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ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 12-01, Change 2

TO: STATE WORKFORCE AGENCIES

**FROM: JOHN PALLASCH /s/
Assistant Secretary**

SUBJECT: States' Ability to Exercise Flexibility in Staffing Models for the Performance of Certain Unemployment Compensation (UC) Administrative Activities

1. **Purpose.** To provide updated guidance to states regarding activities for which they continue to have flexibility in their staffing model after emergency temporary flexibilities for merit staffing standards expire on March 14, 2021. Additionally, this Unemployment Insurance Program Letter (UIPL) provides updated guidance regarding the application of the UC confidentiality provisions to such activities. The information in this UIPL about confidentiality supersedes prior guidance on the topic provided in Section 5.b. of UIPL No. 12-01, issued December 28, 2000.
2. **Action Requested.** The Department's Employment and Training Administration (ETA) requests State Workforce Administrators to provide the information contained in this UIPL to appropriate program and other staff in state workforce systems.
3. **Summary and Background.**
 - a. Summary – Merit staffing is an important feature of the UC system. Merit staffing protections have a long legal and practical history within the UC system. Because many decisions made by public employees affect the rights and property of individuals, these decisions must be made in a fair and unbiased manner that is consistent with the law, as discussed in further detail in UIPL No. 12-01.

It is permissible for states to exercise flexibility in their staffing model for the performance of certain activities that are both involved in the administration of the UC program and that are not inherently governmental in nature, and therefore not subject to a merit staffing system requirement. One example of a state exercising flexibility in its staffing model is to contract out the activity.

This UIPL provides: (i) a summary of the federal law regarding merit staffing requirements for the UC program; (ii) considerations for a state when evaluating whether an activity is appropriate for exercising flexibility in the staffing model; (iii) examples of

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activities of UC administration for which exercising flexibility in the staffing model is permissible; and (iv) discussion of the confidentiality provisions for such activities.

- b. Background – The Coronavirus Aid, Relief, and Economic Security (CARES) Act (Public Law 116-136) was signed into law by the President on March 27, 2020, and includes the Relief for Workers Affected by the Coronavirus Act set out in Title II, Subtitle A. Section 2106 of the CARES Act amends Section 4102(b) of the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA), set out in Division D of the Families First Coronavirus Response Act (Pub. L. 116-127), to allow states to exercise emergency temporary flexibility of “personnel standards on a merit basis” through December 31, 2020, to respond to the spread of the Coronavirus Disease 2019 (COVID-19). Such flexibility is limited to “engaging of temporary staff, rehiring of retirees or former employees on a non-competitive basis, and other temporary actions to quickly process applications and claims.” The Department published UIPL No. 14-20 on April 2, 2020, and UIPL No. 14-20, Change 1, on August 12, 2020. Question 2 of Attachment I to UIPL No. 14-20, Change 1, provided that “[t]he state has maximum flexibility to utilize non-merit staff through December 31, 2020, to quickly process applications and claims...This includes the appeals function as it relates to responding to workload and increased demand resulting from the spread of COVID-19.”

The Consolidated Appropriations Act, 2021, including the Continued Assistance for Unemployed Workers Act of 2020 (Continued Assistance Act) at Division N, Title II, Subtitle A, was signed into law by the President on December 27, 2020. The Continued Assistance Act extends this temporary staffing flexibility to March 14, 2021.

States have reported that the continued high workloads caused by the pandemic continues to require as much flexibility as feasible under federal law to support processing of UC claims in a timely manner. As discussed in this UIPL, states continue to have flexibility in their staffing models for certain activities even after emergency temporary flexibilities for merit staffing standards expire on March 14, 2021. Additionally, given that merit staffing requirements have changed for Wagner-Peyser and Trade Adjustment Assistance staff, there is greater opportunity to cross-train those staff for UI activities that do not require merit staffing.

4. Guidance.

- a. **Federal law regarding merit staffing requirements for the UC program.** Section 303(a)(1), SSA, provides that state law must include a provision for “[s]uch methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of [UC] when due.”

