his rate of contributions as determined for any calendar year pursuant to section 19. The statement or determination shall be final unless further proceedings are taken in accordance with section 32a. However, on request an employer shall be given an extension of 30 days' additional time in which to apply for the review and redetermination. [MCL 421.21(a).]

Reading § 21(a) together with § 32 brings clarity. Upon the filing of an initial application for benefits, every base-period employer will receive a monetary determination that indicates the claimant's reported reason for separation and the extent to which that employer's unemployment insurance account will be charged for any benefits that might be paid. See MCL 421.32(b). The employer can protest the information reported in the monetary determination, and the employer should do so if it disagrees. MCL 421.32(b); see also MCL 421.32(d). If benefits are paid, the chargeable employer will receive "[the] listing of the check as provided in section 21(a)" and will have the opportunity to "protest by requesting a redetermination of the claimant's eligibility or qualification as to that period and a determination as to later weeks and benefits still unpaid that are affected by the protest." MCL 421.32(f). When such a protest is made, it triggers the application of § 32(f) and the concept of the benefit-check-as-determination. Absent such a protest (as in these cases), the benefit check cannot serve as a "determination" for an Agency-initiated

"redetermination" finding that a claimant received benefits to which they were not entitled regardless of whether § 32a's time constraints have been satisfied.

Moreover, construing the MESA as requiring the Agency to issue an original "determination requiring restitution" when it seeks to recover an overpayment (absent an employer's protest under § 32(f)) is consistent with other ways in which a claimant might receive a "benefit to which [the claimant] is not entitled." MCL 421.62(a). For example, a claimant who is approved for benefits and later secures part-time employment might still be "eligible" under the MESA's definition of "unemployed." See MCL 421.48(1). For these claimants, the earning of part-time wages might reduce the amount of benefits they are entitled to in any week, see MCL 421.27(c), but the claimant would remain "eligible and qualified." An overpayment might arise if the claimant misreports their part-time wages (regardless of fraud), and the Agency could pursue restitution by issuing an original determination under § 62(a). Such a decision couldn't be described as a "redetermination" of the benefit-check-as-determination described in § 32(f) because it would not relate to the claimant's eligibility under § 28(a) or a disqualification under § 29.

For these reasons, we conclude that the MESA requires the Agency to proceed by way of an original "determination" when (in the absence of an employer protest) the Agency seeks to establish that a claimant received a "benefit to which [the claimant] is not entitled" and imposes restitution pursuant to MCL 421.62(a).

C. THE AGENCY'S FAILURE TO ADHERE TO THE STATUTORY PROCESS IS GROUNDS FOR INVALIDATING ITS DECISIONS

Finally, we consider whether the Agency's failure to issue "determinations" is grounds for setting aside the "redeterminations."

We first note that in both of these cases the Agency issued the "Notice[s] of Redetermination" well within the three-year time limit described in § 62. Had the Agency's decisions been "determinations" there would no cause for disturbing them. But they were not.

The MESA describes "determinations" and "redeterminations" as distinct decision-making steps. This makes sense given the ordinary understanding of both words: the former necessarily precedes the latter. The distinction is made plain in § 32a: a "redetermination" may "affirm[], modify[], or revers[e] *the prior determination* . . . ." MCL 421.32a(1) and (2) (emphasis added). And though the MESA never provides a comprehensive definition of either term, it repeatedly refers to the process described in § 32a whenever it mentions "redeterminations." See, e.g., MCL 421.14 ("If evidence is presented indicating that an employing unit which has been determined not to be an employer is or was actually an employer, or that services which have been held not to constitute employment are or were actually employment, the previous determination shall be reopened and reconsidered by the commission *in accordance with section 32a and a redetermination made* as *the facts and law require* . . . ."); MCL 421.32(e) ("The claimant or interested party may file an application with an office of the unemployment agency for *a redetermination in accordance with section 32a.*"); MCL 421.33(1) ("An appeal *from a redetermination issued by the agency in accordance with section 32a* . . . shall be referred to the Michigan administrative hearing system for assignment to an administrative law judge."); MCL 421.62(c) ("Any determination made by the unemployment agency under this section is final *unless an application for a redetermination is filed in accordance with section 32a*.").

The Agency accepts this basic distinction between "determinations" and "redeterminations." Perhaps recognizing the problem created by its failure to assert "good cause" when it issued these decisions, the Agency's position in this Court is that these "Notice[s] of Redetermination" were "for all intents and purposes . . . original written 'determination[s]' on the ineligibility and fraud issues[.]" Nevertheless, the Agency contends that invalidating the decisions because they were "redeterminations" would "elevate form over substance." The Agency takes the view that it doesn't really matter if it begins with a "redetermination" because there is always the opportunity for de novo review by an ALJ. See MCL 421.33.

The Agency's argument *might* be a good one if the question was whether these appellants received constitutionally adequate process. After all, "the right to a hearing before an unbiased and impartial decisionmaker is a basic requirement of due process." *Livonia v Dep't of Social Servs*, 423 Mich 466, 508; 378 NW2d 402 (1985).

But that's not the question we are answering. Just as we require claimants and chargeable employers to follow the procedural and substantive requirements of the MESA, so too must the Agency. See *In re Reliability Plans*, 505 Mich at 119; see also *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 589; 50 NW2d 322 (1951) (explaining that an administrative agency cannot "enlarge its authority or exceed the powers given to it by the statute, the source of its power") (quotation marks and citations omitted).

Here, the MESA provides that "the unemployment agency *shall review* any determination" whenever an interested party makes a timely protest. MCL 421.32a(1) (emphasis added). The determination-and-protest step is not a mere perfunctory step in perfecting the claimant's right to appeal—the language plainly contemplates *some* degree

of agency review in response to a protest, even if the Agency ultimately affirms the prior determination or transfers the case for an administrative hearing. Such review is foreclosed if the Agency can simply begin with a "redetermination."[15]

The essence of the Agency's argument is that claimants don't suffer discernable prejudice if the Agency begins at the "redetermination" step, so long as the claimant is adequately apprised of the issue and their right to appeal the decision. But if that is correct, the Agency could *always* begin at the "redetermination" step, without consequence. If an interested party appeals the redetermination and complains about the lack of an initial determination, the Agency could simply respond that the administrative hearing cures any error. And if a party aggrieved by the "redetermination" fails to take a timely appeal, then the Agency would presumably argue that its "redetermination" is final and a party who is informed of their right to appeal yet fails to exercise it cannot complain about the outcome. See MCL 421.32a(1) ("[T]he redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge . . . ."); see also MCL 421.32a(3).

[15] While Justice ZAHRA urges this Court to "[l]ook[] beyond the notices' labels and focus[] instead on their substance," it is far from clear that the Agency understood its decisions to be original "determinations." While the MESA permits the Agency to respond to a timely protest by reviewing the decision and then "transfer[ring] the matter to an administrative law judge for a hearing" in lieu of issuing a redetermination, MCL 421.32a(1), the Agency does not identify anything in the record that would indicate it exercised such discretion in these cases. Notably, the notices sent by the Agency provided different instructions on how to protest a "determination" versus appealing a "redetermination."

But when we interpret a statute, we try to avoid an interpretation that makes nugatory or surplusage any part of it. See, e.g., *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016) ("[W]hen determining [legislative] intent we must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.") (quotation marks and citation omitted). The Agency's "no harm, no foul" argument and the Court of Appeals' endorsement of it are contrary to this basic principle.

We can't ignore the statutory right to protest a "determination" simply because other sections of the MESA provide further (and arguably greater) process. Affirming the reasoning of the Court of Appeals would allow the Agency to begin at the "redetermination" step without ever issuing a "determination" in every instance. And while a claimant's right to protest the original determination and have the Agency review its decision might seem less important than the administrative hearing that follows, the wisdom of the statutory process is a question for the Legislature.

The MCAC correctly concluded that the Agency must issue a "determination" before it issues a "redetermination" and that the failure to do so is grounds for setting aside a determinationless "redetermination." To the extent the Court of Appeals held otherwise, its reasoning is rejected as incompatible with the MESA.

V. CONCLUSION AND RELIEF

We agree with the Court of Appeals that § 62 authorizes the Agency to issue original fraud and restitution determinations that are not subject to the constraints of MCL 421.32a.

We disagree, however, that the Agency's decision to issue "redeterminations" in these cases was of no substantive effect.

We hold that the Agency must issue an original determination alleging fraud *and* that the Agency's failure to do so is grounds for invalidating the "redeterminations" in this case. On this issue the payment of benefits cannot serve as an original "determination" on the alleged fraud, and the Agency's issuance of determinationless "redeterminations" deprives claimants of their right to protest.

We likewise conclude that the Court of Appeals erred in its analysis of the "redeterminations," finding the claimants not unemployed and imposing restitution for the overpayments. When Agency-initiated review of a past-paid benefit results in a decision that the claimant received benefits during a period of ineligibility or disqualification and owes restitution as a result, the Agency must begin with an original "determination" as described in § 62.

Accordingly, the judgment of the Court of Appeals is reversed.

Bridget M. McCormack
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch (as to Parts I, II, III, IV(A), and V as it relates to MCL 421.62 and determinations concerning fraud and restitution)

S T A T E O F M I C H I G A N

SUPREME COURT

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS/UNEMPLOYMENT INSURANCE AGENCY,

Appellee,

v No. 160843

FRANK LUCENTE,

Claimant-Appellant,

and

DART PROPERTIES II, LLC,

Employer-Appellee.

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY,

Appellee,

v No. 160844

MICHAEL HERZOG,

Claimant-Appellant,

and

CUSTOM FORM, INC.,

Employer-Appellee.

WELCH, J. (*concurring in part, dissenting in part, and concurring in the judgment*).

I agree with much of the majority opinion and concur in the judgment. I agree that allegations of fraud and the imposition of restitution are distinct from the redetermination of a claimant's eligibility or qualification for benefits, and thus such matters and associated penalties must be raised in an original determination invoking MCL 421.62 and MCL 421.54. Accordingly, I join Parts I, II, III, and IV(A) of the majority opinion, and Part V as it relates to MCL 421.62 and determinations concerning fraud and restitution.

On the other hand, I read certain portions of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, differently from my colleagues who have joined the majority opinion in full, and this causes me to approach certain aspects of these cases differently. I do not agree that a benefit check is considered a determination under MCL 421.32(f) only for the purposes of an employer filing a protest after receiving the listing of the benefit check. Rather, I believe the statute is clear that a benefit check can always serve as an original determination as to eligibility and qualification to receive benefits in an unemployment proceeding, even if the action is driven by the Unemployment Insurance Agency (UIA) as opposed to the employer. Nor do I agree with the view that the UIA is unable to self-initiate a redetermination of a claimant's eligibility for benefits under MCL 421.32a(1) or (2) after the UIA obtains information showing that an individual was paid but not eligible for such benefits. In that case, I do not believe a new original determination is required as a benefit check in fact serves as an original determination. As a result of these disagreements, and as explained more fully below, I am unable to join Part IV(B) or (C) of the majority opinion in full.

I. FACTS AND ADMINISTRATIVE PROCEDURAL BACKGROUND

I join Part II of the majority opinion because it is an accurate statement of the "basic facts and procedural history," but I believe the statement is incomplete as to certain relevant details and nuances. Accordingly, I offer the following for additional context that is relevant to my understanding of these cases.

A. LUCENTE

Claimant Frank Lucente applied for extended unemployment benefits on February 2, 2010, and he was approved and received benefits from the UIA. See MCL 421.64. On February 16, 2010, Lucente obtained full-time employment with Dart Properties II, LLC. Lucente continued to certify that he was unemployed and without income despite having obtained full-time employment. Accordingly, the UIA continued to pay benefits to Lucente through the week of June 19, 2010, when Lucente then stopped certifying.

On or about July 7, 2010, the UIA mailed a request for information to Lucente's address on file and to Dart Properties, which soon responded and notified the UIA of Lucente's employment. On or about November 30, 2010, the UIA sent two documents labeled "Notice of Redetermination" to Lucente's address on file.

> The first redetermination (the eligibility redetermination) involved Lucente's eligibility for unemployment benefits from February 20, 2010, through June 19, 2010, and stated:
>
> > YOU WORKED FULL-TIME FOR DART PROPERTIES II LLC BEGINNING 2/16/10. AS SUCH, YOU ARE INELIGIBLE FOR BENEFITS UNDER SECTION 48 [MCL 421.48] OF THE [MESA]. YOU WERE PAID, SO RESTITUTION IS REQUIRED, AS SHOWN, UNDER SECTION 62 [MCL 421.62] OF THE ACT.

> The second redetermination (the fraud redetermination) involved Lucente's use of fraud to improperly obtain unemployment benefits from February 20, 2010, through June 19, 2010, and stated:
>
> > YOUR ACTIONS ARE CONSIDERED TO HAVE BEEN INTENTIONAL BECAUSE YOU FAILED TO NOTIFY THIS AGENCY THAT YOU WERE WORKING FULL-TIME AND CONTINUED TO COLLECT BENEFITS FOR FOUR MORE MONTHS. YOU INTENTIONALLY WITHHELD INFORMATION TO OBTAIN BENEFITS. YOU ARE DISQUALIFIED UNDER SECTIONS 62(B) AND 54(B) [MCL 421.54(b)] OF THE [MESA].
>
> [*Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, 330 Mich App 237, 242; 946 NW2d 836 (2019) (alterations in original).]

The UIA also sent a "Non-Protestable Summary of Previously (Re) Determined Restitution" on December 1, 2010, stating that Lucente was obligated to repay $4,794 in wrongfully received benefits and $18,276 in penalties for wrongfully obtained benefits from February 20, 2010 through June 19, 2010.

I agree with the majority opinion's summary of the litigation history of Lucente's case but wish to add two additional details. First, if the notices sent to Lucente were redeterminations issued under § 32a(2), the UIA would have needed to show "good cause" for failing to raise the issue within 30 days of the prior determination that was being considered. This issue was not raised during the initial administrative proceedings, nor was it discussed by the administrative law judge (ALJ) or the UIA's representative during the hearing. Second, it appears that the first time the UIA argued that its redeterminations should be considered mislabeled determinations was in the appeal to the circuit court.

B. HERZOG

In February 2016 claimant Michael Herzog applied and was approved for unemployment benefits. For reasons that are not clear from the record, Herzog did not receive his first benefit check until June 2016. On October 10, 2016, Herzog obtained full-time employment with Custom Form, Inc. Despite this, Herzog continued to certify that he was unemployed and continued to receive benefits for the period covering October 15, 2016, through November 12, 2016.

On October 11, 2017, the UIA sent Herzog a "Notice of Redetermination" for Case No. 0-009-757-100, which stated the following:

> There is a question in regard to your employment status.
>
> You began working full-time for CUSTOM FORM, INC from October 10, 2016 through March 3, 2017. You are not eligible for benefits while working full-time.
>
> You are ineligible for benefits under MES Act, Sec. 48 from October 9, 2016 through March 4, 2017. You will not receive benefit payments during this period.
>
> * * *
>
> Calculation of interest and penalty amount is shown later on this form.
>
> If you disagree with this redetermination, refer to Appeal Rights" [sic] on the reverse side of this form.

Herzog received a second "Notice of Redetermination" from the UIA, also dated October 11, 2017, for Case No. 0-009-757-101, stating as follows:

> This (re)determination is being issued as a result of the determination in case 0-009-757-100 involving Not Unemployed 48.
>
> You received benefits based on the case referenced above. These payments . . . are now found to be improper because you were found ineligible for benefits due to reporting your earnings improperly.

> Your actions indicate you intentionally misled and/or concealed information to obtain benefits you were not entitled to receive. Benefits will be terminated on any claims active on October 8, 2016.
>
> You are disqualified for benefits under MES Act Sec. 62(b). Restitution is due under MES Act, Sec. 62(a). The wages used to establish your claim are cancelled and no further benefits will be paid based on those wages. In addition, you are required to pay the penalty assessed based on this determination under MES Act, Sec. 54(b). . . .
>
> * * *
>
> Calculation of interest and penalty amount is shown later on this form.

In a separate document dated October 11, 2017, titled "Restitution" and citing "MES Act Sec. 62(a)," the UIA asserted that Herzog was obligated to repay $1,810 in wrongfully received benefits and $7,240 in penalties.

Unlike Lucente, Herzog promptly contested the redeterminations. As later explained in two letters sent to the UIA, Herzog claimed a mistaken understanding of how many weeks of benefits he was entitled to, agreed to make payments for the principal amount, challenged the fraud penalties, and invoked his right to appeal. An ALJ entered an order setting aside the redetermination notices before the scheduled hearing. As in Lucente's case, the UIA did not argue that the redeterminations should be treated as mislabeled determinations until the appeal to circuit court.

II. LEGAL ANALYSIS

I join the majority opinion's overview of the MESA in Part I and agree with the standard of review provided in Part III. I further agree with the majority opinion's conclusion that § 62 authorizes that UIA "to make original *determinations* imposing restitution for overpayment or penalties for fraud," and thus join Part IV(A). While I agree with the conclusion reached in Part IV(B)(1) of the majority opinion, I disagree that *Royster*

v Employment Security Comm, 366 Mich 415, 115 NW2d 106 (1962), is applicable to this matter. I also cannot join Part IV(B)(2) of the majority opinion because I do not agree that benefit checks are not determinations that can be reconsidered without an employer protest filed under § 32(f) or that a claimant's eligibility for benefits cannot be reconsidered through an agency-initiated redetermination under § 32a(1) or (2). I also join Part IV(C) of the majority opinion as to the fraud and restitution issues and to the extent that it requires the UIA to respect the legal and procedural distinctions between determinations and redeterminations. However, because I conclude that the UIA could redetermine the claimants' eligibility for benefits in these cases under § 32a(2) upon a showing of good cause, and because this issue has not been litigated, I would remand each case for further proceedings before an ALJ.

A. THE MESA PROVIDES A SAFETY NET DESIGNED TO MITIGATE THE FINANCIAL HARMS OF INVOLUNTARY UNEMPLOYMENT WHILE AVOIDING FRAUDULENT ABUSES OF THE SYSTEM

In 1936, during the Great Depression, the Michigan Legislature created the MESA to "protect the welfare of the people of this state through the establishment of an unemployment compensation fund," to "provide for the protection of the people of this state from the hazards of unemployment," and to "provide for . . . compliance with the provisions of the social security act and the Wagner-Peyser act passed by the Congress of the United States of America[.]" 1936 (Ex Sess) PA 1, title. The Legislature summarized

these purposes as an explicit statement of public policy in 1936 (Ex Sess) PA 1, § 2, which was codified at MCL 421.2(1).[1]

Michigan's modern unemployment insurance benefits program was born from and is governed by the MESA. It was thus designed as a social safety net "primarily for the benefit of persons involuntarily unemployed. Its purpose is to lighten the burden of economic insecurity on those who become unemployed through no fault of their own." *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 417; 565 NW2d 844 (1997). "As the MESA is a remedial statute, it should be liberally construed to achieve its intended goal." *Id.* These consolidated cases demonstrate the tension between the state's administration of the unemployment insurance program and its efforts to prevent fraudulent abuses of the program.

B. REDETERMINATION CHECKS ARE DETERMINATIONS OF A CLAIMANT'S CONTINUED ELIGIBILITY AND QUALIFICATION TO RECEIVE BENEFITS

Lucente's and Herzog's challenged redeterminations were issued on or about November 30, 2010, and October 11, 2017, respectively. At those times, the MESA provided that once "a determination, redetermination, or decision is made that benefits are due an unemployed individual," those benefits "become payable . . . and continue to be payable to the unemployed individual," subject to monetary entitlement limitations, "until the determination, redetermination, or decision is reversed, [or] *a determination, redetermination,* or decision on a new issue *holding the individual disqualified or ineligible*

[1] Nonsubstantive changes were made to MCL 421.2(1) in 2011, and a second stated policy was codified at MCL 421.2(2) concerning the "issuance of bonds by the Michigan finance authority" to finance the state's unemployment trust fund. 2011 PA 268.

is made . . . ." MCL 421.27(a)(1) (emphasis added). Claimants who were initially found eligible and qualified to receive benefits were required to certify their continued eligibility and qualification on a biweekly basis by answering various questions that relate to these criteria, such as sources of income, employment status, and availability for work.

During the administrative proceedings, the parties did not dispute that a benefit check constitutes a determination under the MESA. This is unsurprising considering longstanding statutory language on this precise point. "[T]he issuance of each benefit check *shall be considered a determination* by the [UIA] that the claimant receiving the check was covered during the compensable period, and *eligible and qualified for benefits*." MCL 421.32(f) (emphasis added).[2] Upon receiving the listing of the benefit check as required by MCL 421.21(a), a "chargeable employer" has a right to "protest by requesting a redetermination of the claimant's eligibility or qualification as to that period [covered by the benefit check] and a determination as to later weeks and benefits still unpaid that are affected by the protest." MCL 421.32(f); former MCL 421.32(d). Stated differently, an *employer's protest* of a benefit-check determination cannot seek reconsideration of a claimant's eligibility or qualification to receive benefits for periods that preceded the period covered by the benefit check at issue. If the claimant is found ineligible or not qualified because of an employer-protest-triggered redetermination, the UIA is required to proceed as described in § 62. MCL 421.32(f); former MCL 421.32(d).

While this portion of the MESA has been modified and renumbered over time, for more than 50 years § 32 has provided that benefit checks are a "determination" that during

[2] The quoted language was moved to MCL 421.32(f) from MCL 421.32(d) in 2013. See 2002 PA 192; 2013 PA 144.

the benefit period covered by the check the claimant was "eligible and qualified for benefits." The statutory language does not explicitly limit the legal effect of the first sentence of § 32(f) to that subsection or to circumstances in which only an employer (as opposed to a UIA-initiated action) files a protest. The text following the first sentence in § 32(f) restricts a chargeable employer's right to protest a claimant's eligibility or qualification for benefits to the period covered by the benefit check in question and for future periods. See, e.g., *Roman Cleanser Co v Murphy*, 386 Mich 698, 704-705; 194 NW2d 704 (1972) (holding that an employer could not compel reconsideration of an eligibility determination that preceded the period covered by the protested benefit check). The purpose of the employer protest is to contest the charge against the employer's account, a part of the funding mechanism for the unemployment system, as to that benefit period and future benefit periods. This is done by contesting the former employee's entitlement to benefits for the covered period and future periods. The language used in § 32(f) does not limit the UIA's ability to self-initiate reconsideration of a benefit-check determination as provided for in §§ 32a(1) and (2). As explained in the next section, in addition to the UIA, any interested party[3] (including a claimant) is permitted to request a redetermination of a prior determination, including a benefit-check determination, in accordance with §§ 32 and 32a, subject to express limitations elsewhere in the MESA, such as restrictions placed on employers in § 32(f).

[3] The UIA has defined "interested party" to mean "anyone whose statutory rights or obligations might be affected by the outcome or disposition of the determination, redetermination, or decision." Mich Admin Code, R 421.201(1).

This makes sense when one considers the biweekly certification requirements for claimants receiving benefits under the MESA. As § 27(a)(1) recognizes, after the initial monetary determination, a claimant will continue to receive benefits "if the individual *continues to be unemployed and to file claims for benefits*." (Emphasis added.) The certification process and questionnaires are the manner in which claimants continue to file claims for benefits after initially being approved and how claimants demonstrate continued entitlement to receive benefits. As a part of this process, claimants answer questions that relate to things like their sources of income, their employment status, and their availability to work. A claimant's response to a question may lead to follow-up questions. If a claimant's response (a factual assertion) does not affect either eligibility or qualification for benefits, then the UIA will issue a benefit check (a determination under § 32(f)) in the ordinary course. If a claimant's response changes how the MESA applies to the claimant's circumstances, then the UIA may be compelled by law to issue a new determination or a redetermination, either of which may affect a claimant's prior or continued eligibility or qualification to receive benefits.[4]

C. REDETERMINATION OF ELIGIBILITY

I would analyze the contested notices sent as what they purport to be—redeterminations. I disagree with the majority opinion's conclusion in Part IV(B)(2) that

[4] For example, a claimant could report that they became employed part-time or that they received income from a new source. This may trigger a follow-up question about when the change in circumstance occurred. If the change occurred during a period covered by a prior benefit check, then the UIA may be obligated to redetermine the claimant's eligibility or qualification to receive benefits (or the amount of benefits) during that period and may require a claimant to repay benefits that exceeded what they were entitled to under the MESA. See, e.g., MCL 421.48; MCL 421.27(c).

a benefit-check determination cannot serve as the basis for redetermining a claimant's eligibility to receive benefits. I would hold that the redeterminations issued were appropriate, subject to a finding on the timeliness requirement of § 32a(2). In contrast with the numerous provisions of the MESA that authorize different kinds of determinations, *all redeterminations* under the MESA are governed by § 32a.[5] Aside from minor amendments that are not relevant to these cases,[6] § 32a was substantively identical from 2010 through November 2017 and stated the following:

> (1) *Upon application by an interested party for review of a determination*, upon request for transfer to an administrative law judge for a hearing filed with the unemployment agency within 30 days after the mailing or personal service of a notice of determination, *or upon the unemployment agency's own motion within that 30-day period, the unemployment agency shall review any determination*. After review, the unemployment agency *shall issue a redetermination affirming, modifying, or reversing the prior determination and stating the reasons for the redetermination*, or may in its discretion transfer the matter to an administrative law judge for a hearing. If a redetermination is issued, the unemployment agency shall promptly notify the interested parties of the redetermination, *the redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge in accordance with section 33*.
>
> (2) *The unemployment agency may, for good cause*, including any administrative clerical error, *reconsider a prior determination or*

[5] As the majority opinion notes, while the MESA does not define the term "determination," it is best understood as "an official decision by the [UIA] that involves agency fact-finding and application of law (the MESA) to those facts." *Ante* at 4. See *Black's Law Dictionary* (11th ed) (defining "determination" as "[t]he act of deciding something officially").

