EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION UI
	CORRESPONDENCE SYMBOL OUI/DL
	DATE January 13, 2017

ADVISORY: **UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 01-16, Change 1**

TO: STATE WORKFORCE AGENCIES

FROM: PORTIA WU
Assistant Secretary

SUBJECT: Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers

1. **Purpose.** To respond to questions from state workforce agencies about prior guidance provided to state agencies regarding 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 (CMPPA) as amended, 5 USC 552a(o)-(r);
   - Employment Security Manual Sections 6010-6014, Standard for Claim Determination—Separation Information, 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*;
   - UIPL No. 19-11, *National Effort to Reduce Improper Payments in the Unemployment Insurance (UI) Program*;
   - UIPL No. 02-12, *Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)*; and
   - UIPL No. 01-16, *Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures.*

3. **Background.** On October 1, 2015, the U.S. Department of Labor (Department) issued UIPL No. 01-16 to remind state agencies of the requirements of Federal law pertaining to protecting individual rights in state proceedings to prevent or recover UC overpayments. Because the

RESCISSIONS	EXPIRATION DATE
None	Continuing

requirements articulated in the UIPL represented pre-existing interpretations of Federal law or updates to those interpretations, the guidance became effective upon issuance. However, the Department recognizes that some states may need to change their business processes to comply with Federal law as interpreted in UIPL No. 01-16. We expect that states will make a good faith effort and take immediate steps to make the necessary operational changes as soon as reasonably possible.

The Department held a webinar in December of 2015 and a conference call in February of 2016, to explain the requirements. Numerous questions regarding the scope and implementation of UIPL No. 01-16 arose from those discussions and subsequent state inquiries to the Department. This Change 1 to the guidance is being issued to inform all states of the questions received and the Department's answers to these questions.

4. **Action Requested.** State Administrators are requested to provide this guidance to the appropriate staff.

5. **Inquiries.** Inquiries should be directed to the appropriate Regional Office.

6. **Attachment**. Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers

Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers

I. Questions about claimant and employer notifications and responses

1. If the employer does not specify the amount of wages earned during each week in its response to a request for a claimant's employment and wage information, may the state estimate the weekly wage by prorating the wages among the weeks in the calendar quarter that the individual worked for the employer?

In general, if the state does not have sufficient information to correctly assign wages earned to a particular week, then the state may not prorate wages among weeks in a calendar quarter. However, under certain limited circumstances, wages may be prorated.

States must always make a reasonable attempt to get the weekly wage information from both the employer and the employee. If neither party responds and the state only has quarterly wage information, that is insufficient for purposes of determining whether there was an overpayment, and the amount of the overpayment, for the week(s) in question because the state does not know how much the individual earned during each week in the quarter.

If a party responds to the state agency and provides earnings during a pay period, though still not the weekly wage, prorating may be possible. The state must make an additional reasonable attempt to get the weekly wage information from both the employer and the employee. If neither party provides information about the weekly earnings, the state may prorate the earning among the weeks in the pay period as long as the pay period is no longer than one month. If the state knows when the individual started working for the employer, the state must factor that in when allocating the earnings among the weeks in the pay period. Whenever a state prorates weekly earnings, it must notify the claimant, provide the claimant an opportunity to rebut the information, and explain the consequences of having earnings during weeks for which the individual claimed UI benefits.

If the state obtains information showing that the individual earns an annual salary, the state may calculate the weekly salary based upon the annual salary if the state has information sufficient to determine whether the individual worked full-time or part-time during the week, and if the individual worked part-time, how many hours the individual worked. The state would also need to know when the individual started working in order to determine the first week during the calendar quarter that was potentially overpaid.

2. If an issue is detected involving an individual who was working while claiming benefits, is it sufficient if the state contacts <u>only</u> the employer before making an overpayment determination?

No. States must also contact the individual when conducting fact finding to determine whether an overpayment determination should be issued. As UIPL No. 01-16 explains, before an

overpayment may be established, "an individual must be given an opportunity to be heard, timely notice of the interview, and an opportunity to present evidence." Similarly, the CMPPA requires the agency to notify the individual of the issue and provide him/her the opportunity to contest it before a determination is made. This requirement applies to both Federal programs when cross-matching against a Federal database, and regular state UC programs pursuant to state agreements with the Department of Health and Human Services (HHS), for access to the National Directory of New Hires (NDNH).