The responsibility for the establishment of these standards was transferred to the Office of Personnel Administration (OPM) by the Intergovernmental Personnel Act of 1970 (Pub. L. 91-648). Standards for a merit system of personnel administration are codified at 5 C.F.R. 900.603.

The Department issued UIPL No. 12-01 in response to numerous inquiries concerning the outsourcing (or contracting out) of activities related to the administration of the UC program. In determining the activities for which states have flexibility in their staffing model, states may rely on guidance in the Office of Management and Budget (OMB) Circular No. A-76 (Revised). Section 4.b. of UIPL No. 12-01 provides:

While these issuances, by their terms, apply only to the Federal government, their guidance, combined with the merit system standards listed above [5 C.F.R. 900.603], are considered to be persuasive concerning what functions a State may outsource under a program where a Federal merit-staffing requirement applies. Also, the Department values consistency between what functions may be outsourced by a State and what functions may be outsourced by the Federal Government, as it would be illogical to prohibit a State from outsourcing a function that the Federal Government is permitted to outsource. Therefore, these OMB issuances will also serve as the interpretative guides for the merit-staffing requirement of Sections 303(a)(1), SSA, and the Secretary of Labor will use the guidance provided by these documents in determining whether outsourcing a UC administrative function is consistent with the merit system requirement under Section 303(a)(1), SSA, for purposes of certifying a State's law under the SSA.

The latest version of OMB Circular No. A-76 is dated May 29, 2003, and superseded both the previous 1999 revision and the Office of Federal Procurement Policy (OFPP) Policy Letter 92-1 originally referenced in UIPL No. 12-01. As set forth in Section 4 of OMB Circular No. A-76, federal agencies are instructed, in part, to (a) identify all activities performed by government personnel as either commercial or inherently governmental; (b) perform inherently governmental activities with government personnel; (c) use a streamlined or standard competition to determine if government personnel should perform a commercial activity; and (d) apply the Federal Acquisition Regulation (FAR) set forth at 48 C.F.R. Chapter 1, in conjunction with this circular.

OMB Circular No. A-76 defines "inherently governmental activities" in Section B.1.a. of Attachment A as those which involve:

- Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
- Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
- Significantly affecting the life, liberty, or property of private persons; or

- Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.

OMB Circular No. A-76 provides that “[w]hile inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials” (Section B.1.b. of Attachment A).

Inherently governmental activities “do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security, mail operations, operations of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services” (48 C.F.R. 2.101, *Inherently governmental function*).

OMB Circular No. A-76 further provides that “[a]n activity may be provided by contract support . . . where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight” (Section B.1.c. of Attachment A). To avoid transferring inherently governmental authority to a contractor, agencies are instructed to consider “[i]n claims or entitlement adjudication and related services (a) the finality of any action affecting individual claimants or applicants, and whether or not review of the provider’s action is de novo on appeal of the decision to an agency official; (b) the degree to which a provider may be involved in wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures; (c) the degree to which matters for decisions may involve recurring fact patterns or unique fact patterns; and (d) the discretion to determine an appropriate award or penalty” (Section B.1.c.(3) of Attachment A).

Additionally, OFPP Policy Letter 11-1 (76 Fed. Reg. 56227) also superseded OFPP Policy Letter 92-1 that was referenced in OMB Circular A-76 and was developed, in part, to create a single definition of the term “inherently governmental function” for all federal agencies. Consistent with OMB Circular A-76, OFPP Policy Letter 11-1 defines an inherently government function as one that is so intimately related to the public interest as to require performance by government employees. The term includes judgments relating to monetary transactions and entitlements (Section 3(a)).

In summary, the guidance provided in UIPL Nos. 12-01 and 12-01, Change 1, remains in effect, with the exception of changes to the confidentiality provision as described in Section 5 of this UIPL. It is permissible for states to exercise flexibility in their staffing model to perform certain activities that both support the administration of the UC program and that are not inherently governmental in nature, and therefore not subject to a merit staffing system.