[6] Pursuant to 2011 PA 269, MCL 421.32a was amended to change references to "a referee" to "an administrative law judge" and references to "commission" to "unemployment agency." Section 32a had only been substantively amended twice before 2011, once by 1983 PA 164 and then again by 1996 PA 503. Further amendments that are not at issue in these cases were made by 2017 PA 232, effective July 1, 2018.

> *redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. A reconsideration shall not be made unless* the request is filed with the unemployment agency, *or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year from the date of mailing or personal service of the original determination on the disputed issue*. [MCL 421.32a, as amended by 2011 PA 269 (emphasis added).]

A redetermination under the MESA is thus a reversal, affirmation, or modification of a prior determination based on some change in the relevant facts or law. The UIA is generally limited to 30 days to self-initiate reconsideration of a prior determination under § 32a(1), and if it fails to do so within that period, it must establish "good cause"[7] for the delay in accordance with § 32a(2). The MESA further requires the UIA in the case of such delays to initiate its reconsideration *within 1 year* of the mailing or service of the original determination and to provide *notice to the interested parties* that the agency has reconsidered a prior determination. MCL 421.32a(2), as amended by 2011 PA 269 ("A reconsideration *shall not be made unless* [a request is filed], or reconsideration is initiated by the unemployment agency *with notice to the interested parties*, within 1 year from the date of mailing or personal service of the original determination on the disputed issue.").

Juxtaposing § 32a against the variety of potential "determinations" that can be rendered under the MESA, it is clear that a "redetermination" must be preceded by a "determination." In this regard, I agree with the majority opinion. We also recognized the

[7] The UIA has promulgated a nonexhaustive list of circumstances that can constitute good cause, including the agency's receiving "additional or corrected information," administrative errors, and various circumstances impeding an interested party's ability to act sooner. Mich Admin Code, R 421.270.

distinction between determinations and redeterminations, and the limitations on the latter, in *Roman Cleanser*, 386 Mich at 704-705.[8] To hold otherwise would fail to give independent meaning to each statutory term and negate the distinction between determinations and redeterminations. After all, it is "a fundamental principle of statutory construction that '[w]hen the Legislature uses different words, the words are generally intended to connote different meanings.' " *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 369; 917 NW2d 603 (2018), quoting *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14, 795 NW2d 101 (2009). In this way, MCL 421.32a requires the UIA to make an initial determination as a condition precedent to reconsidering a prior determination and issuing a redetermination.

As I read the statute, there are no limitations in § 32a on the type of determinations that the UIA can reconsider under § 32a(1) or (2) so long as the notice and timing conditions are met. Thus, in my opinion, unless explicitly prohibited elsewhere in the MESA, the UIA can invoke § 32a(2) to reconsider *any* prior determination on a "disputed issue" within one year if there is good cause for not taking action within 30 days of the original determination on that issue under § 32a(1).

---

[8] In *Roman Cleanser*, we held that an employer's protest of a benefit payment filed under what was then § 32(d) did not authorize or require reconsideration of all prior determinations concerning a claimant's eligibility in the absence of the agency's finding good cause to reopen those earlier payments. *Id*. at 704-707. In that case, the agency had expressly stated that it was reconsidering a May 1 benefit check (a determination) and made no mention of the prior March 13 determination. *Id*. at 706-707. The protesting employer therefore did not have a right to force the agency to reconsider its earlier decisions about the claimant's eligibility for benefits and was thus limited to only the May 1 determination/benefit check.

In light of my conclusion about benefit checks and the lack of subject-matter limitations imposed on agency-initiated redeterminations, I conclude that the UIA did not exceed its authority by reconsidering Lucente's and Herzog's eligibility to receive benefits through redeterminations. Had these redeterminations been made within 30 days of and limited to a specific benefit check, or in Lucente's case his approval for extended benefits, then § 32a(1) would apply. Because of the timing and scope of the redeterminations, the UIA would need to satisfy § 32a(2), which requires the UIA to initiate a redetermination within one year of the "original determination on the disputed issue" if good cause exists.

The majority opinion states that the UIA-initiated redeterminations of eligibility issued in these cases were invalid. But the MESA requires a claimant to continue filing claims for benefits during each biweekly period, MCL 421.27(a)(1), and the UIA requires claimants to answer certification questions related to their continued eligibility as a part of this process. Thus, during each biweekly benefit period, a claimant's continued eligibility and qualification to receive benefits is a "disputed issue" for the purposes of a redetermination under § 32a(2).[9] I would accordingly hold that the UIA may rely on a previously issued benefit check as the original "determination" for the purposes of a UIA-

[9] I disagree with the majority opinion's reliance on *Royster*, 366 Mich 415, and the language quoted in that decision from *Lee v Employment Security Comm*, 346 Mich 171, 78 NW2d 309 (1956). The majority opinion relies on the phrase "matters not in dispute, such as payments voluntarily made and accepted, do not fall within the restrictions of section 32a." *Royster*, 366 Mich at 421, quoting *Lee*, 346 Mich at 179. However, a close examination of those opinions makes clear that the phrase was referring to payments made by a chargeable employer into the underemployment system, not to benefit-check payments issued to a claimant. There are additional factual and legal issues that distinguish those cases from the present situations. Accordingly, I do not believe *Royster* or *Lee* is applicable or relevant to these cases.

initiated redetermination of a claimant's eligibility or qualification for benefit under §§ 32a(1) and (2).

I disagree with the majority opinion's attempt to limit the UIA's authority under § 32a(1) or (2) in a manner that is not expressly provided for in the MESA. The conclusion that the UIA lacked authority to redetermine the claimants' eligibility appears to be based on a novel conclusion that the issuance of each benefit check is not a determination as to a claimant's eligibility.[10] As already discussed, § 32(f) states, without limitation, that the issuance of each benefit check is a determination by the UIA that the claimant was "eligible and qualified for benefits" during the relevant period. The majority opinion would limit this language to circumstances in which an employer protests the listing of a benefit check on the basis of a view that "the employer's protest of the benefit-check determination . . . is the triggering event." *Ante* at 24.

But triggering event of what? An employer protest triggers a protest-initiated reconsideration and, if appropriate, further proceedings under § 62. There is no language in § 32(f) preventing the UIA from initiating its own reconsideration of a benefit-check determination or preventing a claimant from challenging the same determination under § 32a. Such a limitation could prevent the UIA from correcting a mistake in the issuance of a benefit check on its own initiative through a redetermination and would instead require a new original determination. I do not believe the MESA compels such a reading, nor do I believe the Legislature intended such a result.

[10] Neither the claimants nor the UIA argued that benefit checks are considered determinations only when an employer files a protest.

D. ACCUSATIONS OF FRAUD AND RESTITUTION

Despite my reservations about relying on *Royster*, I agree with the majority opinion that whether Lucente or Herzog *intentionally* concealed information from the UIA was not a "disputed issue" when the initial eligibility determinations or benefit-check determinations were made for the purposes of § 32a(2). Even if the information provided was false or misleading, the *intent* of the claimant is separate and distinct from a claimant's eligibility and qualification to receive benefits based on the information provided and available.

I also agree that § 62 requires the UIA to issue an original determination concerning fraud and restitution. With respect to Lucente's case, in November 2010, MCL 421.62 provided as follows:

> (a) If the commission *determines that a person has obtained benefits to which that person is not entitled, the commission may recover a sum equal to the amount received by 1 or more of the following methods*: . . . The commission *shall not recover improperly paid benefits from an individual* more than 3 years, *or more than 6 years in the case of a violation of section 54(a) or (b)*[11] *or sections 54a to 54c, after the date of receipt of the improperly paid benefits unless*: (1) a civil action is filed in a court by the commission within the 3-year or 6-year period, (2) the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits, or (3) the commission issued a determination requiring restitution within the 3-year or 6-year period. . . .
>
> (b) . . . *For benefit years beginning after the conversion date prescribed in section 75, if the commission determines that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits*, whether or not the person obtains

[11] MCL 421.54 has provided and continues to provide penalties for a claimant who obtains benefits through intentional fraud or misrepresentation of material facts. Several news sources have reported that Michigan's penalty provisions for fraudulently obtained benefits are believed to be some of the most punitive in the nation.

> benefits by or because of the intentional false statement, misrepresentation, or concealment of material information, *the person shall, in addition to any other applicable penalties, have his or her rights to benefits for the benefit year in which the act occurred canceled as of the date the commission receives notice of, or initiates investigation of, a possible false statement, misrepresentation, or concealment of material information, whichever date is earlier, and wages used to establish that benefit year shall not be used to establish another benefit year*. . . .
>
> (c) Any determination made by the commission under this section is final unless an application for a redetermination *is filed with the commission in accordance with section 32a*.
>
> (d) The commission *shall take the action necessary to recover all benefits improperly obtained or paid under this act, and to enforce all penalties under subsection (b).* [MCL 421.62, as amended by 1995 PA 125 (emphasis added).]

The repeated use of "determines" throughout § 62 during the period relevant to Lucente's case is a strong indication that an original determination was required to invoke the restitution, fraud, and disqualification provisions of §§ 62 and 54. Section 62(c) also provided that a "*determination* made . . . under this section *is final unless* an application for a *redetermination* is filed with the commission in accordance with *section 32a*." (Emphasis added.) Regardless of whether it was the UIA's ordinary practice at the time, the text of § 62 in 2010 did not expressly allow for fraud accusations, fraud penalties, or restitution to be raised and imposed for the first time in a UIA-initiated redetermination.

Section 62 is less clear, however, with regard to Herzog's case. In October 2017, the time relevant to Herzog's case, MCL 421.62 provided as follows:

> (a) If the unemployment agency *determines that a person has obtained benefits to which that person is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest by 1 or more of the following methods*: . . . *The unemployment agency shall issue a determination requiring restitution*

within 3 years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement. Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall not initiate administrative or court action to recover improperly paid benefits from an individual more than 3 years after the date that the last determination, redetermination, or decision establishing restitution is final. *Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall issue a determination on an issue* within 3 years from the date the claimant first received benefits in the benefit year in which the issue arose, or *in the case of an issue of intentional false statement, misrepresentation, or concealment of material information in violation of section 54(a) or (b) or sections 54a to 54c, within 3 years after the receipt of the improperly paid benefits unless the unemployment agency filed a civil action in a court within the 3-year period; the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits; or the unemployment agency issued a determination requiring restitution within the 3-year period*. . . .

(b) *For benefit years beginning on or after October 1, 2000*, if the unemployment agency *determines that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits*, whether or not the person obtains benefits by or because of the intentional false statement, misrepresentation, or concealment of material information, the *person shall, in addition to any other applicable interest and penalties, have his or her rights to benefits for the benefit year in which the act occurred canceled as of the date the claimant made the false statement or misrepresentation or concealed material information, and wages used to establish that benefit year shall not be used to establish another benefit year*. . . .

(c) Any determination made by the unemployment agency under this section *is final unless an application for a redetermination is filed in accordance with section 32a*.

(d) The unemployment agency *shall take the action necessary to recover all benefits improperly obtained or paid under this act, and to enforce all interest and penalties under subsection (b)*. [MCL 421.62, as amended by 2016 PA 522 (emphasis added).]

In November 2017, MCL 421.62(a) no longer referred solely to what the UIA "determines" as it did in 2010. Rather, § 62(a) began:

> If the unemployment agency *determines* that a person has obtained benefits to which that person is not entitled, or *a subsequent determination by the agency* or a decision of an appellate authority *reverses a prior qualification for benefits*, the agency may recover a sum equal to the amount received plus interest . . . . The [UIA] shall issue a determination requiring restitution within 3 years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement. [MCL 421.62(a), as amended by 2016 PA 522 (emphasis added).]

In 2010, § 62(a) only referred to the UIA making an initial determination that a claimant had wrongfully received benefits or intentionally withheld or misrepresented information. The version of the statute that became effective on April 9, 2017, contrasted this initial determination with a "subsequent determination" that "reverses" a prior qualification for benefits—i.e., a redetermination under MCL 421.32a. This could suggest that the UIA was granted greater flexibility to invoke § 62, such as through the use of a redetermination. But this is nullified by (1) language in § 62(a) stating that the UIA "shall issue a determination requiring restitution within 3 years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement," and (2) language in § 62(c) stating that "[a]ny determination made by the unemployment agency under this section is final unless an application for a redetermination is filed in accordance with section 32a." Thus, while the majority opinion does not analyze the statutory provisions in this manner, I agree with the ultimate conclusion that § 62 required the UIA to issue original determinations as to both fraud and restitution.

III. REMEDY

I join Part IV(C) of the majority opinion to the extent that it invalidates the UIA's decisions as to fraud and restitution and requires the UIA to respect the legal and procedural

distinctions between a determination and redetermination. However, I believe the Court should uphold the redetermination notices as they relate to the claimant's eligibility, subject to the "good cause" requirement of § 32a(2). As discussed, I believe §§ 32(f) and 32a provided the UIA authority to use either prior benefit-check determinations or an original eligibility determination as the base determination for reconsidering a claimant's eligibility for benefits. Given that the redeterminations in this matter were issued more than 30 days after any applicable determination, the UIA needed to show good cause for its delay. This issue was never litigated during the ALJ proceedings in Lucente's case, and because Herzog has not received a hearing before an ALJ, the matter has yet to be litigated in his case. Accordingly, I would remand these cases to the appropriate ALJs to allow the parties to litigate whether the UIA had good cause for reconsidering the claimants' eligibility. I would, however, invalidate the notices at issue as they relate to fraud and restitution because those findings required original determinations, and I thus join Part V of the majority opinion in part.

Elizabeth M. Welch

S T A T E O F M I C H I G A N

SUPREME COURT

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS/UNEMPLOYMENT INSURANCE AGENCY,

Appellee,

v No. 160843

FRANK LUCENTE,

Claimant-Appellant,

and

DART PROPERTIES II, LLC,

Employer-Appellee.

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY,

Appellee,

v No. 160844

MICHAEL HERZOG,

Claimant-Appellant,

and

CUSTOM FORM, INC.,

Employer-Appellee.

ZAHRA, J. (*concurring in part and dissenting in part*).

I join the Court in affirming the Court of Appeals' holding that MCL 421.62 (§ 62) of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, authorizes the Department of Licensing and Regulatory Affairs/Unemployment Insurance Agency (the Agency) to make original, in-the-first-instance determinations imposing restitution for overpayment or penalties for fraud.

I dissent, however, from the majority's form-over-substance holding: that the notices sent to these claimants are really redeterminations.[1] In my view, the Agency's notices are, in substance, § 62 determinations that were simply mislabeled. Looking beyond the notices' labels and focusing instead on their substance, it is clear that the Agency understood itself to be proceeding under § 62 given that the notices cite § 62 as authority for the Agency's actions.[2] This Court ought to respect that choice.

The majority's ruling—that the notices *are* redeterminations because they are *labeled* as such—is contrary to well-settled administrative law, which plainly supports my substance-over-form approach. *Azar v Allina Health Servs* dealt with whether the federal Department of Health and Human Services—which administers Medicare through one of its operating divisions, the Centers for Medicare & Medicaid Services—was required to go through a notice-and-comment process to issue any " 'statement of policy . . . that establishes or changes a substantive legal standard . . . .' "[3] The Supreme Court of the

[1] See *ante* at 3 (opinion of MCCORMACK, C.J.); *ante* at 11 (opinion of WELCH, J.).

[2] See *ante* at 3-4 (Lucente); 5-6 (Herzog) (opinion of WELCH, J.).

[3] *Azar v Allina Health Servs*, ___ US ___, ___; 139 S Ct 1804, 1809; 204 L Ed 2d 139 (2019), quoting 42 USC 1395hh(a)(2).

United States held that a period of notice and comment was required. In so holding, it explained that agencies cannot "avoid notice and comment simply by mislabeling their substantive pronouncements. On the contrary, courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply."[4]

The United States Court of Appeals for the District of Columbia Circuit has taken a similar position on labeling. *R Comm of Texas v United States* dealt with whether the decision of the federal Interstate Commerce Commission (ICC) to deny the Railroad Commission of Texas (RCT) the requisite certification under federal law for the RCT to regulate intrastate rail traffic was valid.[5] The D.C. Circuit held that it was. In so holding, it explained that, "[p]roperly viewed, the ICC's decision should be interpreted as a refusal to extend provisional certification rather than a revocation of the earlier provisional certification. This mere mislabelling of what was . . . a fully supported agency action does not" serve to invalidate it.[6] In other words, an agency's mislabeling, whether it be self-serving or inadvertent, cannot and does not relieve courts of their duty to determine what an agency is actually doing by looking to the substance of its action.

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[4] *Id*. at ___; 139 S Ct at 1812. See also *Gen Motors Corp v Ruckelshaus*, 239 US App DC 408, 412; 742 F2d 1561 (1984) (en banc) ("[T]he agency's own label, while relevant, is not dispositive."); *Guardian Fed S&L Ass'n v Fed S&L Ins Corp*, 191 US App DC 135, 143-144; 589 F2d 658 (1978) (stating that if "a so-called policy statement is in purpose or likely effect . . . a binding rule of substantive law," it "will be taken for what it is").

[5] *R Comm of Texas v United States*, 246 US App DC 352; 765 F2d 221 (1985).

[6] *Id*. at 357 n 4.

Two other areas of law support my position. First, it is well settled in the law of pleadings that "[a] party's choice of label for a cause of action is not dispositive. We are not bound by the choice of label because to do so '*would exalt form over substance*.' "[7] I see no reason not to transplant that principle from the law of pleadings and apply it to this Court's de novo examination of whether the Agency's notices were § 62 determinations. Just as courts routinely peer behind the labels of pleadings to see what the parties' actual claims are, we should peer behind the labels of these notices (and other administrative actions like them) to see what they are in substance so that, by seeing them for what they are, parties' rights will be properly adjudged.

The Supreme Court of the United States has also recognized that substance predominates over form with regard to the use of titles and headings in statutory interpretation. The majority in *Yates v United States*[8] explained that statutory titles (and section headings) are "not commanding" but nonetheless are "*tools available for the resolution of a doubt about the meaning of a statute*."[9] *Yates* stands for the elementary

[7] *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011), quoting *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989) (emphasis added).

[8] *Yates v United States*, 574 US 528; 135 S Ct 1074; 191 L Ed 2d 64 (2015).

[9] *Id*. at 540 (opinion of Ginsburg, J.) (quotation marks and citation omitted; emphasis added). See also *United States v Nakhleh*, 895 F3d 838, 841 (CA 6, 2018). Justice Alito's concurrence in *Yates* puts a finer point on this idea: "[Statutory] [t]itles . . . are . . . not dispositive. Here, if the list of nouns did not already suggest that 'tangible object' should mean something similar to records or documents, especially when read in conjunction with [18 USC] § 1519's peculiar list of verbs with their focus on filekeeping, then *the title would not be enough on its own*." *Yates*, 574 US at 552 (Alito, J., concurring) (emphasis added).

proposition that statutory titles do not control what statutes mean, but their text does. As with the pleadings principle, I see no reason not to explicitly extend *Yates*' teaching on statutory titles to the Agency's actions. If courts can look beyond statutes' titles to see what the statutes actually say and do, then they should do the same with things like these notices' labels to see what the notices actually say and do. Administrative law, the law of pleadings, and the relevant principles of statutory interpretation all point in the same direction: The outcome of this case should turn on the substance of the notices rather than on a mechanistic devotion to their form.[10]

Moreover, claimants were not prejudiced by the Agency's purported "redetermination" actions. As ably cataloged by the Court of Appeals, the notices informed claimants that they had been disqualified from receiving benefits and why, that they had fraudulently received benefits and were required to pay restitution and fraud penalties, that they owed the Agency money and how much, and that they had the right to appeal.[11] In other words, the decisions provided claimants "precisely the process contemplated by the

[10] The majority contends that the notices are really redeterminations because they "provided different instructions on how to protest a 'determination' versus appealing a 'redetermination.' " See *ante* at 29 n 15 (opinion of MCCORMACK, C.J.). But the majority's objection is just a species of form-over-substance reasoning with which I have expressed my disagreement. The notices featured comprehensive instructions for *both* actions, so on what basis does the majority decide that this fact tips the analysis toward the conclusion that they are redeterminations rather than determinations? I submit that there is no sound reason to think that a portion of a notice from the Agency that includes both sets of instructions renders the Agency's action a redetermination rather than a determination.

[11] *Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, 330 Mich App 237, 259-260, 264; 946 NW2d 836 (2019).

[MESA] . . . ."[12] Any potential confusion caused by the mislabeling did not prejudice claimants. The determinations of fraud were made within the proper time frame, claimants were informed of their right to protest,[13] and claimants were able to, and did, seek de novo appellate review—before two administrative bodies and the state's entire appellate court system.

Because the notices were simply § 62 determinations that were mislabeled and claimants were not prejudiced by that mislabeling, I would affirm the Court of Appeals.

Brian K. Zahra
David F. Viviano

[12] *Id.*

[13] The majority alleges that "it is far from clear that the Agency understood its decisions to be original 'determinations' " because, while the MESA permits the Agency either to issue a redetermination or transfer the matter to an administrative law judge (ALJ) in response to a claimant's protest, "the Agency does not identify anything in the record that would indicate it exercised such discretion in these cases." See *ante* at 29 n 15 (opinion of MCCORMACK, C.J.). But with respect to Lucente, it appears that he did receive review by the Agency under MCL 421.32a because the Agency determined that his challenge was untimely. With respect to Herzog, while the record is somewhat unclear, the Agency's "Notice of In Person Hearing" responding to Herzog's challenge and transferring his case to an ALJ was entirely consistent with how MCL 421.32a(1) requires a challenge to a determination to be handled. "Upon application by an interested party for review of a determination, . . . the [Agency] shall in its discretion issue a redetermination . . . or may transfer the matter to an [ALJ] for a hearing." MCL 421.32a(1). Therefore, it cannot be said that claimants "lost out" on any process under the MESA.

ATTACHMENT 3

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
	CORRESPONDENCE SYMBOL OUI/DPM
	DATE May 5, 2021

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 20-21

TO: STATE WORKFORCE AGENCIES

FROM: SUZAN G. LEVINE /s/
Principal Deputy Assistant Secretary

SUBJECT: State Instructions for Assessing Fraud Penalties and Processing Overpayment Waivers under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as Amended

1. **Purpose.** To advise states of appropriate circumstances for assessing a monetary fraud penalty and for assessing interest and other collection costs on benefit overpayments created under the CARES Act (Public Law (Pub. L.) 116-136), as amended; and to provide instructions for circumstances under which a state may waive recovery of overpayments, including limited circumstances for permissible use of "blanket waivers."

2. **Action Requested.** The Department of Labor's (Department) Employment and Training Administration (ETA) requests State Workforce Administrators provide the information contained in this Unemployment Insurance Program Letter (UIPL) to appropriate program and other staff in state workforce systems as they implement the unemployment insurance (UI)-related provisions that respond to the economic effects of the Coronavirus Disease 2019 (COVID-19) pandemic.

3. **Summary and Background.**

   a. Summary – This UIPL describes the requirements for establishing benefit overpayments for programs authorized by the CARES Act, as amended. Section 4.c. of this UIPL provides guidance to states regarding the assessment of fraud monetary penalties, reiterates guidance recently provided for the Pandemic Unemployment Assistance (PUA) program, and supersedes guidance previously provided regarding the Federal Pandemic Unemployment Compensation (FPUC), Mixed Earners Unemployment Compensation (MEUC), and Pandemic Emergency Unemployment Compensation (PEUC) programs. States are instructed to not assess interest and other collection costs for CARES Act programs. This UIPL also provides guidance to states regarding the assessment of fraud monetary penalties, interest, and other collection costs for the first week of regular unemployment compensation (UC) that is reimbursed in accordance with Section 2105 of the CARES Act.

RESCISSIONS None	EXPIRATION DATE Continuing

Section 4.d. of this UIPL describes the eligibility criteria for waiving recovery of an overpayment, including a federal definition of "equity and good conscience" that may be applied to overpayments under PUA, FPUC, MEUC, PEUC, and the first week of regular UC reimbursed in accordance with Section 2105 of the CARES Act. In Section 4.d.iii. of this UIPL, the Department provides limited circumstances under the CARES Act when a state may process "blanket waivers" of overpayments. Additionally, after a state determines that recovery of an overpayment is waived, it must refund any amounts that were collected towards the applicable overpayment prior to the determination of waiver eligibility. It may take some time (*e.g.*, up to a year) for states to process such refunds and states are encouraged to contact the Department for technical assistance.

