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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

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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.