When states choose to exercise flexibility in their staffing model for appropriate activities, the state agency must provide to the contractor policies, procedures, directions, orders, and other guidance that identifies the specified ranges of acceptable conduct and subject any discretionary authority to final approval by merit-staffed employees (Section B.1.b. of Attachment A to OMB Circular No. A-76).

b. **Considerations when evaluating whether the state may use flexibility in determining the best staffing model for an activity.** With regard to processing claims for unemployment benefits or determining employer tax liabilities and whether the state may exercise flexibility in determining the best staffing model, the state must differentiate between an activity where a contractor accepts information and sends it to a merit-staffed employee for making decisions and an activity where the contractor makes the decision. The following activities are considered to be inherently governmental and must be merit staffed:

1. Advising a claimant regarding his or her eligibility for benefits based on his or her specific circumstances or advising an employer regarding his or her tax liability based on his or her specific circumstances;
2. Analysis of facts so as to actually make a determination of benefit eligibility or tax liability;
3. Actually making a determination of benefit eligibility or employer tax liability; and
4. Direct supervision of individuals carrying out the activities described in numbers 1 – 3.

Additionally, states are reminded of the requirements of federal law pertaining to protecting individual rights in state procedures to prevent or recover UC overpayments as described in UIPL No. 01-16, published October 1, 2015. Determinations of overpayments or fraud may not be made using automated systems; they must be made by merit-staffed employees.

As states consider where they might use flexibility in their staffing model, they are reminded of the specific parameters described in UIPL No. 12-01, including:

- Determinations must be based on the function, not the title of the position (Section 5.c.);
- Functions, even if commercial activities, may not be outsourced if doing so would create an employer-employee relationship between government and contract employees (Section 5.d.(1));

- Functions, even if commercial activities, may not be outsourced if they can be performed in a more cost effective manner by the government (Section 5.d.); and
- Contracting may not be used to circumvent personnel or salary ceilings (Section 5.d.(3)).

c. **Activities of UC administration for which states may use flexibility in determining the best staffing model.**

Section 5.b. of UIPL No. 12-01, along with UIPL No. 12-01, Change 1, previously advised states that it is permissible for state agencies to exercise flexibility in their staffing model for the following activities:

- Claims taking activities involving the rote acceptance of information. It is permissible to use flexibility in the staffing model for certain activities in the claims filing function where the contractor “merely receives information and refers all questions bearing upon eligibility” to a merit-staffed government employee. In such situations, the claims takers “do not exercise substantial discretion in providing advice” (Section 4 of UIPL No. 12-01, Change 1).
- Collecting delinquent contributions that have been determined to be uncollectible by the state agency. States may exercise flexibility in the staffing model for this activity because merit-staffed government employees have already made the determination on the amount owed and the propriety of the decision and the agency will have taken all the actions required by law to collect the contributions due.
- Use of commercial banks as depositories for clearing and benefit payment accounts. States may exercise flexibility in the staffing model for this activity, provided that the decisions concerning those accounts (e.g., the amount of money to be transferred or drawn down from the Unemployment Trust Fund) are made by merit-staffed government employees.
- Audits, to the extent that they involve only the investigation and verification of past actions taken by government employees or contractors. States may exercise flexibility in the staffing model for this activity, provided: (i) such audits do not involve the ultimate exercise of discretion in applying governmental authority; (ii) that doing so is not inconsistent with state and federal laws relating to procurement of services; and (iii) any eligibility issues discovered are forwarded to a merit-staffed government employee.
- Automated data processing activities that do not require the use of discretion in applying governmental authority, nor do they impact the decisions concerning whether or not an individual is eligible to receive UC.

State UC agencies have experienced significant changes to technology and UC program administration since publication of previous merit staffing guidance. Acknowledging these changes, we offer additional examples of activities for which states may exercise flexibility in their staffing model, depending upon the nature of how the activity is

performed in the state's administration of its UC law. This builds off previous guidance in UIPL Nos. 12-01 and 12-01, Change 1 and is not intended to be exhaustive.