Attachment I to this UIPL provides a quick reference that summarizes the guidelines regarding the establishment and recovery of overpayments across unemployment benefit programs.

b. Background – On March 27, 2020, the CARES Act was enacted. Among other provisions, the CARES Act provided for the creation of three new UC programs: PUA; FPUC; and PEUC. Section 2105 of the CARES Act also provided full federal funding for the first week of regular UC for states with no waiting week. The Department issued UIPL No. 14-20 on April 2, 2020, to provide a summary of the key UI provisions in the CARES Act.

   On December 27, 2020, the Continued Assistance for Unemployed Workers Act (Continued Assistance Act) was enacted under Division N, Title II, Subtitle A of the Consolidated Appropriations Act, 2021 (Pub. L. 116-260). This Act extended to March 14, 2021, the PUA and PEUC programs, as well as federal funding for the first week of regular UC at a reduced amount of 50 percent, beyond their original expiration date of December 31, 2020. The FPUC program, which expired July 31, 2020, was reauthorized to resume at $300 for weeks of unemployment beginning after December 26, 2020. The Continued Assistance Act also permits a state to waive repayment of a PUA overpayment under certain circumstances. Additionally, the Continued Assistance Act provided for the creation of a fourth new UC program, MEUC. The Department issued UIPL No. 09-21 on December 30, 2020, to provide a summary of the key UI provisions in the Continued Assistance Act.

   On March 11, 2021, the American Rescue Plan Act (ARPA) was enacted (Pub. L. 117-2). This Act extended the PUA, PEUC, FPUC, and MEUC programs to weeks of unemployment ending on or before September 6, 2021, and restored full federal funding for the first week of regular UC. The Department issued UIPL No. 14-21 on March 15, 2021, to provide guidance to states regarding the UI provisions in ARPA.

   In March 2020, states signed the "Agreement Implementing the Relief for Workers Affected by Coronavirus Act" (Agreement) with the Department to administer PUA, PEUC, and FPUC, as well as to receive reimbursement for the first week of regular UC for states with no waiting week. The Agreement incorporates amendments to the CARES Act made by the Continued Assistance Act and ARPA. Many states also signed an

addendum to administer the MEUC program in January 2021. Under these agreements, each state is required to operate the programs as required by any statutory amendments and the Department's guidance.

Importance of Program Integrity. Addressing improper payments and fraud is a top priority for the Department and the entire UI system. States play a fundamental role in ensuring the integrity of the UI system. Especially during this time of extraordinary workloads, states should maintain a steadfast focus on UI functions and activities that ensure program integrity and the prevention and detection of improper payments and fraud across all programs operated within the UI system, while ensuring that as many legitimate claimants as possible are able to swiftly access benefits during a critical time. It is critical that states implement processes that ensure payments are being made only to eligible individuals and that states have aggressive strategies and tools in place to prevent, detect, and recover fraudulent payments, with a particular emphasis on imposter fraud by claimants using false or stolen identities.

Additionally, under the Continued Assistance Act, for states to have an adequate system for administering the PUA program, states must include procedures for identity verification or validation and for timely payment, to the extent reasonable and practicable, for all new PUA claims filed on or after January 26, 2021 (*see* Section C.3. of Attachment I to UIPL No. 16-20, Change 4).

UIPL No. 28-20, published on August 31, 2020, and UIPL No. 28-20, Change 1, published January 15, 2021, provided states with funding to assist with efforts to prevent and detect fraud and identity theft and to recover fraud overpayments in the PUA and PEUC programs.

4. **Guidance.** The term "improper payment" refers to both an overpayment and an underpayment of UC. This guidance focuses on overpayments. An overpayment is created when a state determines that the individual received a payment, or a portion of a payment, to which the individual is not entitled.

   Sections 2104(f) and 2107(e) of the CARES Act provide instructions for addressing fraud and overpayments in the FPUC and PEUC programs, respectively. MEUC was added to Section 2104 of the CARES Act with enactment of the Continued Assistance Act; as such, Section 2104(f) of the CARES Act also provides instructions for addressing fraud and overpayments in the MEUC program. Additionally, Section 2105 of the CARES Act temporarily provides full federal funding for the first week of regular UC in states with no waiting week, and Section 2105(f) of the CARES Act cross-references PEUC instructions found under Section 2107(e) of the CARES Act for addressing fraud and overpayments. These instructions include that, in the case of individuals who have received amounts to which they were not entitled, states must require repayment of these amounts except for limited circumstances (discussed further in Section 4.d. of this UIPL) under which such repayment would be waived.

Additionally, under the state UC program, when a state determines an overpayment was made to an individual due to fraud committed by such individual, the state must assess a penalty of at least 15 percent of the amount of the erroneous payment. *See* Section 251(a) of the Trade Adjustment Assistance Extension Act of 2011 (TAAEA) (Pub. L. 112-40), which created Section 303(a)(11) of the Social Security Act (SSA) (42 U.S.C. § 503(a)(11)). States must also assess and deposit penalties against individuals determined to be overpaid under federal UC programs due to fraud in the same manner as the state assesses and deposits these penalties under state law implementing Section 303(a)(11), SSA. These federal UC programs include any federal temporary extension of UC and any federal program which increases the weekly amount of UC payable to individuals. *See* Section 251(b) of the TAAEA and Section 4 of UIPL No. 02-12.

a. **Establishing Overpayments for CARES Act Programs**. States are reminded of the federal law requirements for identifying and establishing overpayments as described in UIPL No. 01-16. This includes: i) conducting an investigation, which includes promptly contacting the individual to whom the potential overpayment was made and providing the individual a reasonable amount of time to be heard before making an official determination that the payment is improper; ii) independently verifying information received from a computer cross-match with a federal database or other automatic processes or matches before suspending, terminating, reducing, or making a final denial of UC; and iii) gathering all relevant information and providing the individual an opportunity to be heard when information is received from a computer cross-match with any database, an outside "tip," or other source. States must weigh the evidence, apply the applicable state and federal law, and issue a written determination that provides sufficient information to understand the basis for the determination and how/when an appeal must be filed. The written determination must also include the facts on which the determination is based, the reason for allowing or denying benefits, the legal basis for the determination, and potential penalties or consequences. Fraud determinations may not be made by an automated system.

   As discussed in Section 4.d. of UIPL No. 01-16, states may not initiate recovery of an overpayment until an official determination of the overpayment has been made. Communications must be in plain language using methods that ensure the communication is most likely to be successful for all populations, including individuals with limited English proficiency. *See* UIPL Nos. 01-16; 02-16; and 02-16, Change 1.

b. **Assessing Fraud Monetary Penalties for CARES Act Programs**.[1]

   i. *Application of a minimum 15 percent monetary penalty*. Within the context of the CARES Act, states must apply a minimum 15 percent monetary penalty to an individual's overpayment when the state determines that such an overpayment was made to an individual due to fraud. Fraud includes instances where an individual knowingly has made, or caused to be made by another, a false statement or

[1] Guidance will be provided separately to territories and Freely-Associated States that do not administer a regular UC program.

representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact. This fraud penalty is applicable to PUA, FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act.

Because the CARES Act provides instructions for addressing fraud and overpayments of FPUC, MEUC, PEUC, and reimbursement of the waiting week under Section 2105 of the CARES Act, the Department's previous guidance advised that states may not impose additional fraud penalties beyond the CARES Act to overpayments for these programs. However, upon further legal analysis, the Department has concluded that Section 251 of the TAAEA is applicable to these programs.

- PUA: This UIPL affirms the guidance provided under Section 5 of UIPL No. 16-20, Change 4, which superseded Question 21 of Attachment I to UIPL No. 16-20, Change 2.
- FPUC: This UIPL supersedes Section F.1. of Attachment I to UIPL No. 15-20, specifically as it relates to the imposition of fraud penalties.
- MEUC: This UIPL supersedes Section 4.b. of UIPL No. 15-20, Change 3, specifically as it relates to the imposition of fraud penalties.
- PEUC: This UIPL supersedes Section E.1. of Attachment I to UIPL No. 17-20, specifically as it relates to the imposition of fraud penalties, as well as Question E.7. of Attachment I to UIPL No. 17-20, Change 1.

ii. *Action required from the state.* States must apply the fraud monetary penalty for PUA for all fraud overpayments established on or after January 8, 2021 (the publication date of UIPL No. 16-20, Change 4). Additionally, states must apply the fraud monetary penalty for FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act for all fraud overpayments established on or after the date of publication for this UIPL.

This instruction does not prevent a state from choosing to apply such monetary penalties retroactively to the beginning of the CARES Act programs under the authority provided by TAAEA.

c. **Assessing Interest and Other Collection Costs for CARES Act Programs**.

i. *Application of interest or other collection costs.* Regarding the application of interest or other collection costs to PUA, Section 2102(h) of the CARES Act provides that the regulations for Disaster Unemployment Assistance (DUA) at 20 C.F.R. Part 625 apply unless Section 2102 provides otherwise or there is a conflict between Part 625 and Section 2102. Neither Section 2102 nor 20 C.F.R. Part 625 provide for the assessment of interest or collection costs. Therefore, states may not apply interest or other collection costs to PUA overpayments, whether such overpayments are considered fraudulent or non-fraudulent.

Additionally, States may not apply interest or other collection costs under state law to overpayments in the FPUC, MEUC, and PEUC programs – whether such overpayments are considered fraudulent or non-fraudulent. This is not permitted under the fraud and overpayment instruction sections found at Sections 2104(f) and 2107(e) of the CARES Act. Because states may not apply interest or other collection costs to overpayments in the PEUC program and Section 2105(f) of the CARES Act cross-references PEUC for instructions on addressing fraud and overpayments, states may also not apply interest or other collection costs to overpayments of the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act.

ii. *Action required from the state.* If a state previously assessed interest and other costs for PUA, FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, the state must reconsider these assessments and refund any money collected towards such payment of interest and other collection costs.

d. **Waiving Recovery of the Overpayment for CARES Act Programs**. Federal law sets out the authority to waive recovery of overpayments under certain circumstances for PUA, FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act.[2] It is a matter of state discretion whether to exercise this waiver authority. A state without such waiver provisions under state law may choose to waive recovery for these programs under this federal authority.

i. *Eligibility criteria for waiving recovery of an overpayment.* For PUA, FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, a state may only waive repayment of an overpayment if the state determines that: (1) the payment of such compensation was without fault on the part of any such individual; and (2) such repayment would be contrary to equity and good conscience. State law determines when an individual is considered to not be at fault for the overpayment.

State law may also determine if repayment would be contrary to equity and good conscience. If such a standard is not addressed in state law, or, if the state chooses to defer to federal authority in waiving the recovery of overpayments for the CARES Act programs, the state must use the following provisions for "equity and good conscience" when assessing whether an individual overpayment may be waived:

- It would cause financial hardship to the person for whom it is sought; or
- The recipient of the overpayment can show (regardless of their financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment either they have relinquished a valuable right or changed positions for the worse; or

[2] Waiver language for PUA was added in the Continued Assistance Act and is found under Section 2102(d)(4) of the CARES Act as amended. Waiver language for FPUC and MEUC is found under Section 2104(f)(2) of the CARES Act, as amended. Waiver language for PEUC is found under Section 2107(e)(2) of the CARES Act.

- Recovery would be unconscionable under the circumstances.

ii. *Processing requests for waiving recovery of an overpayment.* Except as provided in paragraph (iii), the Department has a long-standing interpretation that the methods of administration for evaluating a request to waive an overpayment must be done on an individual basis and not as a matter of course. As discussed in Section 5 of UIPL No. 23-80, the state may choose to either: (1) make a determination as to the applicability of the waiver provision a part of the determination process on every overpayment case; or (2) provide, as part of each overpayment determination, information about the waiver provision and provide that individuals may request consideration of a waiver and receive an appeal determination on the actions taken.

Additionally, a waiver of the underlying benefit overpayment does not automatically waive the overpayment for FPUC and MEUC. Waiver determinations must be made on the facts and circumstances for each individual program.

As provided in Section 4.d. of UIPL No. 01-16:

> States may not initiate recovery of an overpayment until an official determination of the overpayment has been made, consistent with Federal law requirements. States should have clear written procedures that provide for appropriate factfinding and independent verification of information as needed in the official determination process. State law may prohibit recovery of an overpayment until the overpayment determination, including any appeal, has become final under state law.
>
> In addition, if state law provides for a waiver of recovery of an overpayment, the notice of the overpayment determination must provide enough information to enable the individual to understand under what circumstances a waiver may be granted and how to request such a waiver. (See UIPL No. 23-80.) Until the period for a waiver request has elapsed, or, if an individual applies for a waiver, the waiver determination is made, states may not commence recovery of overpayments. State law may provide that if a request for a waiver is filed the state may not commence recovery of an overpayment until the decision on the waiver request, including any appeal, has become final under state law.

If an overpayment is waived, the state must not recover any of the waived amount. If an overpayment is not waived, then the offset provisions described in Departmental guidance (summarized by program in Attachment I to this UIPL) and other recovery provisions under state law apply.

iii. *Limited circumstances under the CARES Act for which a state may process "blanket waivers" for waiving recovery of overpayments*. There are two specific circumstances under which a state may approve waiver of recovery for overpayments using a single set of facts (*i.e*., approve a "blanket waiver"). Application of these circumstances does

not require the individual to submit a request for such a waiver. However, the state must include documentation of its waiver determination on the individual's claim.

Without the authority to process "blanket waivers" as described in this UIPL, states would instead be required to individually determine that many individuals are eligible for waiving the repayment based on the same set of facts – potentially the same number as would be affected by a "blanket waiver." These individualized determinations could result in the same amount of overpayment being forgiven, but at a greater cost to the state because of the workload generated from processing individual waivers.

A. When an individual is eligible for payment under an unemployment benefit program for a given week, but through no fault of the individual, they were paid incorrectly under either the PUA or PEUC program at a higher weekly benefit amount (WBA).

States have experienced significant workload increases and quickly implemented four new unemployment benefit programs over the last year, each of which has a defined place in the program progression hierarchy (*see* Attachment I to UIPL No. 14-21 for the latest iteration). This program progression order was modified due to additional amounts provided under PEUC through enactment of the Continued Assistance Act on December 27, 2020, and again with the enactment of ARPA on March 11, 2021, resulting in certain individuals who were receiving PUA at the time to be switched to PEUC. Additionally, this program progression order has changed as states have triggered "on" and "off" Extended Benefit (EB) periods because of changing state unemployment rates. States have experienced challenges adapting their computer systems and customer service processes quickly to implement these changes. This has sometimes resulted in overpayments for large numbers of individuals who had to move back and forth through programs that had varying WBA calculations.

The defining aspect of this circumstance under which a state may process "blanket waivers" for overpayment recovery is that the individual is eligible for benefits for the week in question; the sole reason for the overpayment is because of a difference in WBA calculations across programs, and recovery would be unconscionable under the circumstances. These types of overpayments meet the criteria for a "blanket waiver" because:

- The individual is without fault: Overpayments under these circumstances occurred because a unique confluence of circumstances (*i.e.*, an avalanche of unemployment claims precipitated by a pandemic, implementation of multiple new programs, and antiquated computer systems) hindered the states' ability to properly switch individuals between the CARES Act programs. Therefore, if the state did not properly switch a number of individuals between programs and this failure to switch programs was not due to the fault of the individual, this condition would be met.

- Repayment would be contrary to equity and good conscience: The United States is entering its second year of a pandemic that has had severe

consequences on the economy and individuals' ability to find and maintain employment. Since the beginning of the pandemic, unemployment has ranged from 14.8 percent at its peak to its current 6.0 percent.[3] While unemployment has decreased from its peak at the beginning of the pandemic, 6.0 percent is still significantly higher, almost double, the unemployment rate for the three years prior to the pandemic. Additionally, the amendments to the CARES Act and the changes to guidance have required states to make significant changes to their administration of the programs. These changes in the statute and guidance made it challenging for states to properly administer the programs, resulting in the overpayments in the situations described above. As such, it would be extremely unfair to require individuals to repay overpayments which occurred as a result of the administration of the various programs and the CARES Act generally – and thus, recovery would be unconscionable under the circumstances.

The authority for states to apply this "blanket waiver" is limited to overpayments made under the PUA, PEUC, and MEUC programs. Such overpayments might occur in moving weeks of unemployment from PUA or PEUC to regular UC as a result of a quarter change or the individual's original benefit year ending, or moving weeks of unemployment from PEUC to PUA. Because the individual is still eligible for benefits for the week in question, there is no overpayment under the FPUC programs. In the case of moving a week of unemployment from PEUC to PUA, there may be an overpayment under the MEUC program that may also be waived under these circumstances.

For example, if the individual, through no fault of their own, is paid PUA for a week when they otherwise would have been eligible for a lesser WBA with regular UC, the state must stop the PUA claim, establish an overpayment on the PUA claim, and the individual may then file weeks against the regular UC claim. Such an overpayment might occur because, when calculating the WBA, the PUA program considers wages earned in the last taxable year and regular UC generally considers wages earned in the first four of the last five completed calendar quarters. An individual filing in March 2021 may have wages from the calendar year 2020 considered for calculation of the PUA WBA and wages from October 2019-September 2020 considered for calculation of the regular UC WBA. In this situation, the state may waive recovery of the resulting PUA overpayment because the individual is not at fault in its creation and recovery would be unconscionable under the circumstances.

B. Specific to PUA, when, through no fault of the individual, the state paid the individual a minimum WBA based on DUA guidance other than UIPL No. 03-20.

Some states experienced confusion in implementing PUA, which is a new unemployment benefit program that is structured differently from any other existing

[3] See Bureau of Labor Statistics Civilian Unemployment Rate available online at: https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm. (Accessed April 5, 2021).

unemployment benefit program. While PUA, in many cases, refers to the DUA regulations, the assistance period is different. The disaster assistance period under DUA typically lasts 26 weeks; the pandemic assistance period under PUA extends across nearly two full calendar years based on a single public health emergency. To facilitate administration of the PUA program, the Department instructed states that the minimum WBA for the PUA program is the amount in UIPL No. 03-20. Some states incorrectly used minimum DUA WBAs published for later quarters instead of using the minimum WBA set out in UIPL No. 03-20 as the Department instructed.

The defining aspect of this circumstance under which a state may process "blanket waivers" for overpayment recovery is that the individual is eligible for benefits for the week in question; the sole reason for the overpayment is because the state did not implement the correct minimum WBA for the PUA program and recovery would be unconscionable under the circumstances. These types of overpayments meet the criteria for a "blanket waiver" because:

- Individual is without fault: Under this circumstance, it is clear that individual recipients of payments were not at fault for the overpayments as state confusion caused the overpayment.

- Repayment would be contrary to equity and good conscience: These overpayments are relatively small and states would have to invest a significant amount of resources to establish and recover relatively small overpayment amounts. Additionally, many individuals collecting PUA do not work in employment covered by the regular UC program which means it is unlikely that these individuals will receive unemployment benefits (outside the scope of PUA) from which future benefits may be offset. To recover these overpayments, states would need to use other collection methods, such as wage garnishments, which may prove challenging for self-employed individuals. Requiring states to expend significant resources to recover these overpayments could reduce the resources states have to properly and efficiently process initial and continued claims during this period of unprecedented need. It would be extremely unfair to require states to expend the resources to establish and collect these overpayments to the detriment of timely processing and payment of claims – and thus, recovery would be unconscionable under the circumstances.

The authority for states to apply this "blanket waiver" is limited only to overpayments under the PUA program. PEUC does not carry the same risk for state confusion as it relies on calculating the WBA under existing state UC law. Further, because the individual is still eligible for benefits for the week in question, there is no overpayment under the FPUC or MEUC programs.

iv. *Action required from the state.* A state must choose one of the following options.

- **Option #1**: Not exercise the waiver authority for these CARES Act programs.
- **Option #2**: Exercise the waiver authority described in paragraph (i) in accordance with paragraph (ii), and not process "blanket waivers" for the two circumstances described in paragraph (iii).
- **Option #3**: Exercise the waiver authority described in paragraph (i) in accordance with paragraph (ii) (as described in Option #2) and process "blanket waivers" for the two circumstances described in paragraph (iii).

A. Instructions for states choosing Option #2 or Option #3. If the state chooses Option #2 to exercise its waiver authority, the state must: (A) exercise such authority for all of the CARES Act programs, including PUA, FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act; (B) as described in prior guidance, apply this practice to all overpayments created since the beginning of the CARES Act programs; and (C) as described in prior guidance, if it has not already done so, notify all individuals with a non-fault overpayment of their ability to request a waiver. The notification must include how to request the waiver.

If the state chooses Option #3 to exercise the waiver authority described in this subsection and processes "blanket waivers" for the two circumstances described in paragraph (iii), in addition to the instructions provided for Option #2, the state must assess all overpayments created since the beginning of the CARES Act programs against the two circumstances described in paragraph (iii). In addition and separate to processing the "blanket waivers," the state, if it has not already done so, must notify all remaining individuals with a non-fault overpayment of their ability to request a waiver. The notification must include how to request the waiver.

For states choosing Option #2 or Option #3, when processing individual waiver requests under paragraph (i) in accordance with paragraph (ii), states must, upon receipt of the waiver request, pause further collections until a determination of waiver eligibility is made. This applies only to individual requests for waiver and not the state's assessment under "blanket waivers". Such a practice helps to mitigate instances requiring refunds described in sub-paragraph (B).

B. Addressing overpayment amounts collected prior to approving waivers under Option #2 and Option #3. If an individual is determined eligible for a waiver of overpayment recovery under PUA, FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act under an individual waiver request or a "blanket waiver", the state must refund any amounts that were collected towards the applicable overpayment prior to the determination of waiver eligibility.

Some states may have assessed an overpayment for particular weeks of unemployment and, upon collecting that overpayment amount from the individual,

restored a balance to the individual's claim that then allowed the individual to collect additional weeks of unemployment benefits based on the restored balance. In such cases, it may not be appropriate to issue a refund. The state may not issue a refund for any benefits that were restored and then subsequently paid to the individual.

Given the many demands on state agencies, it may take some time (*e.g.*, up to a year) for states to program their computer systems and notify individuals before they process such refunds. States are encouraged to contact the Department for technical assistance, including to request support in drafting notification language.

5. **Inquiries.** Please direct inquiries to covid-19@dol.gov with a copy to the appropriate ETA Regional Office.

6. **References.**

- American Rescue Plan Act of 2021 (ARPA), including Title IX, Subtitle A, Crisis Support for Unemployed Workers (Pub. L. 117-2);
- Consolidated Appropriations Act, 2021, including Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) (Pub. L. 116-260);
- Coronavirus Aid, Relief, and Economic Security (CARES) Act, including Title II, Subtitle A, Relief for Workers Affected by Coronavirus Act (Pub. L. 116-136);
- Trade Adjustment Assistance Extension Act of 2011 (TAAEA) (Pub. L. 112-40);
- Section 303 of the Social Security Act (SSA) (42 U.S.C. §503);
- 20 C.F.R. Part 625;
- UIPL No. 14-21, *American Rescue Plan Act of 2021 (ARPA) – Key Unemployment Insurance (UI) Provisions*, issued March 15, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5669;
- UIPL No. 09-21, *Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) - Summary of Key Unemployment Insurance (UI) Provisions*, issued December 30, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3831;
- UIPL No. 28-20, Change 1, *Additional Funding for Identity Verification or Verification of Pandemic Unemployment Assistance (PUA) Claimants and Funding to Assist with Efforts to Prevent and Detect Fraud and Identity Theft as well as Recover Fraud Overpayments in the PUA and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, issued January 15, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9897;
- UIPL No. 28-20, *Addressing Fraud in the Unemployment Insurance (UI) System and Providing States with Funding to Assist with Efforts to Prevent and Detect Fraud and Identity Theft and Recover Fraud Overpayments in the Pandemic Unemployment Assistance (PUA) and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, issued August 31, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8044;
- UIPL No. 20-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Operating, Financial, and Reporting Instructions for Section 2105: Temporary Full Federal Funding of the First Week of Compensable Regular Unemployment for States*

with No Waiting Week, issued April 30, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=6324;

- UIPL No 17-20, Change 1, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020-Pandemic Emergency Unemployment Compensation (PEUC) Program: Questions and Answers, and Revised Reporting Instructions for the PEUC ETA 227*, issued May 13, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8689;
- UIPL No. 17-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020-Pandemic Emergency Unemployment Compensation (PEUC) Program Operating, Financial, and Reporting Instructions*, issued April 10, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8452;
- UIPL No. 16-20, Change 4, *Continued Assistance to Unemployed Workers Act of 2020-Pandemic Unemployment Assistance (PUA) Program: Updated Operating Instructions and Reporting Changes*, issued January 8, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6973;
- UIPL No. 16-20, Change 2, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Pandemic Unemployment Assistance (PUA) Additional Questions and Answers*, issued July 21, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5479;
- UIPL No. 15-20, Change 3, *Continued Assistance for Unemployed Workers (Continued Assistance) Act of 2020 - Federal Pandemic Unemployment Compensation (FPUC) Program Reauthorization and Modification and Mixed Earners Unemployment Compensation (MEUC) Program Operating, Reporting, and Financial Instructions*, issued January 5, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6122;
- UIPL No. 15-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions*, issued April 4, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9297;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390;
- UIPL No. 03-20, *Minimum Disaster Unemployment Assistance (DUA) Weekly Benefit Amount: January 1 - March 31, 2020*, issued December 12, 2019, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3675;
- UIPL No. 02-16, Change 1, *State Responsibilities for Ensuring Access to Unemployment Insurance Benefits, Services, and Information*, issued May 11, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5491;
- UIPL No. 02-16, *State Responsibilities for Ensuring Access to Unemployment Insurance Benefits*, issued October 1, 2015, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4233;
- UIPL No. 01-16, *Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures*, issued October 1, 2015, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5763;
- UIPL No. 02-12, *Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)*, issued December 20, 2011, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6707; and

- UIPL No. 23-80, *Implementation of Wavier of Overpayment Provisions in State UI Laws*, issued March 11, 1980, https://oui.doleta.gov/dmstree/uipl/uipl80/uipl_2380.htm.[4]

7. Attachment(s).

- **Attachment I**: Overpayment Recovery across Unemployment Compensation (UC) Programs.

