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**ADVISORY:** UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 02-12

**TO:** STATE WORKFORCE AGENCIES

**FROM:** JANE OATES /s/  
Assistant Secretary

**SUBJECT:** Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)

**1. Purpose.** To advise states of the statutory amendments related to UC program integrity included in the TAAEA (Public Law (Pub. L.) 112-40), enacted on October 21, 2011.

**2. References.**

- TAAEA (Pub. L. 112-40);
- Sections 303 and 453A of the Social Security Act (SSA) (42 U.S.C. 503 and 653a);
- Sections 3303, 3304, and 3309 of the Federal Unemployment Tax Act (FUTA);
- Unemployment Insurance Program Letter (UIPL) No. 21-80, *Secretary's Decision on Attribution of Benefit Liability to Reimbursing Employers in Proceedings as to Delaware, New Jersey, and New York*;
- UIPL No. 45-89, *Permissible Deductions from Payments of Unemployment Compensation*; and
- UIPL No. 04-01, *Payment of Compensation and Timeliness of Determinations during a Continued Claims Series*.

**3. Background.** To help maintain the integrity of the UC program, the U.S. Department of Labor (Department) and state agencies that administer the UC program have made the prevention of improper payments a high priority. While the Department has been working aggressively with states to develop and implement strategies to improve UC program integrity, additional statutory authority was needed to provide states with better tools and additional resources to combat improper payments. For this reason, the Department transmitted to Congress the Unemployment Compensation Integrity Act of 2011 (Integrity Act), consistent with the proposals in President Obama's Fiscal Year 2012 Budget. The TAAEA includes three provisions that are similar to provisions in the Integrity Act provisions. Specifically, the TAAEA:

<b>RESCISSIONS</b> None	<b>EXPIRATION DATE</b> CONTINUING
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- Requires states to impose a monetary penalty on claimants whose fraudulent acts resulted in overpayments;
- Prohibits states from providing relief from charges to an employer's UC account when the actions of an employer or an agent of an employer have led to an improper payment; and
- Adds a definition of a newly hired employee to include an individual who:
  - Has not previously been employed by the employer; or
  - Was previously employed by the employer but has been separated from the employer for at least 60 consecutive days [new requirement].

**4. Mandatory Penalty Assessment on Fraud Claims.** The TAAEA requires states to assess a penalty on claimants committing fraud in connection with state or Federal UC programs. Section 251(a) of the TAAEA amends section 303(a), SSA, by adding a new paragraph (11). As a condition of receiving a Federal grant to administer its UC law, a state that has determined that an improper payment from its unemployment fund was made to an individual due to fraud committed by such individual must assess a monetary penalty of not less than 15 percent of the amount of the erroneous payment against that individual. The 15 percent penalty amount is the minimum amount required; states may impose a greater penalty.

**A. Requirements:** Section 303(a)(11), SSA, further requires that the state immediately deposit receipts of the Federally-mandated penalty amounts into the unemployment fund of the state. As with other amounts in a state's unemployment fund, use of these penalty funds is limited to the payment of UC, except as provided by sections 303(a)(5), SSA, and 3304(a)(4), FUTA. This penalty applies to benefits paid out of a state's unemployment fund, namely:

- Regular state UC;
- Extended benefits;
- Additional benefits; or,
- Any other state program providing for payment of UC.

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. This means that the state must apply the same penalty to any Federal UC program fraud overpayment. The TAAEA identifies seven types of Federal UC programs to which these penalties apply:

- 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.

Notices advising claimants of these overpayments must include, along with the claimant's appeal rights, the penalty amount and an explanation of the reason for the overpayment and the reason the penalty has been applied.

When a recovery with respect to a fraudulent overpayment is made, the state is encouraged to apply any recovery to the principal amount of the overpayment first, to the Federally-mandated penalty amount second and finally to any other amounts due (e.g., additional penalties and/or interest). However, the order of the recovery is determined by state law. Section 3304(a)(3), FUTA, and sections 303(a)(5) and (11)(B), SSA, require that any recoveries applicable to the overpayment or the Federally-mandated penalty amount be immediately deposited into the state's unemployment fund.

If states wish to impose an additional penalty amount for a fraudulent overpayment in excess of the Federally-mandated penalty, the additional penalty does not need to be established in state law as a separate penalty. However, if a state has one penalty, its law must clearly identify each component designating how much is to be deposited into the state's unemployment fund (minimum 15 percent of the amount of the overpayment) and how much is to be deposited in another fund. Uses of any additional penalty amounts are at the discretion of the state.

States are reminded that offsets of future UC payments to recover overpayments are limited to the recovery of the overpayment amount itself in accordance with Federal and/or state law. Offsets may not be used to recover any interest or penalties due under Federal or state law (See UIPL 45-89, paragraph 5.a.).