- Notating answers to fact-finding questionnaires. Many state Information Technology (IT) systems provide for dynamic fact-finding questionnaires, wherein the response to one question will guide the system to ask a series of related follow-up questions. Some common examples of this include: (1) an individual who reports a discharge from their last employer and is then automatically asked for details regarding any previous related incidents or warnings; (2) an individual who previously reported a return to work date and then filed a weekly claim after the previously reported date so the system presents a series of questions to assess the situation; (3) an individual requests a payment plan to repay a previous benefit overpayment and is asked how much he or she is able to pay for the month; and (4) an employer registers as a limited liability corporation and is then automatically asked for details about how the employer files tax returns with the Internal Revenue Service.

For states that do not have this capability for dynamic questions as part of their IT system or, for states that do, when providing for an individual to file via an alternative method (e.g., over the phone or in-person), the agency may use a contractor to insure claim form completeness by asking the individual to respond to specific questions on the form and may enter the exact information provided by an individual's real-time responses to these questions on the form. Such a process is permissible in serving both individuals filing a claim for unemployment benefits and employers in registering an account with the state agency. Additionally, such a process is permissible whether it occurs through inbound or outbound phone calls. However, any questions from the individual or employer regarding advice of what information should be included on the form that are not general in nature must be referred to a merit-staffed employee.

For example, a contractor may ask and notate the responses for a series of questions, as provided by the state agency. A contractor may also refer the individual to informational publications of the UC agency when an individual asks questions about his or her specific circumstances. However, any discussion about an individual's specific circumstances that impact their eligibility for benefits must be referred to a merit-staffed employee.

- Data entry where no discretion is required to determine the information to be data entered. Some states continue to receive applications manually and require data entry for processing. States may exercise flexibility in their staffing model for data entry of the information provided by claimants on paper applications.
- Providing general program information and answering general program questions. This is discussed in Section 4.A of UIPL No. 14-18, issued August 20, 2018, in the context of providing meaningful assistance. Having meaningful assistance means "having staff that are well-trained in UI claims filing and claimant rights and responsibilities, available in American Job Centers. These staff members provide UI

claim-filing assistance, if requested or if the individual is identified as needing services due to barriers such as limited English proficiency, disabilities, or other barriers. The staff providing this assistance may be UI, Wagner-Peyser, or other American Job Center staff that have been properly trained to provide this type of assistance and service to assist in claims taking by facilitating routine acceptance of information.”

- Providing the status of an individual’s application or pending issue or an employer’s account. States experience a series of repeated questions from individuals, such as a general request to know the status of one’s claim, the reason for a payment delay due to a holiday, or the date by which an individual must respond to a request for information. Many states leverage their IT resources to provide general messaging on the customer service phone line or a claim status snapshot on the individual’s online account portal.

States may exercise flexibility in their staffing model as an interim solution while they modernize their UI IT system or as an alternative option when serving individuals with barriers to using technology. In this situation, flexibility is permissible because the contractor is providing information specific to an individual’s circumstances in accordance with directions from the state agency, though no advice is being provided.

- Routine data processing to update a claim or employer account. Many states offer individuals and employers with the opportunity to update an address, reset a password, or handle account access issues, and perform other activities online or through an automated phone system. States may exercise flexibility in their staffing model as an interim solution while they modernize their UI IT system or as an alternative for serving individuals with barriers to using technology. In this situation, flexibility is permissible because the contractor is processing information, in accordance with directions from the state agency, which does not involve an analysis of facts or determination regarding an individual’s eligibility or an employer’s tax liability.
- Routine data processing of instances of failure to report. There are certain circumstances under which an individual is asked to provide information or report by a specific date in order to properly assess eligibility for unemployment benefits. Examples include a state requesting verification of an individual’s identity or a state instructing an individual to report for a Reemployment Services and Eligibility Assessment (RESEA) appointment. If such an individual fails to report or respond to the request for information, provided state law allows, the state may deny benefits prospectively as of the date the individual failed to report or respond to the requested information.

While it is inappropriate for a state agency to exercise flexibility in its staffing model for the actual determination of eligibility or denial, it is permissible for a state to permit a contractor to enter a notation in the IT system or to complete a form

indicating whether the individual reported or responded as instructed. States may also use contractors to make outbound phone calls, in accordance with directions from the state agency, to follow up with an individual who failed to respond to an initial request for information to obtain information as to why this occurred and to inform the individual of the consequences for failing to respond.