[4] We note that the link to this document shows an expiration date of February 28, 1981. However, per Training and Employment Notice No. 15-20, issued January 14, 2021, this remains an active UIPL.

Quick Reference for Overpayments across Unemployment Compensation (UC) Programs

	Regular UC[5]	EB[6]	PUA[7]	FPUC[8]	MEUC[9]	PEUC[10]	First Week of Regular UC[11]
FRAUD							
Subject to minimum 15% monetary penalty?	Required	Required	Required	Required	Required	Required	Required
Disqualification period	State law	State law	*See* 20 C.F.R. 625.14	State law	State law	State law	State law
BENEFIT OFFSETS							
Offsets limited to no more than 50%	State law	State law	Yes	Yes	Yes	Yes	State law
Offsets limited to 3-years	State law	State law	No	Yes	Yes	Yes	Yes

[5] **Regular Unemployment Compensation (UC)** Reference: State law
[6] **Extended Benefits (EB)** Reference: State law
[7] **Pandemic Unemployment Assistance (PUA)** Reference: Section C.13.h. of Attachment I to UIPL No. 16-20; Section H of Attachment I to UIPL No. 16-20, Change 1; Questions 20-23 of Attachment I to UIPL No. 16-20, Change 2; and Section C.21. of Attachment I to UIPL No. 16-20, Change 4.
[8] **Federal Pandemic Unemployment Compensation (FPUC)** Reference: Section F. of Attachment I to UIPL No. 15-20 and Section B of Attachment I to UIPL No. 15-20, Change 1.
[9] **Mixed Earners Unemployment Compensation (MEUC)** Reference: Same as FPUC.
[10] **Pandemic Emergency Unemployment Compensation (PEUC)** Reference: Section E of Attachment I to UIPL No. 17-20 and Section F of Attachment I to UIPL No. 17-20, Change 1.
[11] **First Week of Regular UC for States with No Waiting Week**: This refers to weeks that are reimbursed in accordance with Section 2105 of the CARES Act. Reference is the same as PEUC.

	Regular UC[5]	EB[6]	PUA[7]	FPUC[8]	MEUC[9]	PEUC[10]	First Week of Regular UC[11]
Subject to Cross-Program Benefit Offsets[12]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Subject to Interstate Benefit Offsets[13]	Yes	Yes	Yes	Yes	Yes	Yes	Yes
CONSIDERATION TO WAIVE RECOVERY							
Eligible for Waiver Consideration	State law	State law	Yes, at state's choice	Yes, at state's choice	Yes, at state's choice	Yes, at state's choice	Yes, at state's choice
Criteria	State law	State law	(A) Individual is not at fault; and (B) repayment would be contrary to equity and good conscience	(A) Individual is not at fault; and (B) repayment would be contrary to equity and good conscience	(A) Individual is not at fault; and (B) repayment would be contrary to equity and good conscience	(A) Individual is not at fault; and (B) repayment would be contrary to equity and good conscience	(A) Individual is not at fault; and (B) repayment would be contrary to equity and good conscience
Determining "non-fault" status	State law	State law	State law	State law	State law	State law	State law

[12]Applies to states that have signed the Cross-Program Offset Recovery Agreement (CPORA).
[13] Applies to states that have signed the Interstate Recovery Offset Agreement (IRORA).

	Regular UC[5]	EB[6]	PUA[7]	FPUC[8]	MEUC[9]	PEUC[10]	First Week of Regular UC[11]
Assessing "equity and good conscience"	State law	State law	State law or Section 4.d. of this UIPL	State law or Section 4.d. of this UIPL	State law or Section 4.d. of this UIPL	State law or Section 4.d. of this UIPL	State law or Section 4.d. of this UIPL
RESOURCES							
Reporting Requirements	ETA 227	ETA 227	ETA 902P Attachment II to UIPL No. 16-20, Change 4	ETA 227 (FPUC) Attachment I to UIPL No. 15-20, Change 2	ETA 227 (MEUC) Attachment II to UIPL No. 15-20, Change 3	ETA 227 (PEUC) Section G of Attachment I to UIPL No. 17-20 and Section 4.b. of UIPL No. 17-20, Change 1	ETA 227

ATTACHMENT 4

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
	CORRESPONDENCE SYMBOL OUI/DPM
	DATE February 7, 2022

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 20-21, Change 1

TO: STATE WORKFORCE AGENCIES

FROM: ANGELA HANKS /s/
Acting Assistant Secretary

SUBJECT: Additional State Instructions for Processing Waivers of Recovery of Overpayments under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as Amended

1. **Purpose.** To provide additional instructions for circumstances under which a state may waive recovery of overpayments under the CARES Act Unemployment Compensation (UC) programs, including elaborating on the criteria for waiving recovery of overpayments where an individual is without fault on an individual, case-by-case basis and expanding the existing limited scenarios for permissible use of "blanket waivers," and to remind states that recovery activities for fraudulent overpayments may never be waived. This Unemployment Insurance Program Letter (UIPL) also describes the required collection activities for overpayments under the CARES Act UC programs which are not eligible for a waiver of recovery.

2. **Action Requested.** The Department of Labor's (Department) Employment and Training Administration (ETA) requests State Workforce Administrators provide the information contained in this UIPL to appropriate program and other staff in state workforce systems as they implement the unemployment insurance (UI)-related provisions that respond to the economic effects of the Coronavirus Disease 2019 (COVID-19) pandemic.

3. **Summary and Background.**

   a. Summary – An overpayment occurs and must be established when a state determines that the individual received a payment, or a portion of a payment, to which they were not entitled. To consider a waiver of the recovery of an overpayment, states must first establish an overpayment. Once the overpayment is established, the state must then evaluate the overpayment against the criteria described in Section 4.c.i. of this UIPL, specifically to determine if the individual was without fault and if recovery would be contrary to equity and good conscience. Section 4.a. of this UIPL clarifies the applicable UC programs covered under the waiver provisions of the CARES Act, as amended, and explains that states may choose the CARES Act UC programs to which they will apply the waiver provisions. This supersedes guidance under Section 4.d.iv.A. of UIPL No. 20-21 providing that if a state exercises the waiver authority for one CARES Act UC program, it must do so for all CARES Act UC programs.

RESCISSIONS None	EXPIRATION DATE Continuing

Section 4.b. of this UIPL refines prior definitions for eligibility fraud and identity (ID) fraud, reiterates that recovery activities for fraudulent overpayments may never be waived, and provides strategies states can use to mitigate negative consequences for victims of ID fraud.

Section 4.c. of this UIPL builds on Section 4.d. of UIPL No. 20-21 to provide examples of applying the waiver of recovery provisions contained within the CARES Act, as amended. When a waiver of recovery of an overpayment is granted, the overpayment is excluded from any required collection activities. Attachment III to this UIPL provides sample language for states to use when communicating the approval of waiving recovery of overpayments to individuals.

Under Section 4.c.ii. of this UIPL, the Department approves five additional scenarios (for a total of seven scenarios) for which states may process blanket waivers only within the context of CARES Act UC programs. These approved blanket waiver scenarios allow the state limited circumstances by which to process the waiver of recovery for individual overpayments when there is no need for additional fact-finding or submission of individual requests. This allows states to process the waiver of recovery for multiple overpayments simultaneously based on a single set of facts. Attachment I to this UIPL describes how each of these approved scenarios satisfies the requirement that the individual is without fault in the creation of the overpayment and that recovery would be contrary to equity and good conscience. The Department provides a process by which states may request approval of additional blanket waiver scenarios using the form provided in Attachment II to this UIPL. Further, states may use automated data processing when issuing blanket waivers of overpayments only under the CARES Act UC programs and only for the limited scenarios described.

Section 4.d. of this UIPL describes the required collection activities for overpayments under the CARES Act UC programs that are not eligible for a waiver of recovery. States are reminded, as previously described in Attachment I to UIPL No. 20-21, that they may only recover certain CARES Act overpayments with the use of benefit offsets for up to three years after the date the individual received the overpaid amount. This three-year limitation on benefit offsets applies to the Federal Pandemic Unemployment Compensation (FPUC), Mixed Earners Unemployment Compensation (MEUC), Pandemic Emergency Unemployment Compensation (PEUC), and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended; this same limitation does not apply to the Pandemic Unemployment Assistance (PUA) program. States are permitted to move weeks of unemployment between programs and may offset at 100 percent when doing so, resulting in a remaining overpayment balance equal to the difference in weekly benefit amount (WBA) for each applicable week. Additionally, states must use the Treasury Offset Program (TOP) for collecting specific types of overpayments. This UIPL also clarifies that the prohibition of applying "other collection costs" as described in Section 4.c. of UIPL No. 20-21 does not apply to TOP administrative fees.

b. Background – On March 27, 2020, the CARES Act was enacted (Public Law (Pub. L.) 116-136). Among other provisions, the CARES Act provided for the creation of three new temporary UC programs: PUA, FPUC, and PEUC. Section 2105 of the CARES Act, as amended, also provided full federal funding for the first week of regular UC for states with no waiting week. The Department issued UIPL No. 14-20 on April 2, 2020, to provide a summary of the key UI provisions in the CARES Act.

On December 27, 2020, the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) was enacted under Division N, Title II, Subtitle A of the Consolidated Appropriations Act, 2021 (Pub. L. 116-260). This Act, among other things, extended to March 14, 2021, the PUA and PEUC programs, as well as federal funding for the first week of regular UC at a reduced amount of 50 percent, beyond their original expiration date of December 31, 2020. The FPUC program, which expired July 31, 2020, was reauthorized to resume at $300 for weeks of unemployment beginning after December 26, 2020. The Continued Assistance Act also permitted a state to waive repayment of a PUA overpayment under certain circumstances and provided for the creation of a new temporary UC program, MEUC. The Department issued UIPL No. 09-21 on December 30, 2020, to provide a summary of the key UI provisions in the Continued Assistance Act.

On March 11, 2021, the American Rescue Plan Act (ARPA) was enacted (Pub. L. 117-2). Among other things, this Act extended the PUA, PEUC, FPUC, and MEUC programs to weeks of unemployment ending on or before September 6, 2021, and restored full federal funding for the first week of regular UC. The Department issued UIPL No. 14-21 on March 15, 2021, to provide guidance to states regarding the UI provisions in ARPA.

In March 2020, each state signed the "Agreement Implementing the Relief for Workers Affected by Coronavirus Act" (Agreement) with the Department to administer PUA, PEUC, and FPUC, as well as to receive reimbursement for the first week of regular UC for states with no waiting week. The Agreement incorporated amendments to the CARES Act made by the Continued Assistance Act and ARPA. Most states also signed an addendum to administer the MEUC program in January 2021. Under these agreements, each state is required to operate the programs as required under the CARES Act and by any statutory amendments and the Department's guidance.

Importance of Equity and Program Integrity. At the most fundamental level, equity within the UI program means that states are paying UC to eligible workers, regardless of background, in a timely and fair manner, with an application and certification process that is readily accessible to all workers. Equity and program integrity are interdependent concepts within the UI program, as states also play a fundamental role in ensuring the integrity of the UI program. Program integrity involves both ensuring that entitled workers are not underpaid nor overpaid, and preventing payments to those who are not entitled to benefits. During implementation and administration of the CARES Act UC programs, states were instructed to maintain a steadfast focus on UI functions and activities that ensure program integrity and the prevention and detection of improper payments and fraud across all programs operated within the UI system, while ensuring

that legitimate claimants are able to swiftly access benefits during a critical time (*see* UIPL No. 23-20, issued May 11, 2020).

Ensuring access to UC is a longstanding priority of the Department. UIPL No. 02-16, issued on October 1, 2015, articulates the applicable requirements under federal law and provides guidance to states to assist in complying with these requirements. UIPL No. 02-16, Change 1, issued on May 11, 2020, highlighted state responsibilities specifically regarding access to UC for individuals with disabilities and individuals with limited English proficiency. Information and claims-filing systems that have the effect of limiting access for individuals with disabilities, persons with limited English proficiency, individuals who are older and/or members of other protected groups may violate Federal nondiscrimination laws. State UI agencies must take reasonable steps to ensure that, if technology or other issues interfere with claimants' access, they have established effective, alternative methods of access, such as telephonic and/or in-person options. On January 20, 2021, the President issued Executive Order (EO) 13985 on advancing racial equity and support for underserved communities. This EO articulates the importance of advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. This includes addressing disparities in accessing government programs facing individuals and communities including, but not limited to, workers who are low paid, Black, Hispanic/Latinx, American Indians, Alaska Native, Asian Americans, Native Hawaiians, Pacific Islanders, Indigenous persons, other persons of color, individuals with disabilities, members of religious minorities, LGBTQI+ persons, individuals with limited English proficiency, women, formerly incarcerated workers, and individuals living in rural areas. The U.S. Government Accountability Office (GAO) shared preliminary information on June 17, 2021, suggesting potential racial and ethnic disparities in the receipt of UI benefits in some states during the COVID-19 pandemic.[1] Although this report did not determine causality, it provided context for the need to take action in evaluating and ensuring equitable access to the UI system.

Impact of CARES Act UC Programs on the Economic Effects of the COVID-19 Pandemic. Congress created the CARES Act UC programs specifically to provide additional benefits for workers beyond the regular UC eligibility requirements, providing benefits to a group which generally includes many who have been historically underserved. By focusing on workers affected by the pandemic, the CARES Act greatly increased recipiency of UC beyond what state systems offered. States implemented these federal CARES Act UC programs quickly in order to best serve the country's workers and accomplish the purpose of the CARES Act.[2] Recognizing the enormous challenges

[1] GAO-21-599R DOL Management Report, *Management Report: Preliminary Information on Potential Racial and Ethnic Disparities in the Receipt of Unemployment Insurance Benefits during the COVID-19 Pandemic*, issued June 17, 2021, https://www.gao.gov/assets/gao-21-599r.pdf.

[2] On average, states implemented the FPUC program within 25 days, the PUA program within 38 days, and the PEUC program within 50 days of enactment of the CARES Act. Reference Report Number 16-21-004-03-315, U.S. Department of Labor Office of Inspector General, *COVID-19: States Struggled to Implement CARES Act*

of implementing new federal programs while also handling a volume of unprecedented claims filed by the millions of workers affected by the pandemic, states generally paid out claims to the best of their ability. There was a significant number of state errors and inaccuracies due to these fast-changing circumstances. A recent report from the U.S. Census Bureau estimates that these expanded unemployment benefits kept 4.7 million people from being in poverty during 2020, decreasing poverty across all racial groups and all age groups.[3]

Workers who received UC under these temporary benefit programs and were later found ineligible, resulting in the establishment of non-fraud overpayments through no fault of their own, generally believed that they were entitled to the benefits and spent the money to support themselves, their families, and the economy. Seeking recovery of these CARES Act overpayments from individuals who did not commit fraud, especially in light of the economic effects of the pandemic, creates an extraordinary hardship on working families, including those who have historically been underserved.

ETA issued UIPL No. 20-21 on May 5, 2021, which described the requirements for establishing benefit overpayments for programs authorized by the CARES Act, as amended. The UIPL provided guidance to states regarding the assessment of fraud monetary penalties, interest, and other collection costs and described the eligibility criteria for waiving recovery of an overpayment. The UIPL also provided two limited scenarios when a state may process "blanket waivers" for recovery of overpayments under the CARES Act UC programs. Additionally, states were instructed that after they determine that recovery of an overpayment may be waived, they must refund any amounts that were collected towards the applicable overpayment prior to the determination of waiver eligibility. ETA estimated that it may take states up to a year to process such refunds and encouraged states to process refunds expeditiously. Attachment I to UIPL No. 20-21 provided a quick reference to summarize the guidelines regarding the establishment and recovery of overpayments across UC programs.

4. <u>Guidance</u>.

a. **Clarification of Terms.** UIPL No. 20-21 described the requirements for establishing benefit overpayments and waiving recovery of overpayments for programs authorized by the CARES Act, as amended. This section clarifies some key terms in response to questions the Department has received from states.

Unemployment Insurance Programs, issued May 28, 2021, https://www.oig.dol.gov/public/reports/oa/2021/19-21-004-03-315.pdf.

[3] U.S. Census Bureau, *Expanded Unemployment Insurance Benefits During Pandemic Lowered Poverty Rates Across All Racial Groups*, issued September 14, 2021, https://www.census.gov/library/stories/2021/09/did-unemployment-insurance-lower-official-poverty-rates-in-2020.html?utm_campaign=20210916msacos2ccstors&utm_medium=email&utm_source=govdelivery.

i. ***Applicable CARES Act UC programs.*** As described in Section 4 of UIPL No. 20-21, the CARES Act UC programs include: PUA, FPUC, MEUC, PEUC, and the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended. States are strongly encouraged to waive recovery of overpayments under the CARES Act programs, within the conditions described in Section 4.c. of this UIPL, to the fullest extent possible and including the use of approved blanket waivers.

States may choose whether to apply a waiver of recovery to some or all of the CARES Act UC programs. This supersedes the guidance provided under Section 4.d.iv.A. of UIPL No. 20-21 that required states which choose to exercise waiver authority for one program to do so for all CARES Act UC programs. The language authorizing states to waive recovery under certain circumstances is nearly identical across the PUA, FPUC, MEUC, and PEUC statutes. Further, the provision authorizing waiver of recoveries for overpayments on the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended, cross-references the PEUC statute.[4] Because each of the sections independently contains the provision providing states flexibility to waive recoveries, the Department will interpret the provisions to permit states to choose to apply the waiver authority for some or all of the programs.

States are reminded that the authority to waive recovery of overpayments for the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended, is subject to the parameters described in Section 4.c.i. of this UIPL. These criteria may be different than the criteria the state considers for waiving recovery of overpayments for other weeks of regular UC under state law.

If a state chooses to exercise its authority to waive the recovery of overpayments for a specific CARES Act UC program, it must apply such waiver consideration under the criteria described in Section 4.c.i. of this UIPL to all overpayments under that specific CARES Act UC program going back to the beginning of the CARES Act UC program.

ii. ***Improper payment and overpayment.*** The term "improper payment" refers to both an overpayment and an underpayment of UC. An overpayment occurs, and must be established, when a state determines that the individual received a payment, or a portion of a payment, to which they were not entitled. States must include appeal rights as part of the determination establishing an overpayment. Further, to consider a waiver of the recovery of an overpayment, states must first establish an overpayment.

[4] Section 201(d) of the Continued Assistance Act for PUA; Section 2104(f)(2) of the CARES Act, as amended, for FPUC and MEUC; Section 2107(e)(2) of the CARES Act, as amended, for PEUC; and Section 2105(f) of the CARES Act, as amended, for the first week of regular UC.

b. **Fraudulent Overpayments.** When establishing an overpayment, the state must determine who is at fault for the overpayment (*i.e.*, individual, employer, state, or a combination thereof) and whether the overpayment is the result of claimant fraud; not all overpayments are fraudulent. If an overpayment is the result of claimant fraud, states **may not** waive recovery activities for the overpayment. Additionally, as discussed in Section 4.b. of UIPL No. 20-21, the state must apply a minimum 15 percent monetary penalty to an overpayment when the state determines, in accordance with their state UC law, that such a payment was made due to fraud. States must apply the same monetary penalty to CARES Act UC programs as it does to the regular UC program. See Section 251(a) of the Trade Adjustment Assistance Extension Act of 2011 (TAAEA) (Pub. L. 112-40), which created Section 303(a)(11) of the Social Security Act (SSA) (42 U.S.C. § 503(a)(11)).[5]

   i. ***Types of fraud.*** The Department recognizes the need to standardize nomenclature of the different types of fraud occurring within the UC programs. ETA provided a definition of eligibility and ID fraud as part of the grant opportunities provided for under UIPL Nos. 28-20, Change 2, and 22-21. These definitions are further refined below.

      A. Eligibility fraud occurs when benefits or services are acquired as a result of false information being provided with the intent to receive benefits for which an individual would not otherwise be eligible. State law determines the criteria for establishing a fraud determination within the UC programs.

      B. ID fraud occurs when one person or group of persons use(s) the identifying information of another person to illegally receive benefits. ID fraud also occurs when an individual's UI account is hacked or taken over by a person or group and the benefit payments are re-directed to another account by changing key user data after the claim has been established (*e.g.*, banking information). In addition to using stolen identities or misusing an individual's identity, synthetic ID fraud occurs when real and/or fake information is combined to create false identities, as discussed in UIPL No. 16-21.

   ii. ***Recovery of fraudulent overpayments.*** Under no circumstances may a state waive recovery activities for a fraudulent overpayment. States must make every possible effort to recover fraudulent overpayments using available resources. States must cooperate with the Department's Office of Inspector General (DOL-OIG) on fraud investigations (*see* UIPL No. 04-17, Change 1) and with the Department of Justice on forfeiture actions taken regarding the recovery of fraudulently-overpaid benefits. Refer to Section 4.d. of this UIPL for additional instructions on collections activity.

[5] As described in Section 4.b.ii. of UIPL No. 20-21, the state must apply the fraud penalty for PUA to all fraud overpayments established on or after January 8, 2021. The state must apply the fraud penalty for all other CARES Act UC programs to all fraud overpayments established on or after May 5, 2021 (the publication date of UIPL No. 20-21). This instruction does not prevent a state from choosing to apply such monetary penalties retroactively to the beginning of the CARES Act UC programs under the authority provided by TAAEA.

iii. ***Addressing fraudulent overpayments resulting from ID fraud to protect the rights of victims.*** As described in Section 5 of UIPL No. 16-21, states must provide individuals who suspect that their identity has been stolen with easily accessible options to report such theft or fraudulent activity. This may include dedicated phone options, email addresses, or an online portal by which individuals can notify the state agency. States may also provide links to other agencies that specialize in protecting consumers and their personal identifiable information, such as the Federal Trade Commission's Consumer website at https://www.consumer.ftc.gov/topics/identity-theft. ETA strongly encourages states to align their website content and communications for victims of ID fraud with the content, resources, and reporting requirements outlined at https://www.dol.gov/fraud.

When a state determines that ID fraud has occurred, that is, the person filing the claim is not the actual owner of the name and/or SSN under which the claim was filed (*i.e.*, an imposter), as stated earlier, the state may not waive recovery of the overpayment. Documentation of claims activity related to the ID fraud must be preserved for future prosecution, recovery efforts, reporting purposes, and data analytics to strengthen fraud control efforts. Additionally, the state must take actions to protect the rights of the ID fraud victim.

Once the state issues a fraud determination, one option states can use to mitigate negative impacts on ID fraud victims is to establish a pseudo claim record and transfer all claim information regarding the imposter's activity to the pseudo claim. This removes the fraudulent activity from the victim's SSN and/or UI account, should the victim need to file for unemployment benefits in the future. States that may not have the current administrative capability to move such activity to a pseudo claim may choose to temporarily mark the overpayment as "uncollectible." This ensures that victims are not negatively impacted while the state develops a process to disassociate the fraudulent activity from the victim's SSN. However, this temporary classification of "uncollectible" does not equate to waiving recovery of the overpayment.

States must refer allegations that are reasonably believed to constitute UC fraud, waste, abuse, mismanagement, or misconduct to DOL-OIG (*see* UIPL No. 04-17, Change 1). Below are other actions the state may take to mitigate the negative consequences for an ID fraud victim. Refer to UIPL No. 16-21 for additional information.

- Ensure that if a future claim is filed under the victim's SSN, the claimant undergoes a secondary ID verification process (*e.g.*, include an in-person reporting requirement or other expanded ID verification alternatives). However, states should try to minimize the burden on the victim as much as possible when verifying identity.
- Ensure that the owner of the SSN is not held responsible for any overpayment and, whenever possible, is not issued a Form 1099G at the end of the year.