**B. Reporting Requirement:** Amounts collected for the Federally-mandated penalty should be reported on line 12 of the ETA 2112, *UI Financial Transaction Summary* (Office of Management and Budget No. 1205-0154). See Handbook 401, Section II-1, for instructions on the reporting of penalty and interest amounts.

**C. Effective Date:** The penalties required under section 303(a)(11), SSA, as amended by the TAAEA, are mandatory for any fraudulent payments established after the end of the two-year period that begins on the date of enactment. That is, a penalty of at least 15 percent must be assessed on any fraudulent overpayment established *after* October 21, 2013. However, states may opt to apply the penalty to fraudulent payments established earlier than this date.

**5. Prohibition on Noncharging Due to Employer Fault.** Section 3303(a)(1), FUTA, governs the conditions under which a state may reduce employers' rates of contributions to its unemployment fund. Many states relieve an employer's unemployment account of charges (e.g., benefits or benefit wages) that the state has determined were made improperly. Section 252(a) of the TAAEA adds a new subsection (f) to section 3303, FUTA, to provide that, for a state law to meet the requirements of section 3303(a)(1), FUTA, the state must not relieve an employer of charges (noncharging) when the employer, or an agent of the employer, does both of the following:

- “was at fault for failing to respond timely or adequately to the request of the [state] agency for information relating to [a] claim” for UC benefits that was subsequently overpaid; and
- “has established a pattern of failing to respond timely or adequately” to requests from the state agency for information relating to claims for UC benefits.

This prohibition applies if the employer has a pattern of failing to respond timely, failing to respond adequately, or failing to respond both timely and adequately. Section 3303(f)(2), FUTA, permits states to impose stricter standards limiting the relief from charges, such as, but not limited to, denying relief from charges to an employer after the first instance of a failure by an employer or an employer’s agent to respond timely or adequately to requests for information. Thus, states have some latitude in implementing the new requirement, including whether a pattern of behavior is required and, if so, the determination of the definition of a pattern of failure to respond timely or adequately to requests for information. A pattern of failure to respond timely or adequately means two (at a minimum) or more instances of such behavior by the employer or an agent of the employer.

- A. Requests for Information:** As mentioned above, the timeliness and adequacy of responses from the employer or agent must be based on an initial written request (including electronic requests) for information relating to a claim for UC. States will also apply the prohibition of noncharging provision to any other requests for information required for the establishment of a claim for UC (i.e., wage information, weeks worked, etc.) in addition to separation information, if the employer is potentially chargeable for the overpaid benefits in question.
- B. Timely Responses:** Each state establishes its own deadlines by which responses to requests for information must be received in order for the state to make timely determinations and payments. States should use their own requirements concerning timely responses when determining whether an employer or agent’s response is not timely for purposes of the prohibition on relief from charging.
- C. Adequate Responses:** In determining the adequacy of responses to requests for information, states must determine whether the employer’s or agent’s response provides sufficient facts to enable them to make the correct determination under its law. A lack of receipt of a response would certainly result in the state not having adequate information; failure to respond would also constitute an inadequate response. However, a response may not be considered inadequate if the state agency failed to ask for all necessary information.
- D. Agents of Employers:** If an employer uses a third party agent to respond on its behalf to the state agency, then the actions of the agent will be considered when determining a pattern of behavior. A pattern is established based on the pattern of the agent’s behavior overall and not only with respect to its behavior related to each individual client/employer.
- E. Duration of Prohibition on Relief from Charges:** UIPL No. 04-01 explains that since an individual in a continued claims series has been determined to be eligible for UC, UC

payments may not be suspended until there has been a determination that the individual is no longer eligible for UC. Thus, until the issue has been adjudicated or an appeals decision has been made, UC payments must continue to be made, even if those payments ultimately are determined to have been overpayments. As such, once a state determines that an employer account will not be relieved from charges because of the employer's or its agent's failure to respond timely or adequately to information requests, this prohibition will apply to each week of UC that is an overpayment until the state agency makes a determination that the individual is no longer eligible for UC and stops making UC payments. If the individual again becomes eligible for UC during a subsequent spell of unemployment, the state may provide the employer relief from charges consistent with the provisions of the state's UC law.

- F. Reimbursing Employers:** Section 3303(f), FUTA, as added by the TAAEA, modifies section 3303(a)(1), FUTA, relating to the conditions under which a taxpayer (employer) may receive a specified credit against the FUTA tax. Section 3303(f) does not apply to state and local governmental entities, Indian tribes, and certain nonprofit organizations, since they are excluded from the FUTA tax.