3. If the employer responds with what appears to be sufficient information before the end of the period of time provided by statute or regulation for the parties to respond, may the state adjudicate the overpayment and/or the fraud if the individual has not yet responded?

No. The determination of overpayment and/or fraud may not be made before "both parties" have had an opportunity to be heard. (See *California Human Resources Dept. v. Java*, 402 U.S. 121 (1971).) Implicit in this requirement is that the parties are notified of any potential issue(s) and given a reasonable amount of time to respond. Thus, if the response period has not ended, the other party's (or parties') opportunity to respond has not expired, and the state may not make an official determination until either all parties have responded, or the response period has expired.

4. Sometimes, even after a state's best efforts, one of the parties may not receive actual notice (e.g., they move with no forwarding address, they fail to provide the agency with updated contact information, etc.). How is "giving notice" defined?

States must make reasonable attempts to notify the individual and other interested parties of an issue, and those attempts must be documented in the record, including when a state is not able to contact the individual. Reasonable attempts should include contacting the individual by e-mail or telephone if the state agency has this contact information. The state agency must also take reasonable steps to ensure the contact information it has is accurate, which may include notifying claimants at the time of filing of the initial claim that contact and address information must be updated if it changes during the benefit year. E-mail, phone, or other steps to confirm contact information may be necessary particularly if the overpayment is being investigated after the claimant's benefit year ended.

5. When pursuing recovery of overpayments via offsets, <u>must</u> the state wait until the notice of determination of overpayment has been <u>received</u> by the claimant, or wait until the determination is final, before initiating recovery efforts?

The answer is "no" in both circumstances. Unless prohibited by state law, the state may take action(s) to recover the overpayment once the determination has been issued to the claimant. States are permitted, but not required, to wait until the determination is final (i.e., all appeals have been exhausted or time to file an appeal has run out) before initiating recovery.

6. If there is a hit against a new hires directory, may the state stop payment if the state has sent the claimant a letter or notice asking for more information and the claimant provides no response?

Yes. The state may stop payment of benefits for failure to report (i.e., respond to a request for information) provided that the state advised the claimant of the consequences for failing to respond and provided adequate opportunity for the claimant to respond within a reasonable time pursuant to state law or regulation prior to stopping payment. The state must also issue a determination containing appeal rights. However, the state may not stop payment based on the underlying issue, recover any overpayments, or adjudicate the underlying issue raised by the "hit", until the hit has been independently verified, appropriate fact finding has occurred, and a determination has been made.

7. If the state has a hit from a cross-match conducted against the state's wage records, which were provided by an employer, does the state have to double-check with the employer (call them back)?

Yes. The state must contact the employer, or make reasonable attempts to contact the employer, to verify the information and weekly earnings before establishing an overpayment. In addition, the state must contact the claimant and provide an opportunity for the claimant to respond to the information before making a determination and establishing an overpayment.

8. UIPL No. 01-16 states, in relation to the NDNH, that pursuant to CMPPA, "the individual must be provided either 30 days or, if provided by statute or regulation, another period of time to respond to the issue." If the state statute says that the individual has seven (7) days to respond to a notification, would that supersede the 30-day requirement?

Yes. CMPPA provides that there is a 30-day notice requirement in cases where a program has not established a specific notice period. Therefore, if the state statute or regulations provides for a shorter notice period, that shorter period applies.

9. Under the CMPPA, must the state provide both the claimant and the employer 30 days to respond?

The CMPPA provision applies to notice to the claimant only. However, Federal UC law, while not specifying a number of days, still requires that the employer be provided a reasonable period of time to respond to a notice.

10. Is it true that reporting requirements may be used only to deny benefits, NOT to establish overpayments?

Yes. After the claimant has been provided an opportunity to respond, the state's reporting requirement may be used to stop payment of UC for failure to report or contact the agency for any week until such time that the individual reports or contacts the agency as directed. However, the failure to report is not sufficient to make a finding as to whether or not any prior weeks of benefits were improperly paid. The state is required to make a separate determination based on the facts to determine whether an overpayment has occurred. Once the state has notified all the necessary parties of the issue, and given them an opportunity to respond, the state may make an overpayment determination based on available information if sufficient. The state may establish an overpayment if there is sufficient information to support the determination.