- Exclude the overpayment from TOP and suspend any Benefit Payment Control collection activity for the actual owner of the SSN.
- Not initiate any legal actions against the actual owner of the SSN.

c. **Waiving Recovery of Overpayments for CARES Act UC Programs.** Under the CARES Act, as amended, states must require an individual to repay the amount to which they were not entitled (*i.e.*, overpayment amount) except that the state may waive recovery under specific conditions. The state must still establish the overpayment by investigating each individual case and providing a written determination with appeal rights, and then make a determination to waive recovery of the established overpayment.

This section of the UIPL reiterates the eligibility criteria for waiving recovery of an overpayment within the context of the CARES Act UC programs, describes states' options to exercise the authority to waive recovery of such overpayments, and provides circumstances where the Department has approved the use of blanket waivers.

States may continue to consider waiving recovery of an overpayment when it does not fall within the approved scenarios for a blanket waiver or when the state is unable to identify if the overpayment falls within the parameters of an approved scenario by evaluating the overpayment on an individual, case-by-case basis as described in Section 5 of UIPL No. 23-80 and in accordance with the criteria described in Section 4.c.i. of this UIPL.

i. ***Eligibility criteria for waiving recovery of an overpayment under the CARES Act UC programs.*** As described in Section 4.d.i. of UIPL No. 20-21, a state may only waive recovery of an overpayment under the CARES Act UC programs if the state determines that both of the following conditions are satisfied. With regards to the approved blanket waiver scenarios described in Section 4.c.ii. of this UIPL, the Department has already found that overpayments occurring within these scenarios meet the two conditions described below (*see* Section 4.c.ii. of this UIPL and Attachment I for additional details). Under no circumstances may a state waive recovery activities for a fraudulent overpayment.

A. <u>Payment of such compensation was without fault on the part of any such individual</u>. As noted earlier, when establishing an overpayment, the state must determine who is at fault for the overpayment (*i.e.,* individual, employer, state, or a combination thereof) and whether the overpayment is the result of claimant fraud. To waive recovery of the resulting overpayment, in addition to repayment being contrary to equity and good conscience, the payment must have been made without fault of the individual.

Without fault means the state has determined the individual had no fault with respect to a given week of unemployment which is determined to be overpaid. Generally, an individual is considered to be without fault when the individual provided all information correctly as requested by the state, but the state failed to

take appropriate action with that information or took delayed action when determining eligibility.

When looking at eligibility to waive recovery on an individual, case-by-case basis, the state may also find that an individual is without fault if the individual provided incorrect information due to conflicting, changing, or confusing information or instructions from the state; the individual was unable to reach the state despite their best efforts to inquire or clarify what information the individual needed to provide; or other similar difficulties (*e.g.*, education, literacy, and/or language barriers) in understanding what information the state needed from the individual to properly determine eligibility for the CARES Act UC programs. In determining if the individual is without fault under these circumstances, some examples of what states might review include verbal or written statements from the individual explaining the confusion they experienced or screenshots of the application questions at the time the individual submitted their original information. Finding an individual to be without fault under these circumstances is fact-specific and must be done on a case-by-case basis.

While many non-fraud overpayments scenarios may be categorized as without fault, states may not categorically equate non-fraud overpayments as being made without fault on the part of an individual. Not all non-fraud overpayments are without fault on the part of the individual.

B. Such repayment would be contrary to equity and good conscience. To waive recovery of the resulting overpayment, in addition to the payment having been made without fault of the individual, the state must also determine that repayment would be contrary to equity and good conscience. The state may defer to state law in defining what it means for repayment to be contrary to equity and good conscience.

Alternatively, where state law does not provide a definition of equity and good conscience, or where the state chooses to defer to federal authority for waiving recovery of an overpayment under the CARES Act UC programs, the state may use the standard provided in Section 4.d.i. of UIPL No. 20-21. This standard provides that recovery would be contrary to equity and good conscience when at least one of three circumstances exists: (1) recovery would cause financial hardship to the person from whom it is sought; (2) the recipient of the overpayment can show (regardless of their financial situation) that due to the notice that such payment would be made or because of the incorrect payment, either they have relinquished a valuable right or changed positions for the worse; or (3) recovery would be unconscionable under the circumstances. The following table provides some examples for each of these circumstances.

Figure 1: Federal Definition for Recovery Being Against Equity and Good Conscience

	Definition of recovery being against equity and good conscience	**Examples (non-exhaustive)**
1	It would cause financial hardship to the person for whom it is sought; or	• A review of the individual's income and debts (including copies of pay records and bills) reflects the hardship caused by having to repay an overpayment because the individual needs much of their current income and liquid assets (including the CARES Act benefits received) to meet ordinary and necessary living expenses and liabilities. Examples of debts may include items such as utility bills, child care expenses, student loans, medical bills, etc.
2	The recipient of the overpayment can show (regardless of their financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment, either they have relinquished a valuable right or changed positions for the worse; or	• The individual incurred a financial obligation by signing a more expensive apartment lease based on benefit payments that they received. The individual is now in a worse financial position than if they had not received the benefits. • The individual relied on the benefit payment and took out a loan to start a new business, in which they have already invested the benefit payment they received. Repayment of their overpayment may cause them to default on the loan, resulting in criminal or civil actions. • The individual passed up state assistance because they received CARES Act UC benefit payments and thought they would not need additional financial assistance from the state.
3	Recovery would be unconscionable under the circumstances	• It would be extremely unfair to require repayment when the individual was not at fault for receiving the overpayment. Requiring repayment now would undermine many individuals' financial stability and the purposes for which the benefits were paid. • See Attachment I to this UIPL for additional examples of scenarios approved for blanket waiver where recovery would be unconscionable under the circumstances.

ii. ***Scenarios under which states may waive recovery using a blanket waiver process for overpayments under the CARES Act UC programs.*** The Department has identified a total of seven scenarios as permissible scenarios for states to apply and use blanket waivers, two of which were previously approved under Section 4.d.iii. of UIPL No. 20-21. As described below, states may request that additional scenarios be considered for approval.

These approved blanket waiver scenarios permit the state, under the limited authorized circumstances, to process the waiver of recovery for individual overpayments that do not require additional fact-finding or submission of individual requests. These scenarios also permit the state to process the waiver of recovery for multiple overpayments meeting one of the approved scenarios simultaneously based on a single set of facts. States may process waiving recovery for overpayments under these approved scenarios without requiring individuals to submit requests. Where feasible, the state should proactively identify individuals eligible for a blanket waiver.

If a state is unable to identify whether an overpayment falls within the parameters of an approved scenario, the state may not use the blanket waiver process. Instead, the state may consider waiving recovery of the overpayment on an individual, case-by-

case basis as described in Section 5 of UIPL No. 23-80 and in accordance with the criteria described in Section 4.c.i. of this UIPL.

Additionally, as discussed earlier, states may not waive recovery activities for fraudulent overpayments. States must take care to ensure that overpayments resulting from cases of known ID fraud are not included in processing blanket waivers.

A. Approved seven scenarios for states to use blanket waivers. Attachment I to this UIPL provides examples and an explanation as to how the affected individuals within these scenarios are determined to be without fault in the creation of these overpayments and how recovery would be contrary to equity and good conscience based on a single set of facts.

Group 1: Scenario(s) applicable to the PUA, FPUC, MEUC, and PEUC programs, as well as the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended.

1. The individual answered "no" to being able to work and available for work and the state paid PUA or PEUC without adjudicating the eligibility issue. Upon requesting additional information from the individual, the individual either did not respond or the individual confirmed that they were not able to work nor available for work for the week in question, resulting in an overpayment for that week.

Group 2: Scenario(s) applicable to the PUA, MEUC (where applicable), and PEUC programs. Because the individual was still eligible for unemployment benefits for a given week, these scenarios do not involve overpayments under the FPUC program. Because MEUC is not payable under the PUA program, there may be claims involving overpayments under the MEUC program.

2. When an individual is eligible for payment under an unemployment benefit program for a given week, but through no fault of the individual, they were instead incorrectly paid under either the PUA or PEUC program at a higher WBA. (This scenario was previously approved in Section 4.d.iii.A. of UIPL No. 20-21).

3. The state paid the wrong amount of dependents' allowance (DA) on a PUA or PEUC claim because the state, through no fault of the individual, used the wrong amount when calculating the DA, resulting in an overpayment equal to a minimal difference in DA for each paid week.

Group 3: Scenario(s) applicable to the PUA and FPUC (where applicable) programs.

4. The individual answered "no" to being unemployed, partially unemployed, or unable or unavailable to work because of the approved COVID-19 related reasons and the state paid PUA anyway. Upon requesting a new self-certification, the individual either did not respond or the individual confirmed that none of the approved COVID-19 related reasons were applicable, and the state's payment resulted in an overpayment for that week.

Group 4: Scenario(s) applicable to the PUA program. Because the individual was still eligible for unemployment benefits for a given week, these scenarios do not involve overpayments under the FPUC program.

5. Through no fault of the individual, the state paid the individual a minimum PUA WBA based on Disaster Unemployment Assistance (DUA) guidance that was higher than the state's minimum PUA WBA provided in UIPL No. 03-20, which resulted in an overpayment. (This scenario was previously approved in Section 4.d.iii.A. of UIPL No. 20-21).

6. The individual complied with instructions from the state to submit proof of earnings to be used in calculating their PUA WBA. However, through no fault of the individual, the state's instructions were either inadequate or the state incorrectly processed this calculation using self-employment gross income instead of net income or documents from an inapplicable tax year, resulting in an incorrect higher PUA WBA. The state establishes an overpayment for the difference in PUA WBA.

Group 5: Scenario(s) applicable to the MEUC program

7. The individual complied with instructions from the state to submit proof of self-employment earnings to be used in establishing eligibility for MEUC. However, through no fault of the individual, the state's instructions were either inadequate or the state incorrectly processed this calculation using the incorrect self-employment income or based on documents from an inapplicable tax year, resulting in the individual incorrectly being determined eligible for MEUC. The state establishes an overpayment for any weeks of MEUC that were paid.

B. Requesting additional scenarios to be considered for blanket waivers. This UIPL provides five scenarios in addition to the two previously approved in Section 4.d.iii. of UIPL No. 20-21. Outside of these approved scenarios, the Department has a long-standing interpretation that Sections 303(a)(1) and (a)(5), SSA, require individualized determinations of an individual's eligibility for a waiver of

recovery and do not permit waivers of recovery to be granted on a blanket basis. Blanket waivers are not permitted for the regular UC program, except where noted for the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended.

States that wish to propose additional scenarios within the context of the CARES Act UC programs to be considered for blanket waivers may do so by submitting the form contained in Attachment II to this UIPL to covid-19@dol.gov with a copy to the appropriate ETA Regional Office.[6] The Department will strive to provide a response of approval or disapproval within 14 days of receipt. If circumstances prohibit the Department from meeting this deadline, the Department will inform the state of its progress in reviewing the request. Additional scenarios may not be implemented unless and until approved by ETA.

C. Use of automated data processing when issuing blanket waivers for CARES Act UC programs. When processing blanket waivers for CARES Act UC programs within the limited parameters involving these seven approved scenarios outlined in Section 4.c.ii. of this UIPL, states may automate the determinations on the waivers of recovery. Individual fact-finding is not required (*see* Option #1 under Section 4.c.iii.A. of this UIPL for notification requirements).

iii. ***Exercising the authority to waive recovery of overpayments for the CARES Act UC programs.*** As described in Section 4.d. of UIPL No. 20-21, federal law sets out the authority to waive recovery of overpayments under the CARES Act UC programs. It is a matter of state discretion whether to exercise this waiver authority.

A. Action required from the state. Section 4.d.iv. of UIPL No. 20-21 provided the following three options for states. This UIPL renumbers these options and further expands on these options. States may choose both Options #1 and #2, which would provide for waiving recovery on an individual, case-by-case basis and for blanket waivers.

- **Option #1:** Under limited circumstances, the state may choose to process blanket waivers for the specific scenarios approved by the Department in Section 4.c.ii. of this UIPL.

  Options for the process used in evaluating blanket waiver eligibility. States may only waive recovery using a blanket waiver process under the scenarios approved by the Department, as described in Section 4.c.ii. of this UIPL.

[6] Section 2116(a) of the CARE Act, as amended, provides that "Chapter 35 of Title 44, United States Code, (commonly referred to as the 'Paperwork Reduction Act of 1995'), shall not apply to the provisions of, and the amendments made by, this subtitle." As the Office of Management and Budget (OMB) approval process is waived for these reporting instructions, these instructions are considered final and states must provide the information requested in this form.

The Department recognizes that not all blanket waiver scenarios will apply to every state. A state may choose to exercise blanket waiver authority for some approved scenarios and not for others.

For states implementing Option #1: If an individual has a non-fault overpayment and does not fit within one of the approved blanket waiver scenarios, the state must address their eligibility for a waiver individually as described in Option #2.

*Notification requirements when the state determines through the blanket waiver process that an overpayment **is eligible** for a waiver of recovery.* As stated earlier, the state must first establish the overpayment by investigating each individual case and providing a written determination with appeal rights. When a state approves the waiver for recovering an overpayment under one of the approved blanket waiver scenarios, the state must also notify each individual that a waiver of recovery has been granted.

Although this notification that an overpayment is eligible for a waiver of recovery need not include formal appeal rights, the state must provide instructions to the individual on how to request a reconsideration of the approved waiver if the individual does not wish to have recovery of the overpayment waived. Because the overpayment itself is established and even though recovery is waived, there may be peripheral considerations that warrant the individual choosing not to have recovery waived.

Attachment III to this UIPL provides sample language for states to use in communicating approval of a waiver with individuals.

Further, a state may identify an individual who is eligible for a waiver of recovery under the approved blanket waiver scenarios at the same time the overpayment is being established. The state may choose to provide a single notice to the individual that both establishes the overpayment and waives recovery. When drafting a combined notice, the state may include an introductory explanation as to why notice is being sent when payment is not required. An example of this explanation includes: "*You are receiving this notice because you received unemployment benefits to which you are not entitled and federal law requires that you be notified of an overpayment. However, you do not need to repay these benefits because these payments were issued incorrectly through no fault of your own, and repayment would be contrary to equity and good conscience."*

Within that single notice, the state must include the required information for written determinations, including appeal rights to protest the establishment of the overpayment (*see* Section 4.a. of UIPL No. 01-16), in addition to an explanation that recovery of this overpayment is waived and

providing instructions to the individual on how to request a reconsideration if they do not wish to have recovery of the overpayment waived (*see* Sample Letter in Attachment III to this UIPL).

- **Option #2:** Exercise the authority to waive recovery of certain overpayments for the CARES Act UC programs on an individual, case-by-case basis, as described in Section 4.d.ii. of UIPL No. 20-21.

  Determining if an overpayment meets the criteria for waiving recovery. Under this option, a state may choose to use the definitions provided in its state UC law to waive recovery of the overpayment, provided its state UC law, at a minimum, adheres to the minimum federal requirements of the CARES Act. Specifically, to waive recovery, the individual must be without fault in the creation of the overpayment and recovery must be contrary to equity and good conscience. Alternatively, a state may choose to use the federal standards provided in Section 4.c.i. of this UIPL, regardless of whether its state UC law provides authority to waive recovery of overpayments.

  Options for the process used in evaluating waiver eligibility. In determining whether an overpayment satisfies the waiver criteria, the state must review the overpayment on an individual, case-by-case basis. As described in Section 5 of UIPL No. 23-80, the state may conduct this review by either: (1) making a determination as to the applicability of the waiver provision as part of the determination process on every overpayment case (without requiring an individual to request such a waiver); or (2) providing, as part of each overpayment determination, information about the waiver provision and provide that individuals may request consideration of a waiver and receive an appealable determination on the actions taken. Many states chose to evaluate eligibility for a waiver of recovery according to (2), based on an individual's request for consideration.

  Notification requirements when the state provides for individual waiver requests. As described in Section 4.d.iv.A. of UIPL No. 20-21, if the state chooses to exercise Option #2 as described in (2) in the above paragraph (*i.e.*, by requiring individuals to submit a request for waiver consideration), the state must notify all individuals with a non-fault overpayment of their ability to request a waiver. Appeal rights must be included as part of the determination establishing the overpayment, though instructions on how to request a waiver may be done as a separate notice. Where feasible, the Department encourages states to combine communications and provide instructions in plain language. This reduces confusion for individuals and may mitigate unnecessary appeals.

If the state requires individuals to submit a request for waiver consideration, upon receipt of the waiver request, the state must pause further collections until a determination of waiver eligibility is made.

Notification requirements when the state determines, on an individual case-by-case basis, if an individual is eligible for a waiver of recovery. When a state determines whether the individual is eligible for the requested waiver, the state must notify each individual in writing of the outcome.

- Individual **is not eligible** for a waiver of recovery: As described in Section 6, of UIPL No. 23-80, "[a] decision not to waive recovery of the overpaid benefits…constitutes a denial of a claim for [UC] within the meaning of Section 303(a)(3)[, SSA]. In such circumstances, the claimant must have the right to appeal such a decision and to have [their] contention for waiver considered and decided by the appellate tribunal on its merits in accordance with any evidence which bears upon the issue."

- Individual **is eligible** for a waiver of recovery: When a state chooses to exercise Option #2 as described in (1) in the above paragraph on *Options for the process used in evaluating waiver eligibility* (*i.e.*, by making a determination on the applicability of the waiver provision for every overpayment determination) and approves the waiver of recovery without a request from the individual, the state must provide instructions to the individual on how to request a reconsideration of the approved waiver if the individual does not wish to have recovery of the overpayment waived.

  If the individual requested the waiver of recovery and is approved, written notice is required though the state does not need to provide instructions on how to request a reconsideration of the approved waiver.

Attachment III to this UIPL provides sample language for states to use in communicating approval of a waiver with individuals.

- **Option #3:** Not exercise the authority to waive recovery of certain overpayments for these CARES Act UC programs.

As noted earlier in this UIPL, seeking recovery of these overpayments from individuals who did not commit fraud and were without fault in receiving the overpayment, especially in light of the economic effects of the pandemic, creates an extraordinary hardship on working families. The Department strongly encourages states to exercise the waiver authority provided in the CARES Act, as amended, in qualifying cases.

B. Requirements for states exercising CARES Act waiver authority. As described in Section 4.a.i. of this UIPL, the state may choose to apply this provision to some or all of the CARES Act UC programs. A state choosing to exercise the waiver authority under Options #1 and #2 must apply this practice to all overpayments created since the beginning of the CARES Act UC program(s). For example, if a state decides to implement Option #2 with regards to PUA claims in January 2022 as they resolve workload items pending for weeks of unemployment ending prior to the end of the PUA program, the state must also retroactively identify and notify individuals with previously-established PUA overpayments of their potential waiver eligibility, consistent with Section 4.d.iv.A. of UIPL No. 20-21.

Additionally, as described in Section 4.d.iv.B. of UIPL No. 20-21, if recovery of an overpayment is waived, the state must refund any amounts that were collected prior to the determination of the waiver for the applicable overpayment. There is one exception to this refund requirement: specifically, that the state may not issue a refund for any benefits that were restored and then subsequently paid to the individual. For example, a state may have assessed an overpayment for particular weeks of unemployment and, upon collecting that overpayment amount from the individual, restored a balance to the individual's claim. This restored balance allowed the individual to collect additional weeks of unemployment benefits that covered the amount of the collected overpayment. In such cases, the state may not issue a refund.

d. **Collection of Overpayments for CARES Act UC Programs.** When an overpayment does not meet the criteria for recovery to be waived or the state does not exercise the authority to waive certain overpayments, the state must require the individual to repay the amount to which they were not entitled (*i.e.*, the overpayment).[7]

As described in Section 4.c. of UIPL No. 20-21, states may not apply interest or other collection costs to overpayments in the CARES Act UC programs, regardless of whether such overpayments are considered fraudulent or non-fraudulent. If a state previously assessed interest and other collection costs under the CARES Act UC programs, the state must reconsider these assessments and refund any money collected towards such payment of interest and other collection costs. Section 4.d.i.B. of this UIPL explicitly addresses overpayments, penalties, and administrative fees under TOP.

[7] Instructions for the ETA 227 report, found in ET Handbook 401, define a *waived amount* as "a non-fraud overpayment for which the state agency, in accordance with state law, officially relinquishes the obligations of the claimant to repay. Usually, this is authorized when the overpayment was not the fault of the claimant and requiring repayment would be against equity and good conscience or would otherwise defeat the purpose of the UI law." Separately, a *written-off amount* is defined as "an amount of overpayment not subject to further recovery because of a state law provision authorizing cancellation of the overpayment. Usually write-offs are applied after the statute of limitations expires, bankruptcy has been approved by a court, or the claimant has died." For purposes of the CARES Act UC programs, a state may only waive recovery under the narrow parameters provided in the CARES Act, as amended – specifically, if the individual was without fault and repayment would be against equity and good conscience. Additionally, the state must apply the write-off of an overpayment under the CARES Act UC programs consistent with how it applies the write-off of an overpayment under the regular UC program.

i. ***Required collection activities.*** As described in Section 4.b. of UIPL No. 23-20, states must complete the same recovery activities for the CARES Act UC programs as required for the regular UC program: benefit offsets (including cross-program offsets under the Cross Program Offset Recovery Agreement (CPORA) and interstate reciprocal offsets under the Interstate Reciprocal Offset Recovery Arrangement (IRORA)) and participation in the TOP.

A. Benefit offsets within the context of the CARES Act UC programs.

1. *Recovering overpayments via benefit offset in general.* States must offset regular UC and other state and federal UC programs to recover overpayments under the CARES Act UC programs, as described in Question 16 in Attachment I to UIPL No. 13-20, Change 1, and further clarified in Section 5 of UIPL No. 13-20, Change 2. States have significant flexibility in the way that they implement the benefit offset requirement, such as limiting the amount to be deducted from each payment. See Section 4.b. of UIPL No. 05-13.

   Conversely, states must offset benefits paid under the CARES Act UC programs to recover overpayments for other UC programs. However, as referenced in Attachment I to UIPL No. 20-21 and except as described in clause (2) below, states may not deduct more than 50 percent of the CARES Act benefit to recover such overpayments.

   Additionally, specific to overpayments under the FPUC, MEUC, PEUC programs, as well as the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended, such offsets are limited to "the 3-year period after the date such individuals received the payment."[8] The state must collect in accordance with the same procedures as apply to the recovery of overpayments of regular UC – except that states do not have the authority to conduct benefit offsets after this three-year period expires. This same three-year limitation does not apply to overpayments under the PUA program.

2. *Recovering overpayments when switching individuals between programs.* States vary in how they establish the overpayment when an individual is eligible for payment under an unemployment benefit program for a given week, but they were incorrectly paid under a different program. Some states may transfer the weeks from the incorrect program to the correct program and establish an overpayment amount equal to the difference in WBA for each applicable week (if the original program paid a higher WBA than the correct program).

[8] Sections 2104(f)(3)(A), 2105(f), and 2107(e)(3)(A) of the CARES Act, as amended.

Other states may create an overpayment for the entire amount paid on the incorrect program and then use an "offset workaround" when processing weeks under the correct program to recover the amount overpaid. In this "offset workaround," the state is not bound to the 50 percent limitation referenced in clause (1) above. Under the authority of the CARES Act, as amended, the state may operationally use an "offset workaround" to withhold 100 percent of the benefit due for each week under the correct program to recover the overpayment established on the incorrect program, leaving a remaining overpayment balance equal to the difference in WBA (if any) for each applicable week. The state may subsequently waive recovery of this overpayment balance under the approved blanket waiver scenarios (*see* Section 4.c.ii.A.2. of this UIPL).

Further, if FPUC was issued for the week of unemployment paid under the incorrect program, states should not pay FPUC a second time for the same week of unemployment under the correct program. As described in Section C.3. of UIPL No. 15-20, states have some flexibility in how they issued the FPUC payment: states could either provide FPUC as an amount paid at the same time and in the same manner as the underlying benefit amount or as a separate payment for the same week of unemployment as the underlying benefit amount. Operationally, it is also permissible for states to use an "offset workaround" to transfer FPUC payments correctly.

B. TOP within the context of the CARES Act UC programs. The state must use TOP recovery for any overpayment that meets the requirement of a "covered UC debt," as described in Questions 17 and 18 of Attachment I to UIPL No. 13-20, Change 1. This includes any overpayment that is determined to be fraudulent or that is the result of a person's failure to report earnings, as well as any penalties.[9] No other type of overpayment under the CARES Act UC programs may be submitted to TOP. Although federal law does not specify the frequency of submission of covered UC debt to TOP, the state is expected to submit the required debts at some time during each calendar year.