Rather, the liability of these entities for the costs of unemployment benefits are governed by section 3309(a)(2), FUTA, which provides that they may elect to pay into "the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to" services in the employ of such an employer. In a 1979 conformity opinion, the Secretary of Labor held that whether benefits paid are attributable to service in the employ of a reimbursing employer is determined under the provisions of a state law "which reasonably interpret and implement Section 3309(a)(2) of FUTA." (See UIPL No. 21-80) The Secretary concluded that it was a reasonable interpretation that erroneously paid benefits were not "attributable" to service in the employ of an employer.

It is the Department's position that it is unreasonable to not "attribute" service in the employ of an employer when the overpayment falls within the terms of section 3303(f)(1)(A) and (B), FUTA; that is, the erroneous payment was made because of the employer's or agent's fault and the employer or agent has established a pattern of fault. When the employer or agent is at fault as part of a pattern of such fault, any rationale determining that the services are not attributable to the employer no longer exists since the employer is responsible for the erroneous benefits. Thus, the Department interprets 3309(a)(2), FUTA, as prohibiting states from relieving employers from reimbursement under the same conditions that apply to contributing employers under section 3303(f)(1)(A) and (B), FUTA. However, if the state chooses to impose the stricter standard in 3303(f)(2), FUTA, to taxpayers liable for the FUTA tax, the Department encourages states to impose the same stricter standard to reimbursing employers. The Department will issue additional guidance on reimbursable employers reflecting this interpretation.

- G. Combined-Wage Claims:** Determinations of noncharging for a combined-wage claim will be made by the paying state, since the paying state has the necessary information to make the determination of a timely or adequate response from the employer in the transferring state. If the response from the employer does not meet the criteria

established by the paying state for an adequate or timely response, the paying state must promptly notify the transferring state of its determination and the employer must be appropriately charged.

- H. Good Cause:** Many state laws provide for good cause for failure to follow certain administrative requirements (e.g., good cause for filing an appeal late). While states may provide for good cause for failure to respond timely or adequately to information requests, in order for the prohibited relief from charging to have practical effect, such good cause must be extremely limited (e.g., agency error resulted in the notice being sent to the wrong address or a disaster made it impossible for an employer to respond timely). Otherwise, the costs of these overpayments will be borne by all employers in the state.
- I. Effective Date:** Under Section 252(b)(1) of the TAAEA, the requirements of section 3303(f), FUTA, “apply to erroneous payments established after the end of the two-year period beginning on the date of the enactment of this Act [October 21, 2013].” That means that if an erroneous payment is made because an employer or its agent was at fault for failing to respond timely or adequately to an agency request, and the state determines that the employer or agent has established a pattern of such failure (or at the first instance if the state elects a stricter standard), the employer will not be entitled to relief from charges that result from the erroneous overpayment if the overpayment is established *after* October 21, 2013. However, section 252(b)(2) of the TAAEA, permits a state to opt to prohibit relief from charging based on such erroneous payments established before this date.

**6. Reporting of Rehired Employees to the Directory of New Hires.** Section 253(a) of the TAAEA adds a new section 453A(a)(2)(C), SSA, expanding the scope of individuals reported to the state directory of new hires by specifically defining a “newly hired employee” as an employee who “has not previously been employed by the employer,” or “was previously employed by the employer but has been separated from such prior employment for at least 60 consecutive days.” Newly hired employees meeting either of these terms must be reported to the state directories of new hires.

- A. Overpayment Prevention:** Adding to the definition of “newly hired employee” that includes a rehired employee who was separated for at least 60 days, will enhance state’s ability to detect and prevent overpayments when states conduct cross-matches with their state directory of new hires.
- B. Effective Date:** Under section 253(b) of the TAAEA, the new definition is effective six months following the date of the enactment, April 21, 2012. However, if the Department of Health and Human Services (HHS) determines the state must amend its law in order for the State Plan for Child and Spousal Support required by the SSA to meet the requirements imposed by this new definition, the statute establishes a transition period within which the state may meet these requirements. The state will not be deemed to have failed to meet these requirements until the first day of the second calendar quarter that follows the close of the first regular session of the state legislature that begins after the effective date of the amendment. If the state has a two-year legislative session, each year of the session is deemed to be a separate regular session. HHS will be providing

guidance to those states requiring a statutory change to implement these new requirements.

**7. Action Requested.** State Administrators are requested to provide this information to appropriate staff. States are requested to submit to the appropriate Regional Office a copy of any state law, regulation, or policy enacted or implemented to meet the requirements of the statutory changes related to UC program integrity.

**8. Inquiries.** Questions should be directed to the appropriate Regional Office.

**9. Attachment.** Trade Adjustment Assistance Extension Act of 2011, Subtitle C – Offsets, Part I – Unemployment Compensation Program Integrity