11. If the agency discovers that the amount of UC benefits paid was miscalculated and overpaid due to an obvious agency error, does the agency have to provide notice before issuing the overpayment determination?

Claimants must be provided an opportunity to be heard regarding any issue(s) that affects their benefit rights, including the establishment of an overpayment on a claim that resulted from an agency error. There may be limited circumstances, however, when an obvious administrative error is made on a claim(s) and the state wants to take quick action to correct it; examples include errors that occur due to a computer programming issue such as duplicate wages on a monetary determination(s), or duplicate funds loaded on a claimant's debit card for the same week. Under such circumstances, the state may correct the error before notifying the claimant. However, the state must provide the claimant(s) with information regarding the error, and also advise the claimant of any overpayment waiver provisions that may apply and provide the opportunity to appeal the overpayment determination.

II. <u>Questions about automation</u>

1. Concerning the independent verification necessary from computer cross-matching, UIPL No. 1-16 says that "[s]tates may not make determinations of overpayments and/or fraud using automated systems without staff intervention." May non-fraud overpayment determinations be made without staff intervention if the claimant was notified, provided an opportunity to rebut, but did not respond?

Under certain limited circumstances, a non-fraud overpayment determination may be made without staff intervention. The state must make a reasonable attempt to contact the claimant, provide the claimant adequate notice of the issue, and attempt to obtain from the claimant all information needed. If the claimant fails to respond AND the state has sufficient information from the employer or other party to determine the existence and amount of the overpayment for a given week, the state may issue a non-fraud overpayment determination without further staff action.

2. Are there any circumstances under which the state may issue a fraud determination that is fully automated?

No. As stated in UIPL No. 01-16, because fraud determinations generally "require the state agency to make determinations of credibility and intent, determinations of fraud must be made by agency staff. Such fraud determinations may not be made by an automated system."

3. Will the Department determine whether specific products or services offered by vendors comply with the requirements of UIPL No. 01-16?

No. States must ensure that the services and products provided by vendors comply with all applicable Federal and state laws, regulations, and policies. Even when the Department provides funding to a state for a specific automation project, the state must ensure that the project meets all requirements. The Department will provide technical assistance to states as they work with

their vendors to validate that the approach complies with the requirements of UIPL No. 01-16. This does not preclude the Department from determining, as part of oversight of Federal grants, after vendor performance has begun or been completed, that the vendor's products or services do not meet Federal law requirements.

4. One state suggested there may be a conflict between UIPL No. 01-16 and UIPL No. 19-11 regarding stopping payments on NDNH hits. How do states instruct vendors when contracting for implementation of automated systems?

There is no conflicting guidance between these UIPLs. UIPL No. 19-11 does not address "stopping payments on NDNH hits." However, it does specify that:

> Cross-matching with State Directories of New Hires (SDNH) and National Directories of New Hires (NDNH), followed by immediate contact with the claimant when there is a match to let the claimant know there is a potential overpayment, is considered to be one of the most effective strategies for addressing this root cause.

This instruction is consistent with UIPL No. 01-16. States need to make immediate contact to obtain the necessary information to verify or rebut the information from the crossmatch. Any contract with vendors to design and implement automated systems must meet the requirements of UIPL No. 01-16 in this regard.

III. Questions about the Computer Matching and Privacy Protection Act requirements.

1. How is "independent verification" on page 5 of the UIPL defined?

States must verify a cross-match with information from a different source, such as the employer or the claimant. If verification by either one is sufficient to verify the cross-match hit, a determination on the underlying issue can be made if the other party does not respond as long as both the employer and claimant have been given a sufficient opportunity to respond. A cross-match hit alone is not sufficient to establish an overpayment and verification against another database is also not sufficient.

2. Under the CMPPA, which UC programs are "Federal benefit programs"?

"Federal benefit program" means any program administered or funded by the Federal government, or by any agent or state on behalf of the Federal government, providing cash or in-kind assistance in the form of payments, grants, loans or loan guarantees to individuals (page 5 of the Computer Matching Agreement). Federal UC programs to which these provisions apply were identified in UIPL No. 02-12. They are:

- UC for Federal civilian employees (5 USC 8501 *et seq.*);
- UC for ex-servicemembers (5 USC 8521*et seq.*);
- Trade readjustment allowances (19 USC 2291-2294);
- Disaster unemployment assistance (42 USC 5177(a));

• Any Federal temporary extension of UC;
• Any Federal program which increases the weekly amount of UC payable to individuals; and
• Any other Federal program providing for the payment of UC.