TOP administrative fees. Administrative fees are deducted from the amounts collected through TOP, as described in Section 6 of UIPL No. 02-09. States are instructed to examine their laws to determine if they may assess administrative fees and add them to the covered UC debt. The result would be that 100 percent of the covered UC debt is returned to the state, and the individual would pay any additional processing costs through a further reduction to any tax refund. Otherwise, amounts to pay administrative fees may be withheld from the debts themselves. Since nothing in federal law explicitly addresses this situation, it is a matter of state law. TOP administrative fees are not considered "other collection

[9] Covered UC debt includes both penalties and interest associated with fraudulent overpayments and overpayments resulting from the individual's failure to report earnings. However, only penalties are applicable to the CARES Act programs, since states may not assess interest (*see* Section 4.c. of UIPL No. 20-21).

costs" as described in Section 4.c. of UIPL No. 20-21. The state's process for handling TOP administrative fees for the regular UC program must also be applied to the CARES Act programs.

ii. ***Additional collection activities.*** As described in Section 4.b. of UIPL No. 23-20, the Department strongly encourages states to use additional recovery activities, where allowed by state law, both during and after the three-year period described above. This includes negotiating repayment plans with individuals, accepting repayments through various methods, and other activities such as state income tax offset, wage garnishment, civil actions, property liens, and collection agency referrals.

5. Inquiries. Please direct inquiries to covid-19@dol.gov with a copy to the appropriate ETA Regional Office.

6. References.

- American Rescue Plan Act of 2021 (ARPA), including Title IX, Subtitle A, Crisis Support for Unemployed Workers (Pub. L. 117-2);
- Consolidated Appropriations Act, 2021, including Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) (Pub. L. 116-260);
- Coronavirus Aid, Relief, and Economic Security (CARES) Act, including Title II, Subtitle A, Relief for Workers Affected by Coronavirus Act (Pub. L. 116-136);
- Trade Adjustment Assistance Extension Act of 2011 (TAAEA) (Pub. L. 112-40);
- Section 303 of the Social Security Act (SSA) (42 U.S.C. §503);
- 20 C.F.R. Part 625;
- UIPL No. 23-21, *Grant Opportunity for Promoting Equitable Access to Unemployment Compensation (UC) Programs*, issued August 17, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7400;
- UIPL No. 22-21, *Grant Opportunity to Support States with Fraud Detection and Prevention, Including Identity Verification and Overpayment Recovery Activities, in All Unemployment Compensation (UC) Programs*, issued August 11, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=4240;
- UIPL No. 20-21, *State Instructions for Assessing Fraud Penalties and Processing Overpayment Waivers under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as Amended*, issued May 5, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6830;
- UIPL No. 16-21, *Identity Verification for Unemployment Insurance (UI) Claims*, issued April 13, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9141;
- UIPL No. 14-21, Change 1, *State Responsibilities After the Temporary Unemployment Benefit Programs under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as amended, End Due to State Termination of Administration or When the Programs Expire*, issued July 12, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9502;

- UIPL No. 14-21, *American Rescue Plan Act of 2021 (ARPA) – Key Unemployment Insurance (UI) Provisions*, issued March 15, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5669;
- UIPL No. 09-21, *Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) - Summary of Key Unemployment Insurance (UI) Provisions*, issued December 30, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3831;
- UIPL No. 28-20, Change 2, *Additional Funding to Assist with Strengthening Fraud Detection and Prevention Efforts and the Recovery of Overpayments in the Pandemic Unemployment Assistance (PUA) and Pandemic Emergency Unemployment Compensation (PEUC) Programs, as well as Guidance on Processes for Combatting Identity Fraud*, issued August 11, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7207;
- UIPL No. 28-20, Change 1, *Additional Funding for Identity Verification or Verification of Pandemic Unemployment Assistance (PUA) Claimants and Funding to Assist with Efforts to Prevent and Detect Fraud and Identity Theft as well as Recover Fraud Overpayments in the PUA and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, issued January 15, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9897;
- UIPL No. 28-20, *Addressing Fraud in the Unemployment Insurance (UI) System and Providing States with Funding to Assist with Efforts to Prevent and Detect Fraud and Identity Theft and Recover Fraud Overpayments in the Pandemic Unemployment Assistance (PUA) and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, issued August 31, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8044;
- UIPL No. 23-20, *Program Integrity for the Unemployment Insurance (UI) Program and the UI Programs Authorized by the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Federal Pandemic Unemployment Compensation (FPUC), Pandemic Unemployment Assistance (PUA), and Pandemic Emergency Unemployment Compensation (PEUC) Programs*, issued May 11, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4621;
- UIPL No. 20-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Operating, Financial, and Reporting Instructions for Section 2105: Temporary Full Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week*, issued April 30, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=6324;
- UIPL No. 17-20, Change 3, *American Rescue Plan Act of 2021 (ARPA) – Pandemic Emergency Unemployment Compensation (PEUC) Program: Extension, Elimination of Transition Rule, Increase in Total Benefits, and Extension of Coordination Rule*, issued March 26, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9169;
- UIPL No. 17-20, Change 2, *Continued Assistance for Unemployed Workers Act of 2020 – Pandemic Emergency Unemployment Compensation (PEUC) Program: Extension, Transition Rule, Increase in Total Benefits, and Coordination Rules*, issued December 31, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=9291;
- UIPL No 17-20, Change 1, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020-Pandemic Emergency Unemployment Compensation (PEUC) Program:*

Questions and Answers, and Revised Reporting Instructions for the PEUC ETA 227, issued May 13, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8689;

- UIPL No. 17-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020-Pandemic Emergency Unemployment Compensation (PEUC) Program Operating, Financial, and Reporting Instructions*, issued April 10, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8452;
- UIPL No. 16-20, Change 6, *Pandemic Unemployment Assistance (PUA) Program: Updated Operating Instructions and Reporting Changes*, issued September 3, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4801;
- UIPL No. 16-20, Change 4, *Continued Assistance to Unemployed Workers Act of 2020-Pandemic Unemployment Assistance (PUA) Program: Updated Operating Instructions and Reporting Changes*, issued January 8, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6973;
- UIPL No. 16-20, Change 2, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Pandemic Unemployment Assistance (PUA) Additional Questions and Answers*, issued July 21, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5479;
- UIPL No. 15-20, Change 4, *American Rescue Plan Act of 2021 (ARPA) – Extensions to the Federal Pandemic Unemployment Compensation (FPUC) Program and Mixed Earners Unemployment Compensation (MEUC) Program*, issued March 26, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3728;
- UIPL No. 15-20, Change 3, *Continued Assistance for Unemployed Workers (Continued Assistance) Act of 2020 - Federal Pandemic Unemployment Compensation (FPUC) Program Reauthorization and Modification and Mixed Earners Unemployment Compensation (MEUC) Program Operating, Reporting, and Financial Instructions*, issued January 5, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6122;
- UIPL No. 15-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 - Federal Pandemic Unemployment Compensation (FPUC) Program Operating, Financial, and Reporting Instructions*, issued April 4, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9297;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Insurance (UI) Provisions and Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390;
- UIPL No. 13-20, Change 2, *Families First Coronavirus Response Act, Division D Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA) – Review of State Compliance for Receipt of Emergency Administrative Grants and Clarification on Benefit Offset Requirements*, issued June 3, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?docn=8645;
- UIPL No. 13-20, Change 1, *Families First Coronavirus Response Act, Division D Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA) – Reporting Instructions, Modifications to Emergency Administrative Grants Application Requirement, and Questions and Answers*, issued May 4, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5374;

- UIPL No. 03-20, *Minimum Disaster Unemployment Assistance (DUA) Weekly Benefit Amount: January 1 - March 31, 2020*, issued December 12, 2019, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3675;
- UIPL No. 04-17, Change 1, *Requirement for States to Refer Allegations of Unemployment Compensation (UC) Fraud, Waste, Abuse, Mismanagement, or Misconduct to the Department of Labor's (Department) Office of Inspector General's (DOL-OIG) and to Disclose Information Related to the Coronavirus Aid, Relief, and Economic Security (CARES) Act to DOL-OIG for Purposes of UC Fraud Investigations and Audits*, issued August 3, 2021, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5817;
- UIPL No. 04-17, *Disclosure of Confidential Unemployment Compensation (UC) Information to the Department of Labor's Office of Inspector General (OIG)*, issued December 16, 2016, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7523;
- UIPL No. 02-16, Change 1, *State Responsibilities for Ensuring Access to Unemployment Insurance Benefits, Services, and Information*, issued May 11, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5491;
- UIPL No. 02-16, *State Responsibilities for Ensuring Access to Unemployment Insurance Benefits*, issued October 1, 2015, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4233;
- UIPL No. 01-16, *Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures*, issued October 1, 2015, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5763;
- UIPL No. 05-13, *Work Search and Overpayment Offset Provisions Added to Permanent Federal Unemployment Compensation Law by Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2021*, issued January 10, 2013, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3698;
- UIPL No. 02-12, *Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)*, issued December 20, 2011, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6707;
- UIPL No. 02-09, *Recovery of Unemployment Compensation Debts Due to Fraud from Federal Income Tax Refunds*, issued November 28, 2008, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2687; and
- UIPL No. 23-80, *Implementation of Wavier of Overpayment Provisions in State UI Laws*, issued March 11, 1980, https://oui.doleta.gov/dmstree/uipl/uipl80/uipl_2380.htm.[10]

[10] We note that the link to this document shows an expiration date of February 28, 1981. However, per Training and Employment Notice No. 15-20, issued January 14, 2021, this remains an active UIPL.

7. <u>Attachment(s)</u>.

- **Attachment I:** Evaluation of Eligibility for Approved Blanket Waiver Scenarios.
- **Attachment II**: Requesting Additional Blanket Waiver Circumstances under the CARES Act UC Programs.
- **Attachment III**: Sample Communication to Claimants for Approved Blanket Waiver Circumstances.
- A**ttachment IV**: Sample Language for State Websites.

Evaluation of Eligibility for Approved Blanket Waiver Scenarios

As described in Section 4.c.ii. of this UIPL, the Department has approved the following seven scenarios as permissible scenarios for states to apply and use the blanket waiver process to waive recovery of an established overpayment (two of which were previously approved under Section 4.d.iii. of UIPL No. 20-21). This attachment provides an explanation as to how the affected individuals are considered without fault in the creation of these overpayments and how recovery would be contrary to equity and good conscience for all individuals based on a single set of facts.

States may only waive recovery using a blanket waiver process under these approved scenarios. States may continue to consider waiving recovery of overpayments that do not fall within the approved scenarios or when the state is unable to identify if the claim falls within the parameters of an approved scenario by evaluating on an individual, case-by-case basis as described in Section 5 of UIPL No. 23-80 and in accordance with the criteria described in Section 4.c.i. of this UIPL.

Group 1: Scenario(s) applicable to the PUA, FPUC, MEUC, and PEUC programs, as well as the first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended.

1. **The individual answered "no" to being able to work and available for work and the state paid PUA or PEUC without adjudicating the eligibility issue. Upon requesting additional information, the individual either did not respond or confirmed that they were not able to work nor available for work for the week in question, and the state continued to pay, resulting in an overpayment for that week.**

   The individual is without fault: In this scenario, the individual is without fault as they provided accurate information at the outset which the state did not consider prior to paying the individual. If the individual did not respond to a request for confirmation, or confirmed that they were not able to work or available for work, payments after the confirmation or failure to confirm are still without fault on the part of the individual because the state continued to pay benefits rather than ceasing benefit payments. Therefore, the state's action caused the overpayment. Overpayments under these circumstances occurred because a unique confluence of circumstances (i.e., an avalanche of unemployment claims precipitated by a pandemic, implementation of multiple new programs, and public and political pressure to implement new programs rapidly) hindered the states' ability to process claims timely and to the extent they would have under normal circumstances.

   Repayment would be contrary to equity and good conscience: Repayment is contrary to equity and good conscience when it would be extremely unfair to require repayment. It would be extremely unfair to require repayment when the individual was not at fault for receiving the overpayment and the state would be requiring repayment of benefits that were designed to support individuals during the pandemic, which created financial

uncertainty for much of the country at that time. Individuals generally relied on these payments for their livelihoods and made purchases and entered into financial commitments based on these payments. Requiring repayment now would undermine many individuals' financial stability and undermine the purposes for which the benefits were paid.

Group 2: Scenario(s) applicable to the PUA, MEUC (where applicable), and PEUC programs. Because the individual was still eligible for unemployment benefits for a given week, these scenarios do not involve overpayments under the FPUC program. Because MEUC is not payable under the PUA program, there may be claims involving overpayments under the MEUC program.

2. **When an individual is eligible for payment under an unemployment benefit program for a given week, but through no fault of the individual, they were instead incorrectly paid under either the PUA or PEUC program at a higher weekly benefit amount (WBA).** This approved scenario is described in more detail under Section 4.d.iii.A. of UIPL No. 20-21.

   This refers to the overpayment created by a difference in WBAs across programs, not the entirety of the overpayment on one claim (*see* Section 4.d.i.A.2. of this UIPL). For example, an individual received five weeks of PUA at a $300 WBA (total = $1,500) for weeks where they were actually eligible for regular UC at a $200 WBA (total = $1,000). The $500 difference because of a lower WBA is eligible for a blanket waiver (*i.e.*, the additional amount paid to the individual under PUA instead of regular UC). The remaining $1,000 from the original PUA claim should be resolved when the state transitions such weeks from PUA to regular UC.

3. **The state paid the wrong amount of dependents' allowance (DA) on a PUA or PEUC claim because the state, through no fault of the individual, used the wrong amount when calculating the DA, resulting in an overpayment equal to a minimal difference in DA for each paid week.**

   The individual is without fault: Overpayments under these circumstances occurred because a unique confluence of circumstances (i.e., an avalanche of unemployment claims precipitated by a pandemic, implementation of multiple new programs, new PUA standalone systems, and antiquated computer systems) hindered the states' ability to adequately update or test all PUA and PEUC system scenarios and distribute payments properly. Under this circumstance, individual recipients of payments were without fault for the overpayments as state system/technology issues caused the overpayment.

   Repayment would be contrary to equity and good conscience: Repayment is contrary to equity and good conscience when it would be extremely unfair to require repayment. It would be extremely unfair to require repayment when the individual was not at fault for receiving the overpayment and the state would be requiring repayment of benefits that were designed to support individuals during the pandemic, which created financial uncertainty for much of the country at that time. Individuals generally relied on these

payments for their livelihoods and made purchases and entered into financial commitments based on these payments. Requiring repayment now would undermine many individuals' financial stability and undermine the purposes for which the benefits were paid. Additionally, recovering overpayments in this scenario could be extremely unfair because it could impact an individuals' ability to support their dependents.

Group 3: Scenario(s) applicable to the PUA and FPUC (where applicable) programs.

4. **The individual answered "no" to being unemployed, partially unemployed, or unable or unavailable to work because of the approved COVID-19 related reasons and the state paid PUA anyway. Upon requesting a new self-certification, the individual either did not respond or confirmed that none of the approved COVID-19 related reasons were applicable, and the state's payment resulted in an overpayment for that week.** See Attachment I to UIPL No. 16-20, Change 6, for a full list of the approved COVID-19 related reasons.

   The individual is without fault: In this scenario, the individual was without fault for the overpayment as they provided accurate information on their initial application which the state did not consider prior to paying the individual which created the overpayment. In addition, once information was requested and the individual failed to respond or confirmed the information, the state continued to pay benefits. Overpayments under these circumstances occurred because a unique confluence of circumstances (i.e., an avalanche of unemployment claims precipitated by a pandemic, implementation of multiple new programs, and public and political pressure to implement new programs rapidly) hindered the states' ability to process claims timely and to the extent they would have under normal circumstances.

   Repayment would be contrary to equity and good conscience: Repayment is contrary to equity and good conscience when it would be extremely unfair to require repayment. It would be extremely unfair to require repayment when the individual was not at fault for receiving the overpayment and the state would be requiring repayment of benefits that were designed to support individuals during the pandemic, which created financial uncertainty for much of the country at that time. Individuals generally relied on these payments for their livelihoods and made purchases and entered into financial commitments based on these payments. Requiring repayment now would undermine many individuals' financial stability and undermine the purposes for which the benefits were paid.

Group 4: Scenario(s) applicable to the PUA program. Because the individual was still eligible for unemployment benefits for a given week, these scenarios do not involve overpayments under the FPUC program.

5. **Through no fault of the individual, the state paid the individual a minimum PUA WBA based on Disaster Unemployment Assistance (DUA) guidance that was higher than the state's minimum PUA WBA provided in UIPL No. 03-20, which resulted in**

an overpayment. This approved scenario is described in more detail under Section 4.d.iii.B. of UIPL No. 20-21.

6. **The individual complied with instructions from the state to submit proof of earnings to be used in calculating their PUA WBA. However, the state's instructions were either inadequate or the state incorrectly processed this calculation using self-employment gross income instead of net income or documents from an inapplicable tax year, resulting in an incorrect higher PUA WBA. The state establishes an overpayment for the difference in PUA WBA.**

   The individual is without fault: Under this circumstance, states were serving a new population of unemployed workers (contractors, self-employed, gig economy) who were unfamiliar with the unemployment program, new monetary eligibility requirements, and UI systems. The states provided either no guidance or inadequate guidance for providing the correct income information. States struggled at the outset to clearly articulate income requirements to this new population, and continuously worked to change and improve their documents and forms to try to better convey this requirement through the CARES Act period. Individual recipients of payments were without fault for the overpayments as they complied with states' instructions (which did not adequately convey the requirement) on providing income information. Because the states failed to adequately inform claimants about the requirement, individuals are without fault for overpayments created using gross income instead of net income.

   Repayment would be contrary to equity and good conscience: Repayment is contrary to equity and good conscience when it would be extremely unfair to require repayment. It would be extremely unfair to require repayment when the individual was not at fault for receiving the overpayment and the state would be requiring repayment of benefits that were designed to support individuals during the pandemic, which created financial uncertainty for much of the country at that time. Individuals generally relied on these payments for their livelihoods and made purchases and entered into financial commitments based on these payments. Requiring repayment now would undermine many individuals' financial stability and undermine the purposes for which the benefits were paid.

Group 5: Scenario(s) applicable to the MEUC program.

7. **The individual complied with instructions from the state to submit proof of self-employment earnings to be used in establishing eligibility for MEUC. However, the state's instructions were either inadequate or the state incorrectly processed this calculation using the incorrect self-employment income or based on documents from an inapplicable tax year, resulting in the individual incorrectly being determined eligible for MEUC. The state establishes an overpayment for any weeks of MEUC that were paid.**

   The individual is without fault: The state failed to provide clear instructions on how to report income or which tax year to use for reporting the earnings. As a result, claimants

did not provide the correct information. Overpayments under these circumstances occurred because a unique confluence of circumstances hindered the states' ability to adequately provide proper guidance. Consequently, staff were unable to identify correct or applicable self-employment income documentation when determining eligibility for MEUC. Because these problems were created by the state, recipients of MEUC payments were without fault for these overpayments.

Repayment would be contrary to equity and good conscience: Repayment is contrary to equity and good conscience when it would be extremely unfair to require repayment. It would be extremely unfair to require repayment when the individual was not at fault for receiving the overpayment and the state would be requiring repayment of benefits that were designed to support individuals during the pandemic, which created financial uncertainty for much of the country at that time. Individuals generally relied on these payments for their livelihoods and made purchases and entered into financial commitments based on these payments. Requiring repayment now would undermine many individuals' financial stability and undermine the purposes for which the benefits were paid.

Requesting Additional Blanket Waiver Scenarios under the CARES Act UC Programs*

Instructions: States that wish to propose additional scenarios within the context of the CARES Act UC programs to be considered for blanket waivers may do so by submitting this form to covid-19@dol.gov with a copy to the appropriate ETA Regional Office. States are requested to use the Subject Line: "Additional Scenario for Blanket Waiver Approval."

States must complete a separate form for each blanket waiver scenario for which the state is requesting approval.

Unemployment Insurance **Scenario for Blanket Waiver Approval Request**
1. State Name:
2. Contact Information of the State Agency Administrator **Name:** **Title:** **Email Address:** **Telephone Number:**
3. CARES Act Program Lead Information **Name:** **Title:** **Email Address:** **Telephone Number:**

* Division A, Title II, Section 2116(a) of the CARES Act states that "Chapter 35 of Title 44, United States Code, (commonly referred to as the 'Paperwork Reduction Act of 1995'), shall not apply to the provisions of, and the amendments made by, this subtitle." As such, the PRA does not apply to this request.

4. Description of the Scenario Proposed for Blanket Waiver
5. Explain why the individuals affected by the scenario above are without fault in the creation of the overpayment (see examples provided under approved scenarios in Attachment I to this UIPL).
6. Explain why repayment of the overpayments indicated in the scenario above would be contrary to equity and good conscience (see examples provided under approved scenarios in Attachment I to this UIPL).
7. Description of how the state will apply the blanket waiver scenario (if approved) and ensure that fraudulent overpayments are not included in its application of the scenario.
8. What is the number of individuals (known or estimated) who would receive a blanket waiver under this process, if approved? Provide an explanation of the methodology used in calculating this number.
9. What is the total dollar amount (known or estimated) that would be waived if the blanket waiver is approved and the breakdown of amount by CARES Act UC program? Provide an explanation of the methodology used in calculating this amount.
10. What is the average processing time spent (or would be spent) (known or estimated) by state staff addressing this scenario if done on an individual, case-by-case basis? Provide an explanation of the methodology used in calculating this time.
11. List the CARES Act UC programs that would be subject to this blanket waiver (PEUC, PUA, FPUC, MEUC, first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended).

Instructions for Completing Questions 4-11 of the Form

4. Description of the scenario proposed for blanket waiver: Briefly describe the reason the state is requesting the blanket waiver. Include the circumstances under which the overpayments occurred.

5. Explain why the individuals affected by the scenario above are without fault: Describe why the individuals in this scenario are without fault for the creation of the overpayment. States are encouraged to reference UIPL No. 20-21 and Attachment I to this UIPL for supporting language.

6. Explain why repayment would be contrary to equity and good conscience: Describe why repayment would:

a. Cause financial hardship to the group of persons for whom it is sought; or
b. Cause the recipient of the overpayment (regardless of their financial circumstances) to have relinquished a valuable right or changed positions for the worse; or
c. Be unconscionable under the circumstances.

States are encouraged to reference UIPL No. 20-21 and this UIPL for supporting language.

7. Description of how the state will apply the blanket waiver scenario (if approved) and ensure that fraudulent overpayments are not included in its application of the scenario. Explain how the state plans to apply the blanket waiver scenario (*e.g.*, will the state run a query against its computer system, will the state apply the blanket waiver as it identifies such scenarios in working individual backlog cases). Additionally, explain how the state will ensure that when the state is applying this proposed blanket waiver scenario, it will not waive recovery activities for fraudulent overpayment.

8. What is the number of individuals (known or estimated) who would receive a blanket waiver under this process, if approved?: Provide the estimated (or known total) number of individuals for whom the state expects to waive overpayments under this proposed blanket waiver request. Provide an explanation of the methodology used in calculating this number or estimate.

9. What is the total dollar amount (known or estimated) that would be waived?: Provide the estimated (or known total) dollar amount that the state expects to waive (per CARES Act program) from this blanket waiver if approved. For example, PUA $1.2M, PEUC $2.1M, FPUC $3.5M. Provide an explanation of the methodology used in calculating this amount or estimate.

10. What is the average processing time spent (or would be spent) (known or estimated) by state staff addressing this scenario if done on an individual basis?: Provide the average amount of time that state staff would normally spend to individually process each waiver if the blanket waiver is not approved *(e.g.*, estimated 15 minutes per individual waiver). If known or estimated, include how long would it take to process all individual waivers in this scenario (*e.g.*, 6 months for all waivers in this scenario). Provide an explanation of the methodology used in calculating these times or estimates.

11. List the programs that would be subject to this blanket waiver: Indicate the CARES Act UC program overpayments the state will address with this waiver (PEUC, PUA, FPUC, MEUC,

first week of regular UC that is reimbursed in accordance with Section 2105 of the CARES Act, as amended). Note that regular UC overpayments are not available for blanket waiver consideration (see Section 5 of UIPL No. 23-80 for reviewing waiver eligibility on an individual, case-by-case basis).

Sample Communication to Claimants when Recovery of Overpayment is Waived

This Attachment includes a sample communication that states may use when approving the waiver of recovery for an overpayment. This can be used both when processing individual waiver requests in accordance with Section 4.c.i. of this UIPL and blanket waivers in accordance with Section 4.c.ii. of this UIPL. It is written with the assumption that a state has previously sent a determination establishing the overpayment. Option #1 under Section 4.c.iii.A. of this UIPL provides instructions for states who wish to provide a combined notice that both establishes the overpayment and waives recovery.

States that choose to create their own notification should consider the following:

- We recommend including reference to the applicable determination that established the overpayment and the date such determination was mailed on the notice. If the state uses a case number or letter IDs for the underlying eligibility and qualification determinations, the state can also use that information to connect the overpayment determinations to this notice.

- We recommend that the state include clear language that the waiver of recovery for the overpayment does not change the underlying ineligibility of benefits.