- Computer programming and other activities associated with maintaining state UI IT systems. States may exercise flexibility in their staffing model for work to develop, maintain, and implement UI IT systems.

5. Confidentiality Provisions when Exercising Flexibility for the State’s Staffing Model.

Section 5.b. of UIPL No. 12-01 provides: “In all cases where outsourcing is contemplated, safeguards must be in place to ensure that any confidential data available to the contractor is not disclosed.” The guidance issued in this Change 2 supersedes this guidance previously provided regarding confidentiality provisions.

Section 303(a)(1), SSA, has long been interpreted to require states to have methods of administration in place to maintain the confidentiality of UC information. Federal regulations, set forth at 20 C.F.R. Part 603, regarding the confidentiality of UC information were promulgated on September 27, 2006. Specifically, 20 C.F.R. 603.6(a) provides that “[t]he confidentiality requirement of 303(a)(1), SSA, and §603.4 are not applicable to this paragraph (a) and the Department of Labor interprets Section 303(a)(1), SSA, as requiring disclosure of all information necessary for the proper administration of the UC program.”

Contractors that perform appropriate functions of UC administration are acting directly on behalf of the state agency. Therefore, contractors may have access to confidential UC information when it is necessary for the proper administration of the UC program and the other requirements of 20 C.F.R. Part 603 are met.

Contractors acting directly on behalf of the state agency are subject to the same requirements as state employees to maintain the confidentiality of the UC data. The contractor must enter into a written, enforceable, and terminable agreement with the state agency that, at a minimum, contains the following:

- A listing of all parties to the agreement;
- A description of the specific tasks the agent or contractor will perform on behalf of the agency;
- A statement that those who are granted access to confidential UC information under the agreement will be limited to those with a need to access it and only for purposes listed in the agreement;
- Provisions for safeguarding the information against unauthorized access or redisclosure, as described in 20 C.F.R. 603.9; and
- A requirement that a contractor performing services on behalf of the agency maintains a system sufficient to allow on-site inspections and provisions for on-site inspections of the contractor to assure that the requirements of state law and the agreement are being met, should the agency decide an inspection is necessary.

6. **Inquiries.** Please direct inquiries to the appropriate ETA Regional Office.

7. **References.**

- Consolidated Appropriations Act, 2021, including Division N, Title II, Subtitle A, Continued Assistance for Unemployed Workers Act of 2020;
- Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. 116-136), including Title II, Subtitle A Relief for Workers Affected by Coronavirus Act;
- Families First Coronavirus Response Act (Pub. L. 116-127), including Division D, Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA);
- Federal Activities Inventory Reform Act (FAIR Act), (Pub. L. 105-270);
- Intergovernmental Personnel Act of 1970 (Pub. L. 91-648);
- Section 303 of the Social Security Act (SSA) (42 U.S.C. § 503);
- 5 C.F.R. 900.603;
- 20 C.F.R. Part 603;
- 48 C.F.R. Chapter 1;
- Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*;
- Office of Management and Budget (OMB) Circular No. A-76 (Revised), *Performance of Commercial Activities*, <https://www.whitehouse.gov/omb/information-for-agencies/circulars/>;
- UIPL No. 12-01, *Outsourcing of Unemployment Compensation Administrative Functions*, issued December 28, 2000, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1736;
- UIPL No. 12-01, Change 1, *Outsourcing of Unemployment Compensation Administrative Functions – Claims Taking*, issued November 26, 2007, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2558;
- 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. 14-18, *Unemployment Insurance and the Workforce Innovation and Opportunity Act*, issued August 20, 2018, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4089;
- UIPL No. 14-20, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Summary of Key Unemployment Provisions and Guidance Regarding Temporary Emergency State Staffing Flexibility*, issued April 2, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3390 and
- UIPL No. 14-20, Change 1, *Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 – Questions and Answers*, issued August 12, 2020, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3791.

8. **Attachment(s).** None.