3. Why does the CMPPA apply to state regular UC programs when states match against the NDNH?

The NDNH is administered by HHS. HHS, under its own authority (Section 453(j)(8)(D), SSA) has mandated that state benefit programs accessing the NDNH comply with the CMPPA as a condition of such access. Before the state may match against the NDNH, it must, in accordance with the CMPPA, submit a signed Computer Matching Agreement (CMA), which will be provided to the state by HHS upon request. The CMA sets out the legal framework for the match. It also includes a Security Addendum, which specifies the physical, administrative, and technical security requirements. The CMPPA already applies to all Federal benefit programs, including Federal UC programs. Thus, states must agree to adhere to the CMPPA requirements when using the NDNH to identify state UC program overpayments when they sign the CMA.

IV. <u>Questions about timeliness</u>

1. Should an issue that is created by the claimant's self-disclosure prevent payment of future weeks of benefits, or should we continue to pay benefits even though the claimant has created the eligibility issue that could result in the improper payment of subsequent weeks of benefits?

As noted in UIPL No. 04-01, "sometimes the question of eligibility affects future weeks. In such circumstances, not issuing payment for these later weeks because of the earlier eligibility issue is acceptable until a timely determination is made. However, if a timely determination cannot be made, payments must continue to be paid based on the existing determination of eligibility that is in effect. However, when the question of eligibility does not affect later weeks, states must make payment for the later weeks without delay." As stated in UIPL No. 04-01, a determination is timely where it is issued by the end of the week following the week the issue is detected.

2. Based on UIPL No. 01-16, is it permissible to have a stop on the claim as long as the state releases the payment, or adjudicates the claim, by the end of the week following the week in which the possible issue is detected?

Yes. As stated in UIPL No. 01-16, the provisions of UIPL No. 04-01 still apply in this situation.

3. What is meant by the requirement that the state issue a decision no later than the end of the week following the week the issue is detected? Must a payment be issued within 7 to 10 days? Can an example be provided?

If a determination of ineligibility has not yet been made, a benefit <u>payment</u> must be made by the end of the week following the week in which an issue is detected. In practice, that means that states would have at most 7-10 days to make a determination of ineligibility in order to <u>not</u> issue the benefit payment. For example, if an issue is detected via cross-match with the NDNH on a

Tuesday during week five of the claim, the state must either make a determination or make a payment by the end of the following week, in this case on Friday of week six, which is 10 days later. Absent a determination of ineligibility during a continued claim series, there is a presumption of continued eligibility and benefit payments must be issued timely.

V. Questions about offsetting benefits and waivers.

1. May states offset benefits prior to the appeal period ending?

Yes. Unless prohibited by state law, states may offset benefits prior to the appeal period ending if all of the proper procedures have been followed including notifying the individual, providing him/her with an opportunity to contest, and issuing an overpayment determination. However, states are not required to offset at that time and may instead wait to begin recovery until the overpayment is final, i.e., the appeal period for the overpayment determination ends, or if an appeal is filed, until the appeal decision is issued.

2. In our state, there is no limit to the period of time during which an individual may request a waiver of recovery. An individual may request a waiver anytime until the debt is recovered or determined to be unrecoverable. UIPL No. 01-16 provides that "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." Does this mean that we can never initiate recovery of the overpayment?

No. For purposes of complying with the requirements of UIPL No. 01-16 concerning recovery of overpayments, in states whose laws permit individuals to request a waiver of recovery at any time under certain circumstances, the state may commence recovery of overpayments after the period of time during which an individual may file a timely appeal of the overpayment ends and the overpayment becomes final under state law. Thus, if an individual did not file a timely appeal of the overpayment, the state may commence recovery after the period for filing a timely appeal ends. If an individual filed a timely appeal, the state would need to wait to initiate recovery until an appeal decision is made affirming the overpayment determination, and the appeal decision becomes final.