- As described in Section 4.c.iii.A. of this UIPL, when approving a waiver of recovery, the state must provide instructions on how to request a reconsideration of the approved waiver if the individual does not wish to have recovery of the overpayment waived.

- In addition to providing instructions on how an individual may ask specific questions related to their claim, the state may consider providing for a pre-recorded message or a statement on its website to refer individuals for general information about the waiver.

- States may also refer to the plain language guidelines provided at https://www.plainlanguage.gov/guidelines/.

Sample Letter when Claimant Already Received Determination Establishing Overpayment

[Claimant contact information]
[Applicable CARES Act programs]
Overpayment Amount: [$XX]
Recovered Amount: [$XX]
Current Balance: [$XX]
Recovery Waived for this Amount: [$XX – should equal Overpayment Amount]
Total Due: $0

Refund Due: [$XX – should equal Recovered Amount]

Notice that You Do NOT Need to Repay Benefits Received

[State's greeting CLAIMANT'S NAME:]

We, [Agency name], are writing to let you know that you **DO NOT** owe the overpayment related to the determination(s) issued on [date of determination(s) finding ineligibility/disqualification]. During the pandemic, we sent you payments in error. But you are not responsible for this error and do not need to return any money. You do not need to do anything. Please keep this Notice for your records.

What Happened?

> We, [Agency name], determined that you were not entitled to [a portion of/all] the benefits you received for week(s) ending [list weeks]. You received payments before knowing you were not entitled to those benefits. This decision created a debt (called an overpayment) of [$XX] on your [enter CARES Act program here] claim.
>
> But you are not required to repay this overpayment. You were without fault in creating this overpayment and the agency has determined that recovery would be contrary to equity and good conscience. Therefore, the Agency is waiving recovery of this overpayment. This waiver means you are not required to pay back the overpayment related to this determination.

What's Next?

> ***[Consider this paragraph when no collection activity has occurred]***
> There is nothing more for you to do to get this waiver. Please keep this Notice for your records. We are working to update your overpayment status on your unemployment insurance claim records to reflect that there is no need to repay benefits received. If needed, you may give a copy of this Notice to others such as debt collectors, credit bureaus or other legal entities to let them know that we are waiving recovery of your overpayment.

[Consider this paragraph when collection activity has occurred and state will process a refund]

There is nothing more for you to do to get this waiver. You do not need to send any additional payments related to this overpayment caused by determination. You will receive a [$XX] refund [enter repayment type] for the money you have already paid back towards this overpayment. [If the state will issue refunds via direct deposit, consider including a reminder to have the individual log into their account to confirm their banking information. Alternatively, the state may wish to remind the individual to confirm their mailing address].

Additional Questions?

If you do not want a waiver of the overpayment, please contact your state agency by [deadline] by [insert contact instructions].

This Notice only applies to the overpayment issued on [date of determination(s) finding ineligibility/disqualification] for the week(s) ending [list weeks] and does not apply to any other overpayment.

For more details on waiving recovery of an overpayment, please check the Agency website at [agency website], or call [agency number]. You may also look up the state's policy allowing this waiver at [agency website].

If you have additional questions about this notice, please contact: [Address, telephone, website, etc.]

If you believe this notice has been issued due to fraud or you have been a victim of identity theft, please contact [agency website, telephone].

Sample Language for State Websites

This Attachment includes sample language for state websites regarding the waiver of recovery provisions under the CARES Act UC programs. ETA recognizes that state laws and practices may vary. States are encouraged to use this language as a starting point for their communication. States are encouraged to reference this link in their determinations when an overpayment is established and in their written notices when a waiver of recovery is approved.

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Important Information for those who Receive[d] "Overpayment" Notices PLEASE READ AS YOU MAY NOT HAVE TO PAY THEM BACK

Temporary Unemployment Benefits under the CARES Act Programs Information on Overpayments

You may have received a notice from [STATE AGENCY] that you were paid unemployment benefits under the CARES Act programs that you were not entitled to, this is called an overpayment. You may also have received a notice from [STATE AGENCY] that you do not have to pay this money back. This page explains what may be happening depending on your specific circumstances.

Why do I have an overpayment?

The CARES Act created new temporary pandemic-related unemployment compensation programs. We have identified some people that were paid money that they were not entitled to. We have reviewed our records and, as needed, [are reaching out/have reached out] to these people. If it [is/was] determined that they were not eligible for this money, we [will establish/have established] an overpayment. In normal circumstances, someone with an overpayment is responsible for paying the money back, but we recognize that the pandemic was not a normal circumstance.

In what instances am I not responsible for repaying an overpayment?

If the overpayment was not your fault and we determine that it would be unfair to ask you to pay it back (in other words, it would be against equity and good conscience to recover the money from you), we are **not** going to require you to pay back the money. This is called a waiver of recovery.

What we are doing [***For states that are processing blanket waivers***]

The U.S. Department of Labor has identified several scenarios where we can automatically waive recovery of an overpayment. You can find these at [insert state-specific link that references what scenarios the state may be applying from Section

4.c.ii.A. of UIPL No. 20-21, Change 1]. We are currently reviewing overpayments to determine if they are eligible for recovery to be waived. [States may, if applicable to how they are applying the blanket waiver scenarios, consider adding a sentence that says: *You do not need to submit an individual request to be considered under one of these scenarios.*] Any overpayments resulting from fraud are not eligible for waiver.

If you are eligible for a waiver, we will send you a written notice. Additionally, any money that was collected on this overpayment will be refunded to you. Additional information regarding any refund you may be owed will be included in this written notice. Please note that this process may take [insert state estimated timeframe].

What you can do [*For states that allow for individual waiver requests, rather than evaluating every overpayment created (see Section 5 of UIPL No. 23-80)*]

[For states processing blanket waivers, consider this intro sentence: *If you do not get a waiver but think you should,*] you have two options. If you disagree with the overpayment and believe that you were entitled to receive unemployment benefits for the week(s) in question, you may file an appeal. If you do not wish to file an appeal but do not think you are at fault for the overpayment, you may request consideration for a waiver of recovery.

- ***File an appeal.*** If you do not believe you got an overpayment (meaning you believe that you were entitled to receive unemployment benefits for the weeks in question), you may file an appeal. Please review your determinations to see which one(s) found you disqualified or ineligible and follow the appeals instructions listed on the determination(s). [If applicable under state law, consider adding the sentence: *If it is past the deadline to file an appeal, you will need to show good cause for why you missed the deadline.* State may consider including some examples of what constitutes good cause.]

  You can find the determinations and the process to file an appeal on your claimant portal by [insert language about the state's particular online portal].

  [Consider for the online webpage – *add a screen shot of where to find the determination(s) and the appeal link on the claimant's portal*. States are permitted and encouraged to add any help buttons or other explanations consistent with this language to guide claimants.]

  If you are successful in your appeal, there is no need to request a waiver because you will no longer be considered overpaid.

- ***Request a waiver so you do not have to pay back the overpaid amount.*** There are two requirements to qualify for a waiver of recovery:

  (1) you were not at fault for the receipt of the benefits; and

(2) it would be unfair to collect money – that is, it would be "contrary to equity and good conscience."

If you believe these two requirements apply to you, you may request a waiver by [insert state-specific instructions].

If your request for a waiver is granted, we will send you a written notice. In that case, you will not be responsible for repaying the money. Additionally, any money that was collected on this overpayment will be refunded to you.

I received a written notice that I do not need to repay benefits received

If you received written notice that you do not need to repay benefits received, this means that we have reviewed the overpayment and determined that you do not have to repay this money. You do not need to return any money. You do not need to do anything for this overpayment.

Importantly, while you do not have to pay back the overpayment listed on the notice we sent you, this waiver of recovery does not apply to any other overpayment you may have on your account.

I received a written notice that I do not qualify for a waiver. What are my options?

If you received a written notice that you do not qualify for a waiver but think that you should have received it, please follow the appeals instructions listed on the determination saying that you did not qualify for a waiver. [If applicable under state law, consider adding the sentence: *If it is past the deadline to file an appeal, you will need to show good cause for why you missed the deadline.* State may consider including some examples of what constitutes good cause.]

If you do not file an appeal, we encourage you to contact us and make payment arrangements as soon as possible. To make payment arrangements, please contact [insert state-specific instructions]. For more information on our collections process, please visit [insert link to state's website explaining the collections process].

ATTACHMENT 5

304 P.3d 427
Court of Appeals of New Mexico.

Frank MILLAR, Petitioner–Appellee,
v.
NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS
and Western Refining Southwest, Inc., Respondents–Appellants.

No. 31,581.
|
Jan. 31, 2013.
|
Certiorari Denied, April 3, 2013, No. 34,045.

Synopsis

Background: Unemployment benefits claimant appealed decision of Department of Workforce Solutions (DWS) determining that claimant was required to repay $4,900 in benefits. The District Court, Santa Fe County, Barbara J. Vigil, D.J., reversed the DWS decision, and DWS appealed.

[Holding:] The Court of Appeals, Vanzi, J., held that DWS was not equitably estopped from collecting overpayment.

Reversed.

Procedural Posture(s): On Appeal.

West Headnotes (8)

[1] Administrative Law and Procedure Review using standard applied below

In an administrative appeal, the Court of Appeals conducts the same standard of review of an administrative order as the district court sitting in its appellate capacity.

[2] Administrative Law and Procedure Character and amount of evidence in general

Under the whole record standard of review in an administrative appeal, a court looks not only at the evidence that is favorable, but also evidence that is unfavorable to the agency's determination.

[3] Administrative Law and Procedure Deference to Agency in General

In an administrative appeal, questions of substantial compliance with a statute depend on statutory construction, and a court reviews those questions de novo.

[4] **Estoppel** Particular state officers, agencies or proceedings

Unemployment Compensation Actions and proceedings

At Department of Workforce Solutions (DWS) hearing on claimant's eligibility for unemployment benefits, claimant sufficiently made state and federal standards for timeliness of processing appeals part of administrative record, and thus, on appeal of DWS decision, district court could consider whether DWS violated the timeliness guidelines, for purposes of determining whether DWS could be equitably estopped from collecting overpayment of benefits; during hearing, claimant specifically argued that the overpayment claim against him was unlawful because the hearing violated the time-lapse standards of state and federal law, and attached copies of the relevant state and federal law, as well as a timeliness and quality report, to his motion for relief from overpayment claim. West's NMSA § 51–1–8(D); 20 C.F.R. § 650.1; NMRA, Rule 1–077(J).

3 Cases that cite this headnote

[5] **Unemployment Compensation** Recovery Back or Recoupment of Benefits

Unemployment Compensation Actions and proceedings

Department of Workforce Solutions (DWS) could collect $4,900 overpayment of unemployment benefits, even though DWS failed to notify claimant that employer had appealed eligibility determination and even if DWS had violated state and federal timeliness guidelines by holding hearing several months after appeal had been filed; employer had filed timely appeal, claimant did not challenge whether he was ineligible for benefits, DWS had a statutory duty to recover funds that had been issued to ineligible claimants, and nothing in timeliness guidelines allowed claimant who was subsequently disqualified from receiving benefits to challenge the DWS's mandatory obligation to recover overpayments. West's NMSA §§ 51–1–8(D), 51–1–38(F); 20 C.F.R. § 650.1.

3 Cases that cite this headnote

[6] **Estoppel** Particular state officers, agencies or proceedings

Unemployment Compensation Actions and proceedings

Department of Workforce Solutions (DWS) could not be equitably estopped from collecting $4,900 overpayment of unemployment benefits, even though DWS failed to notify claimant that employer had appealed eligibility determination and even if DWS had violated state and federal timeliness guidelines by holding hearing several months after appeal had been filed; doctrine of equitable estoppel could not be applied contrary to DWS' mandatory statutory duty to collect benefits paid to ineligible claimants. West's NMSA § 51–1–38(F).

3 Cases that cite this headnote

[7] **Estoppel** State government, officers, and agencies in general

Equitable estoppel cannot be applied contrary to statutory requirements and can only be applied against the state in exceptional circumstances where there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it.

[8] **Estoppel** State government, officers, and agencies in general

With respect to state agencies, the doctrine of equitable estoppel only is available to bar those rights or actions over which an agency has discretionary authority.

Attorneys and Law Firms

***428** New Mexico Legal Aid, Inc., Timothy R. Hasson, Santa Fe, NM, for Appellee.

New Mexico Department of Workforce Solutions, Marshall J. Ray, Elizabeth A. Garcia, Albuquerque, NM, for Appellant.

OPINION

VANZI, Judge.

{1} The New Mexico Department of Workforce Solutions (DWS) appeals from a district court order reversing a decision of the DWS's Appeals Tribunal (Tribunal). The Tribunal determined that claimant Frank Millar was required to repay an overpayment of unemployment compensation benefits in the amount of $4,931. The district court held that the Tribunal's hearing, conducted five months after Millar started receiving benefits, violated the timeliness requirements for processing appeal claims under state and federal law. In the alternative, the district court found that the doctrine of equitable estoppel barred DWS from claiming and collecting an overpayment from Millar. We disagree with the district court's decision and reverse.

BACKGROUND

Factual Background

{2} Millar was discharged from his employment with Western Refining Southwest, Inc. (Western Refining) on November 20, 2009. He filed for unemployment benefits on December 6, 2009. After preliminary fact finding, the DWS claims examiner issued a notice of claims determination (NCD) in favor of Millar granting him benefits of $269 per week. The NCD stated that the determination was final "unless an appeal is filed within fifteen calendar days from [ ] 01/07/2010." In addition, the NCD stated, "If your employer challenges a decision allowing benefits to you and the appeal decision is against you, you will be required to repay those benefits." On January 21, 2010, Western Refining appealed the claims examiner's decision.

{3} It is undisputed that DWS did not immediately inform Millar that it had received the January 21, 2010 notice of appeal from Western Refining. The parties further agree that Millar did not learn of the appeal until the Tribunal sent out a notice of hearing on June 4, 2010, setting the hearing for June 16, 2010. However, he continued to receive benefits until April 17, 2010. At the June 16, 2010 hearing, the Tribunal found Millar to be disqualified from benefits due to misconduct connected with his employment. Millar subsequently received an overpayment notice for the unemployment payments that he had received from December 19, 2009, until his benefits were exhausted at the end of April 2010.

{4} Although he did not appeal the misconduct issue, Millar timely appealed the overpayment determination through the DWS's administrative process. The Tribunal affirmed the claims examiner's decision that Millar had been overpaid benefits in the amount of $4,931 and that the benefits must be refunded to DWS. In turn, the DWS's cabinet secretary (secretary) upheld the January 7, 2011 determination of the Tribunal. The secretary's affirmation was the final administrative decision in the matter. Having exhausted his administrative remedies, Millar appealed to the district court under Rule 1–077 NMRA and NMSA 1978, Section 51–1–8(M), (N) (2004). The district court granted Millar's writ of certiorari and, after a hearing, reversed the decision of the secretary, affirming the Tribunal. Specifically, the ***429** court found that DWS was out of compliance with federal and state timeliness standards for processing appeals and that the long delay in scheduling an appeal hearing "unfairly resulted in an onerous overpayment claim." In the alternative, the district court ruled that DWS was equitably estopped from pursuing overpayments against Millar. This appeal timely followed.

DISCUSSION

{5} DWS raises two issues on appeal: (1) whether the district court exceeded its authority in holding that the Tribunal violated the timeliness requirements of 20 C.F.R. §§ 650.1 to 650.4 (2006, as amended through 2013) and Section 51–1–8(D); and (2) whether the district court erred in ruling that the doctrine of equitable estoppel barred DWS from recovering the overpayments to Millar. We begin with the standard of review and an overview of the law relating to the payment of unemployment benefits and the recovery of overpayments. We then turn to the issues raised by DWS.

Standard of Review

[1] [2] [3] {6} Generally, we apply the same standard of review as the district court, and we review an administrative order to determine whether DWS acted fraudulently, arbitrarily, or capriciously, or whether, based on the whole record, the decision is not supported by substantial evidence. *See* Rule 1–077(J); *San Pedro Neighborhood Ass'n v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.,* 2009–NMCA–045, ¶¶ 10–11, 146 N.M. 106, 206 P.3d 1011. "This Court ... will conduct the same [standard of] review of an administrative order as the district court sitting in its appellate capacity[.]" *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003–NMSC–005, ¶ 16, 133 N.M. 97, 61 P.3d 806. Under the whole record standard of review, "we look not only at the evidence that is favorable, but also evidence that is unfavorable to the agency's determination." *Fitzhugh v. N.M. Dep't of Labor,* 1996–NMSC–044, ¶ 23, 122 N.M. 173, 922 P.2d 555. Questions of substantial compliance with a statute depend on statutory construction, and we review those questions de novo. *See* *Stennis v. City of Santa Fe,* 2008–NMSC–008, ¶ 13, 143 N.M. 320, 176 P.3d 309 ("Interpretation of ... statutes is a question of law that we review de novo.").

Administrative Procedures in the Payment of Unemployment Benefits and the Recovery of Overpayments

{7} In order to frame the factual setting and legal issues raised in this appeal, we summarize the relevant statutes and administrative proceedings relating to the payment of unemployment benefits in New Mexico and the recovery of overpayments. Unemployment compensation is an insurance program "to be used for the benefit of persons unemployed through no fault of their own" and is designed to "lighten [the] burden which now so often falls with crushing force upon the unemployed worker and his family." NMSA 1978, § 51–1–3 (1953). Benefits run for twenty-six weeks, NMSA 1978, § 51–1–4(E) (2011), but may be continued for an additional twenty-six weeks during times of high employment. NMSA 1978, § 51–1–48(E) (2011). An unemployed worker is not eligible for benefits if he has left work without good cause or has been discharged for misconduct connected with the employment. NMSA 1978, § 51–1–7(A)(1), (2) (2011).

{8} The initial determination of whether a claimant is eligible for unemployment benefits is made by a claims examiner who conducts preliminary fact finding, including obtaining statements from the claimant and employer. *See* 11.3.300.308(A) NMAC11.3.300.308(A) NMAC (11/15/2012). Once the claim has been evaluated, the claims examiner issues a NCD. 11.3.300.308(C) NMAC11.3.300.308(C) NMAC. A party dissatisfied with the determination of the claims examiner may appeal the initial determination. If an initial determination is made in favor of the claimant and payment of benefits is begun, payments shall not be stopped without prior notice and an opportunity to be heard. 11.3.300.308(E) NMAC11.3.300.308(E) NMAC. This provision necessarily results in some payments being made upon an initial determination of eligibility that are subsequently overturned. As a result, the NCD advises the claimant that if the appeal decision is against him, he will be required to repay the benefits received. Following a hearing before an Administrative ***430** Law Judge (ALJ) within DWS's appeals tribunal at which parties may be represented by counsel and may present testimonial and documentary evidence, the ALJ issues a decision of the appeals tribunal. *See* 11.3.500.10 NMAC11.3.500.10 NMAC (11/15/2012). The parties may further appeal the decision of the ALJ first to the secretary, who may enter a decision, refer the decision to the board of review directly, or if the secretary does not take action within fifteen days, the decision will be automatically scheduled to be heard before the board. 11.3.500.12(B), (C) NMAC11.3.500.12(B), (C) NMAC (11/15/2012). Once the secretary or board of review issues a decision,

the appellant has exhausted administrative review. 11.3.500.13 NMAC11.3.500.13 NMAC (11/15/2012). Finally, an aggrieved party may appeal that decision as of right to the district court. Rule 1–077(A).

{9} DWS's authority to recover overpayments of unemployment benefits is governed by Section 51–1–8(J) and NMSA 1978, Section 51–1–38(F) (1993). In "double affirmation" cases—those in which a decision in favor of the claimant is then affirmed by either the tribunal, board of review, or judicial action only to be ultimately reversed—Section 51–1–8(J) provides that the claimant is not liable for overpayments. This case, however, involves "single affirmation" in which the Tribunal and secretary disagreed with the decision of the claims examiner. In such cases, the overpayments are not "unemployment compensation," and the monies are not being used for the administration of unemployment compensation laws and must be recouped. Section 51–1–38(F) states that a claimant

> who has received benefits as a result of a determination or decision of the department ... that he was eligible and not disqualified for such benefits and such determination or decision is subsequently modified or reversed by a final decision ... irrespective of whether such overpayment of benefits was due to any fault of the person claiming benefits, *shall,* as determined by the secretary or his authorized delegate, either be liable to have such sum deducted from any future benefits payable to him ... or be liable to repay to the department ... a sum equal to the amount of benefits received by him for which he was not eligible or for which he was disqualified or that was otherwise overpaid to him[.]

(Emphasis added.) Thus, DWS is required by law to issue a demand for a refund of improperly paid benefits whenever a determination of overpayment is made. It is against this backdrop that we proceed to analyze the decision of the district court.

The Regulation's Timeliness Guidelines

[4] {10} As we have said, Millar's disqualification for receipt of unemployment compensation benefits in the amount of $4,931 is not at issue in this case. We address only whether DWS may seek recoupment of those benefits in full. In its order, the district court held that the "Tribunal hearing conducted more than five months after [Millar] was awarded benefits was untimely, in that it violated the requirements of state and federal law, found at [Section] 51–1–8[(D)] and 20 C.F.R. [§] 650.1[to] 20 C.F.R. [§] 650.4." DWS first contends that the district court exceeded the scope of its authority in reviewing the federal time-lapse standards, including a timeliness quality report showing New Mexico's thirty-day and forty-day compliance rates at 2.8% and 5%, respectively, because such evidence was not properly presented in the administrative hearing. DWS then argues that the district court misapplied federal law in holding that the Tribunal violated state and federal regulations.

{11} We disagree with DWS that evidence regarding compliance with the federal time-lapse standards was not part of the administrative record and that, therefore, Millar failed to properly preserve the issue for review by the district court. Rule 1–077(J) states that the "district court shall determine the appeal upon the evidence introduced at the hearing before the board of review or secretary of the [DWS]." Although preservation of an issue is a prerequisite to its review on appeal, "the preservation requirement should be applied with its purposes in mind, and not in an unduly technical manner." *Gracia v. Bittner,* 120 N.M. 191, 195, 900 P.2d 351, 355 (Ct.App.1995).

***431** {12} As an initial matter, the Codes of Federal Regulation are federal law and, if relevant, may properly be considered by the district court. More importantly, in his motion for relief from claim of overpayment filed in the Tribunal, Millar specifically argued that the overpayment claim against him was unlawful because the hearing violated the time-lapse standards of state and federal law. In support of his argument, Millar attached copies of the relevant state and federal law, as well as a timeliness and quality report, to his motion. Further, during the hearing, counsel for Millar directed the ALJ to the exhibits, and the ALJ acknowledged that he was looking at them. In its reply brief, DWS does not dispute Millar's assertion that he presented the evidence in his motion and at the administrative hearing. We conclude that the documents were sufficiently made part of the

record before the Tribunal and that, therefore, the district court did not violate Rule 1–077(J). We now turn to DWS's contention that the district court misapplied federal law in holding that the untimely appeal hearing before the Tribunal violated state and federal time-lapse standards and that, therefore, Millar did not have to repay the overpayment.

{13} New Mexico's unemployment compensation program is jointly operated by the federal and state governments. While New Mexico administers the program pursuant to its own laws, it must nevertheless adhere to federal guidelines in doing so. *See* 42 U.S.C. § 502(a) (2004) (requiring that all federal monies received are used for the proper and efficient administration of unemployment compensation laws). Further, 42 U.S.C. § 503(a)(1), (3) (2012) provides that state laws regarding unemployment compensation must include provisions for methods of administration that are "reasonably calculated to insure full payment of unemployment compensation when due" and an opportunity for a fair hearing for all individuals whose claims for unemployment compensation have been denied. The secretary of labor has interpreted the above to require that hearings be commenced and appeals decided "with the greatest promptness that is administratively feasible." 20 C.F.R. § 650.3(a)(2). Further, the secretary of labor has construed 42 U.S.C. § 503(b)(2) as requiring states to substantially comply with the required provisions of state law. 20 C.F.R. § 650.3(b). Accordingly, 20 C.F.R. § 650.4(b) states:

> A State will be deemed to comply substantially with the State law requirements set forth in § 650.3(a) with respect to first level appeals, the State has issued at least 60 percent of all first level benefit appeal decisions within 30 days of the date of appeal, and at least 80 percent of all first level benefit appeal decisions within 45 days.

Section 51–1–8(D) incorporates 20 C.F.R. §§ 650.1 through 650.4 by reference.

{14} DWS argues that the standards set forth in 20 C.F.R. § 650.4(b) only offer guidelines in processing unemployment appeals and do not set absolute deadlines for processing an individual first level appeal. We agree and see nothing in the broad language of the regulation requiring otherwise. We conclude that the plain language of 20 C.F.R. § 650.4(b) does not establish any mandatory statutory time limit that would require Millar to be notified of the pending appeal or within which the hearing had to be held. More compelling, however, is DWS's assertion that the timeliness rules set forth above do not eliminate a disqualified claimant's liability for overpayments.

[5] {15} As we have stated and discuss in further detail below, the timeliness regulations are primarily concerned with ensuring that unemployment benefits are promptly provided to eligible claimants. There is no dispute that Millar began receiving benefits as soon as the claims examiner issued the NCD in his favor, and he continued to receive those benefits for the full twenty-six weeks. On the other hand, Section 51–1–38(F) unequivocally imposes a statutory duty upon DWS to recover funds issued to claimants who are later found to be ineligible or disqualified from receiving benefits. We are concerned that DWS did not notify Millar that Western Refining had filed an appeal yet continued to pay him benefits for several months after the appeal was filed. There is nothing humane about a delay of some months in not informing an unemployed person ***432** that his employer is contesting the award of benefits and that he may lose them. Nevertheless, nothing in the above regulations allows a claimant who is subsequently disqualified from receiving benefits to challenge the DWS's mandatory obligation to recover overpayments. The refund demand was timely, and Millar is liable to repay the unemployment benefits he collected.

{16} Millar does not point to any case in which a claimant has challenged—let alone successfully—an overpayment obligation based on DWS's failure to adhere to the suggested timelines for processing unemployment appeal decisions, and we have found none. He does, however, cite to *Dunn v. New York State Department of Labor,* 474 F.Supp. 269 (S.D.N.Y.1979), in support of his assertion that an individual claimant may bring a cause of action based on the same time-lapse standards at issue in this case. In *Dunn,* the plaintiffs, on behalf of themselves and a class of similarly situated claimants, brought an action pursuant

to 42 U.S.C. § 1983 (1996) seeking declaratory and injunctive relief against the state department of labor and its industrial commissioner. *Dunn,* 474 F.Supp. at 271–72. The plaintiffs alleged that New York's failure to provide prompt hearings of unemployment compensation appeals deprived them of their Fourteenth Amendment due process rights to receive prompt payment of unemployment compensation under the "when due" provision of 20 C.F.R. § 503(a)(1). *Dunn,* 474 F.Supp. at 272. The federal district court agreed, noting the United States Supreme Court's recognition of the importance of promptly providing unemployment insurance benefits to eligible claimants. *Id.* at 273 (citing *Cal. Dep't of Human Res. v. Java,* 402 U.S. 121, 91 S.Ct. 1347, 28 L.Ed.2d 666 (1971)). Moreover, the court said, "promptness in the adjudicatory process is essential to prompt payment." *Dunn,* 474 F.Supp. at 273. It entered judgment for the plaintiffs and required the defendants to submit copies of their monthly appeals promptness reports to the court for a period of one year. *Dunn,* 474 F.Supp. at 276. Unlike *Dunn,* this case does not involve a claim of a constitutional deprivation but instead seeks a waiver of money owed for benefits to which a claimant was disqualified and to which he has no vested right. We conclude that neither the regulations nor *Dunn* support Millar's position that he has a right to unemployment compensation benefits to which he was not entitled and which DWS has a statutory obligation to recover.

{17} Although prompt payment is not the only consideration of procedural fairness to a claimant, prompt notice of benefits being in jeopardy must be as well. However, the district court's interpretation of 20 C.F.R. § 650.4(b) cannot be reconciled with DWS's statutory obligation to recover overpayments from an initial favorable eligibility ruling that is subsequently overturned on appeal. We conclude that the district court misapplied the federal and state time-lapse standards to the facts of this case. Accordingly, we reverse its decision that the Tribunal acted arbitrarily and capriciously in ordering Millar to repay the overpayment.

The Application of Equitable Estoppel

[6] {18} As an alternative ruling, the district court found that the doctrine of equitable estoppel barred DWS from claiming and collecting the overpayment from Millar. Specifically, the district court relied on the New Mexico Supreme Court's decision in *Waters–Haskins v. New Mexico Human Services Department,* 2009–NMSC–031, 146 N.M. 391, 210 P.3d 817, in reaching its decision. For the reasons that follow, we conclude that the district court erred in applying the doctrine of equitable estoppel to the facts of this case.

[7] **[8]** {19} The parties agree that estoppel cannot be applied contrary to statutory requirements and can only be applied against the state in exceptional circumstances where there is a shocking degree of aggravated and overreaching conduct or where right and justice demand it. *Envtl. Control, Inc. v. City of Santa Fe,* 2002–NMCA–003, ¶ 22, 131 N.M. 450, 38 P.3d 891. "With respect to New Mexico state agencies in particular, the doctrine only is available to bar those rights or actions over which an agency has discretionary authority." *Waters–Haskins,* 2009–NMSC–031, ¶ 17, 146 N.M. 391, 210 P.3d 817. ***433** Thus, "[e]quitable relief is not available when the grant thereof would violate the express provision of a statute." *Coppler & Mannick, P.C. v. Wakeland,* 2005–NMSC–022, ¶ 8, 138 N.M. 108, 117 P.3d 914 (internal quotation marks and citation omitted). Even in those circumstances, the party raising estoppel must show the result of estoppel would not be contrary to statutory requirements and must establish the six essential elements of estoppel. *Waters–Haskins,* 2009–NMSC–031, ¶¶ 16–17, 146 N.M. 391, 210 P.3d 817 (estopping the state only after first determining whether the state was acting in its discretionary authority, the basic elements of estoppel were met, and right and justice demanded it). We begin by first deciding whether the provisions of Section 51–1–38(F) are mandatory or discretionary.

{20} As we have set forth above, DWS has a statutory duty to recover benefits paid to claimants later found to be ineligible or disqualified. Section 51–1–38(F) states that any overpayment of benefits, regardless of the fault of the person claiming the benefits, "shall" be repaid either from any future benefits payable to him or in "a sum equal to the amount of benefits received

by him for which he was not eligible or for which he was disqualified or that was otherwise overpaid to him[.]" The use of the word "shall" imposes a mandatory, not discretionary, requirement. *See* NMSA 1978, § 12–2A–4(A) (1997) (explaining that " '[s]hall' and 'must' express a duty, obligation, requirement or condition precedent"). Accordingly, although DWS has the discretion to deduct overpayments from a claimant's future benefits or seek repayment, given the mandatory language of Section 51–1–38(F), it does not have any discretion to forego overpayments altogether.

{21} Millar concedes that Section 51–1–38(F) "appears to be mandatory and without exception." Nevertheless, he argues that DWS in fact has discretion regarding overpayments. We are not persuaded. First, Millar contends that because the Federal Emergency Unemployment Compensation Act, Pub.L. 110–252, § 4005(b), 122 Stat. 2323 (2008), and the Trade Act of 1974, 19 U.S.C. § 2315(a)(1) (2011), provide some discretion to waive overpayments, at least with respect to federal extended unemployment benefits, DWS must have such discretion as well. However, the federal discretionary authority has no bearing in this case, particularly where Millar was paid state unemployment insurance benefits, not federal extended benefits. Further, we reiterate that unlike the federal discretionary authority over repayment of extended benefits, the New Mexico Legislature has unambiguously mandated that DWS shall not have any discretion to waive claims of overpayment. *See* § 51–1–38(F).

{22} We also reject the district court's and Millar's reliance on *Waters–Haskins* as inapplicable to the facts of this case. In *Waters–Haskins,* the New Mexico Human Services Department (HSD) sought repayment of food stamps erroneously issued to the appellant for just under the period of a year. 2009–NMSC–031, ¶ 1, 146 N.M. 391, 210 P.3d 817. HSD argued that federal regulations mandated that it pursue collection of overpayment of food stamps and, as a result, HSD had no discretion in its policies for establishing overpayment claims. *Id.* ¶ 18. Our Supreme Court disagreed and found that the food stamp regulations expressly allowed the HSD to compromise or waive overpayment claims. *Id.* ¶ 20 (noting that the United States Department of Agriculture, when creating the food stamps program, gave state agencies "broad authority to establish and collect overpayments claims, and the creation of the policies to meet those ends are a discretionary exercise within the scope of that authority"). In contrast to the food stamp regulatory scheme discussed in *Waters–Haskins,* the unemployment compensation laws at issue here do not permit DWS to "compromise or waive" overpayment liability.

{23} We are also not persuaded by Millar's argument that because DWS "elsewhere lays claim to broad discretion in the collection of overpayments of state unemployment benefits," equitable estoppel is a valid option for the district court to apply here. Specifically, Millar points to regulations that permit DWS, at its discretion, not to pursue collection of overpayments which are more than ten years old or less than $50 and more than seven years old, or are otherwise uncollectible. ***434** *See* 11.3.300.324 NMAC11.3.300.324 NMAC (01/01/2003) (amended 11/15/2012). We note that nowhere do these regulations authorize DWS discretion for a complete waiver of overpayments, and doing so would necessarily conflict with the statutory obligation imposed upon DWS by Section 51–1–38(F), thus thwarting the legislative objectives of recovering taxpayer funds to which an ineligible claimant is not entitled. At the very least, the regulations do not grant the type of "broad authority to establish and collect overpayment[s]" that our Supreme Court found existed in *Waters–Haskins,* 2009–NMSC–031, ¶ 20, 146 N.M. 391, 210 P.3d 817. Because DWS has no discretionary authority in pursuing collection of any overpayment, the doctrine of equitable estoppel is not a valid defense to Millar's claim that he should be excused from repaying the unemployment benefits to which he was not entitled to receive.

{24} Having concluded that DWS has no discretion to forego recovery of overpayments, we need not conduct any further analysis regarding the doctrine of equitable estoppel based on the facts of this case. We acknowledge that any resulting hardship to Millar to repay the benefits is unfortunate, but recoupment is crucial to the preservation of the ongoing integrity of the unemployment compensation system, and our Legislature recognized as much when it enacted Section 51–1–38(F). The affirmative obligation imposed on DWS to recover full repayment of benefits from Millar forecloses the application of equitable estoppel against it. The decision of the district court is reversed.

CONCLUSION

{25} For the reasons set forth above, we reverse the decision of the district court.

{26} **IT IS SO ORDERED.**

WE CONCUR: RODERICK T. KENNEDY, Chief Judge, and J. MILES HANISEE, Judge.

All Citations

304 P.3d 427, 2013 -NMCA- 055

ATTACHMENT 6

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	**CLASSIFICATION** UI
	CORRESPONDENCE SYMBOL OUI/DL
	DATE October 1, 2015

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-16

TO: STATE WORKFORCE AGENCIES

FROM: PORTIA WU /s/
Assistant Secretary

SUBJECT: Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures

1. Purpose. To remind state agencies of the requirements of Federal law pertaining to protecting individual rights in state procedures to prevent or recover unemployment compensation (UC) overpayments.

2. References.

- Sections 303(a)(1) and 303(a)(3), Social Security Act (SSA);
- Computer Matching and Privacy Protection Act of 1988, as amended (CMPPA), 5 USC 552a(o)-(r);
- Employment Security Manual Sections 6010-6014, Standard for Claim Determination—Separation Information" (*Standard for Claim Determination*, Codified as Appendix B of 20 CFR 614, 617, and 625);
- Unemployment Insurance Program Letter (UIPL) No. 1145 ("Procedures for Implementation of the Java Decision"),
- UIPL No. 23-80 ("Implementation of Waiver of Overpayment Provisions in State UI Laws"),
- UIPL No. 04-01 ("Payment of Compensation and Timeliness of Determinations during a Continued Claims Series"), and
- ET Handbook 301: *UI PERFORMS: Benefits Timeliness & Quality Nonmonetary Determinations Quality Review* (http://wdr.doleta.gov/directives/attach/ETAH/ET_Handbook_No_382_3rd_Edition.pdf).

3. Background. To address an unacceptably high improper payment rate for the Unemployment Insurance (UI) program, the Department of Labor (Department) has worked aggressively with states to implement new strategies to improve prevention, detection, and recovery of improper payments. The strategies to reduce improper payments include thorough fact finding, timely determinations and appeals, and use of tools such as the National Directory of New Hires (NDNH). While states have broad authority and are strongly encouraged to use a variety of

RESCISSIONS None	**EXPIRATION DATE** Continuing

methods to prevent, detect, and recover improper payments, states also must ensure that individuals' rights are protected. Building on existing guidance, the Federal requirements described below afford individuals protections in the overpayment prevention and recovery processes.

4. Discussion.

a. Federal Law Requirements Overview. As a condition for receiving UC administrative grants, state laws must, under Section 303(a)(1), SSA, provide for "such methods of administration…as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." In addition, Section 303(a)(3), SSA, as a condition for receipt of UC administrative grants, requires state law to provide an "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." Thus, in order to be eligible to receive administrative grants, a state must do the following in the context of identifying and establishing improper payments, including when an improper payment is identified through the Benefit Accuracy Measurement program:

- conduct an investigation, which includes promptly contacting the individual to whom the potential overpayment was made and providing the individual a reasonable amount of time to be heard, before making an official determination that the payment is improper;
- independently verify information received from a computer cross-match with a Federal database or other automatic processes or matches before suspending, terminating, reducing, or making a final denial of UC;
- gather all relevant information and provide the individual an opportunity to be heard when information is received from a computer cross-match with any database, an outside "tip", or other source;
- for all determinations, including overpayments and fraud, the individual must be provided with a written determination which provides sufficient information to understand the basis for the determination and how/when an appeal must be filed and must also include the facts on which the determination is based, the reason for allowing or denying benefits, the legal basis for the determination, and potential penalties or consequences;
- provide the individual an opportunity to appeal the overpayment or fraud determination;
- continue to make timely UC payments (if due) and wait to commence recovery of overpayments until an official determination of ineligibility is made; and
- if state law provides for waiver of recovery of overpayments under certain circumstances, states must clearly communicate the potential availability of a waiver to individuals when establishing an overpayment and, if an individual requests a waiver, make an official determination on the waiver request before initiating overpayment recovery.

b. Establishing Overpayments. Potential UC overpayments may be identified through cross-matches, fraud hotlines, or a variety of other methods. States must conduct an investigation before issuing an official determination that an overpayment has been made. In so doing, states must ensure that investigators gather all relevant information, which may include supporting documents and statements from either the individual to whom the payment was

made or others. In addition, an individual must be given an opportunity to be heard, timely notice of the interview, and an opportunity to present evidence. In California Department of Human Resources v. Java, 402 U.S. 121 (1971), (*Java*) the U.S. Supreme Court held that a state's law and procedures must provide for paying benefits "at the earliest stage of unemployment that such payments [are] administratively feasible after giving both the worker and the employer an opportunity to be heard." This case is further explained in UIPL No. 1145. In order to give individuals an opportunity to be heard, as required by *Java*, the state must contact the individual before an overpayment is established. The requirements of Section 303(a)(1), SSA, as interpreted by *Java*, mean that when a state identifies a potential overpayment via a cross-match "hit," such as from a state prisoner database or other source, the state must take the initiative to gather all relevant information through fact-finding and provide the individual an opportunity to be heard before making an overpayment determination or initiating recovery. In addition, when there is a factual conflict between the information received from an individual and other information received by the agency, from any source, it is incumbent upon a state to make further contact with the individual, inform him or her of the conflict, and allow an opportunity for rebuttal. The State should determine that the conflicting information appears valid and relevant to the eligibility determination prior to contacting the individual and requesting additional information. Note that these requirements are essentially the same as the independent verification standard of the CMPPA described in Section 4.g. below.

c. Notice of Overpayment Determination. In the *Standard for Claim Determination*, the Department interprets the Federal UC requirements for providing notice to individuals. Section 6013.C.1.c. of the *Standard for Claim Determination* provides that the state agency must give each individual a written notice of any determination that adversely affects his or her rights to benefits. Footnote 1 to Section 6013 explains that a determination adversely affects an individual's right to benefits if the state agency, among other things:

> . . . (5) determines that an overpayment has been made or orders repayment or recoupment of any sum paid to him; or (6) applies a previously determined overpayment, penalty, or order for repayment or recoupment; or (7) in any other way denies claimant a right to benefits under the State law.

Section 6013.C.2 provides that this written notice of determination to individuals must furnish "sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal." ET Handbook 301 provides a more detailed description of the information that must be included in a written determination which includes: 1) a summary statement of the material facts on which the determination is based; 2) the reason for allowing or denying benefits; and 3) the conclusion of the decision based on the state's law. A state should also include the potential penalties or consequences associated with the determination. It must also provide a statement of appeal rights that includes the individual's right to appeal, protest, or, if state law permits, to request a redetermination; the period in which the appeal, protest, or request for redetermination must be filed; the manner in which it must be filed, information on whether an extension for filing

may be available; and where the individual can obtain additional information and assistance about filing an appeal, protest, or request for redetermination.

d. Recovery of Overpayments. States may not initiate recovery of an overpayment until an official determination of the overpayment has been made, consistent with Federal law requirements. States should have clear written procedures that provide for appropriate fact-finding and independent verification of information as needed in the official determination process. State law may prohibit recovery of an overpayment until the overpayment determination, including any appeal, has become final under state law.

In addition, if state law provides for a waiver of recovery of an overpayment, the notice of the overpayment determination must provide enough information to enable the individual to understand under what circumstances a waiver may be granted and how to request such a waiver. (See UIPL No. 23-80.) Until the period for a waiver request has elapsed, or, if an individual applies for a waiver, the waiver determination is made, states may not commence recovery of overpayments. State law may provide that if a request for a waiver is filed the state may not commence recovery of an overpayment until the decision on the waiver request, including any appeal, has become final under state law. The Department strongly encourages states to adopt policies that permit waiver of non-fault overpayments (if permitted by state or Federal law) when recovery of the overpayment would be contrary to equity and good conscience.

e. Opportunity for a fair hearing. UIPL No. 23-80, section 6, defines "denials" for purposes of the Section 303(a)(3), SSA, requirement for an opportunity for a fair hearing (appeal) after the denial of a claim. Denials occur not just when initial applications for UC are denied, but also in any case in which there is an adverse determination that places an individual in a less advantageous position with respect to UC entitlement. This includes state agency determinations that an individual has received UC to which he/she was not entitled, determinations that UC payments must stop because the individual no longer meets the eligibility requirements, and determinations that the overpayment was a result of fraud. In such circumstances, the individual must receive a written copy of that determination and must have the right to appeal the denial. States are not required to conduct a full, formal evidentiary appeal hearing before determining that an individual was overpaid, but they must offer the individual an opportunity to know and rebut the information in fact finding before issuing a decision that the individual is not eligible and was overpaid.

f. Continued Claims. UIPL No. 1145 describes requirements imposed on state agencies, as a result of Java, regarding when UC is payable. UIPL No. 04-01 addresses payment of UC and timeliness of determinations during a continued claims series. It explains that because individuals in a continued claims series had been determined to be eligible for UC, UC payments may not be suspended or delayed pending a determination on an eligibility issue. If the state agency cannot make an eligibility determination before the date of a timely payment, the state agency "presumes the claimant's continued eligibility until it makes a determination otherwise." Additionally, a state must inform individuals that the pending eligibility issue may affect their entitlement to UC and may result in an overpayment.

g. Requirements for Independently Verifying Information from Computer Cross-Matching. For certain overpayments detected from matching with a Federal database, such as the NDNH, the Computer Matching and Privacy Protection Act (CMPPA) also applies. This law provides in part, in 5 U.S.C. 552a(p), that an agency participating in a matching program, including a non-Federal agency such as a state or local government agency, may not "suspend, terminate, reduce, or make a final denial of any financial assistance or payment under a Federal benefit program" unless three conditions are met. First, the agency must have "independently verified the information" obtained from the computer match. Second, the agency must notify the individual of the issue and provide him/her with an opportunity to contest it. Third, the individual must be provided either 30 days or, if provided by statute or regulation, another period of time to respond to the issue. The Department of Health and Human Services (HHS) under its own authority (Section 453(j)(8)(D), SSA) has mandated that state benefit programs accessing the NDNH comply with the CMPPA. Thus, states must agree to adhere to the CMPPA requirements when using the NDNH to identify state UC program overpayments.

Because it is the responsibility of the state UC agency to take the initiative to obtain information regarding an individual's claim, independent verification of the information that is the basis of the overpayment, such as an individual's return to work, must be initiated by the state agency. State agency staff must independently verify the information through the normal required fact-finding process and make the determination of eligibility base upon that verification, including for any type of cross-match hit whether subject to CMPPA or not. States may not make determinations of overpayments and/or fraud using automated systems without the input of agency staff. The individual must also be informed of the information received as a result of the match with the Federal database and given the opportunity to be heard before a determination of an overpayment may be issued.

For example, when a state gets a "hit" off of a cross-match of claim files with the NDNH, the state may not suspend or delay payment before the individual is notified of the issue and has an opportunity to be heard, and the state makes an official determination that the payment was improper. Similarly, when a state gets a "hit" off of a cross-match of claim files with the NDNH, a state may not commence overpayment recovery via offset from current eligibility or otherwise, without notifying the individual, providing him/her an opportunity to be heard, and making a formal determination that the payment was improper.

h. Requirement that Individuals Report to the Agency. When attempting to meet all of the above requirements, in addition to offering individuals the opportunity to be heard before an overpayment determination is made, states often may require individuals to report to the state agency to provide additional information about the potential overpayment, including the result of the cross-match with a Federal database. Requests for such information must be based on *bona fide* need and on reliable evidence that an issue exists. If an individual fails to report as required, the state may apply (subject to any applicable procedural protections for individuals) its law's provisions on ineligibility for UC due to failure to report until the individual complies with the reporting requirement.

i. Requirements for Making Determinations of Fraud. The "when due" requirement means that all determinations require a complete investigation of the issue(s) involved, including the opportunity to rebut, before the issuance of a determination. When there is a factual conflict between the information received from an individual and other information received by the agency, from any source, it is incumbent upon a state to make further contact with the individual, inform him or her of the conflict, and allow an opportunity for rebuttal. Because such factual conflicts require the state agency to make determinations of credibility and intent, determinations of fraud must be made by agency staff. The determination may not be made by an automated system.

After the agency has made a determination that the overpayment was a result of fraud, notice of such must be provided to the individual. The fraud notice may be included in the overpayment determination notice, but it must indicate that either or both of the determinations, the overpayment and that it was the result of fraud, are appealable. As discussed in Section 4.c. above, a fraud determination notice must be sufficient to allow the individual to know the potential penalties or other consequences of a fraud determination as well as his or her rights with respect to an appeal. The individual must be provided additional information on the appeal process including the right to have representation; to present testimony and other evidence relative to the appeal; to subpoena witnesses and records; and to be apprised of the consequences of failing to attend an appeal if one is requested. Communications must be in plain language and using methods that ensure the communication is most likely to be successful for all populations, including individuals with limited English proficiency.

5. Action Requested. State Administrators are requested to:

a. Review their state law, regulations, policies, and procedures concerning UC overpayment prevention and recovery to determine if they meet Federal requirements;

b. Provide this guidance to appropriate staff; and

c. Take appropriate action to ensure that their state law, regulations, policies, and procedures meet these Federal requirements, if they are not currently met.

6. Inquiries. Inquiries should be directed to your Regional Office.

MI Court of Claims Court Name	**PROOF OF SERVICE**	2022-000007-MM Case Number

1. At the time of service, I was at least 18 years of age.
2. My email address used to e-serve: **husbands1@michigan.gov**
3. I served a copy of the following document(s) indicated below:

Title(s) of documents served:

Motion (fee $20): Saunders motion brief dismiss

CONNECTED FILING: Saunders Attach 1 UIPL 16-20 Change 4 CAUW 1 8 21 (general, new documentation req, waiver)

CONNECTED FILING: Saunders Attach 2 Lucente

CONNECTED FILING: Saunders Attach 3 UIPL 20-21 penalties and waivers 5 5 21

CONNECTED FILING: Saunders Attach 4 UIPL 20-21 penalties and waivers Change 1 2 7 22

CONNECTED FILING: Saunders Attach 5 Millar v NM

CONNECTED FILING: Saunders Attach 6 UIPL 01-16

Person Served	Service Address	Type	Service Date
Paula Price	pricep2@michigan.gov	e-Serve	03-14-2022 5:10:23 PM
Michigan Department of Attorney General		25f2ff7e-cb5f-4ec2-96f3-281158e0e382	
Frances Hollander	hollander@bwlawonline.com	e-Serve	03-14-2022 5:10:23 PM
Blanchard & Walker, PLLC		0ed80f9d-565e-4bac-921f-f31a44167b4b	
Natalie Walter	natalie@bwlawonline.com	e-Serve	03-14-2022 5:10:23 PM
Blanchard & Walker, PLLC		a9b06570-b5e7-469a-a8bc-d98254d1d428	
Shannon Husband	husbands1@michigan.gov	e-Serve	03-14-2022 5:10:23 PM
Michigan Department of Attorney General		e6b1f798-5081-4659-9f66-1d1abfc33ae2	
David Blanchard	Blanchard@BWLawonline.com	e-Serve	03-14-2022 5:10:23 PM
Blanchard & Walker PLLC		96ab7f01-e114-420f-a034-9fe52cf44b02	

TrueFiling created, submitted and signed this proof of service on my behalf through my agreements with TrueFiling.
The contents of this proof of service are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

03-14-2022
Date

/s/Shannon Husband
Signature

Husband, Shannon (60352)

Last Name, First Name (Attorney Number)

Michigan Department of Attorney General

Firm Name