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Change 1

TO: STATE WORKFORCE AGENCIES

FROM: JANE OATES *June only*
Assistant Secretary

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

1. Purpose. To respond to questions from state workforce agencies about the UC program integrity provisions of the TAAEA.

2. References.

- TAAEA (Pub. L. 112-40);
- Sections 303 and 453A of the Social Security Act (SSA) (42 U.S.C. 503 and 42 U.S.C. 653A);
- Sections 3303, 3304, and 3309 of the Federal Unemployment Tax Act (FUTA) (26 U.S.C. 3303, 3304, and 3309);
- Unemployment Insurance Program Letter (UIPL) No. 26-85, *Interest on Overpayment of Federal Claims*; and
- UIPL No. 02-12, *Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)*.

3. Background. TAAEA amended sections 303 and 453A of the SSA and sections 3303, 3304, and 3309 of FUTA to:

- a. Require states to impose a monetary penalty (an amount not less than 15 percent of the erroneous payment) on claimants whose fraudulent acts resulted in overpayments;
- b. Prohibit states from providing relief from charges to an employer's UC account when a UC overpayment results from an employer (or an employer's agent) failing to respond timely or adequately to a request for information by the state agency (i.e., employer or agent at fault), and, at minimum, the employer (or its agent) has established a pattern of failing to respond to such requests; and

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- c. Expand the scope of employees that employers report to a state directory of new hires as “newly hired employees,” to also include individuals who were previously employed by the employer but who have been separated from the employer for at least 60 consecutive days.

The first two changes may require states to amend their state UC law with respect to penalty assessments on fraud overpayments and noncharging provisions for employers. State provisions implementing these two Federal amendments must apply to overpayments established after October 21, 2013. The Federal amendment on newly hired employees became effective April 21, 2012, unless the U.S. Department of Health and Human Services (HHS), which is responsible for the “new hires” data, determined that the state must amend its state law to meet the new reporting requirement. In that case, the state has until the first day of the second calendar quarter that follows the close of the first regular session of the state legislature beginning after October 21, 2011, to amend its UC law. If the state has a 2-year legislative session, each year of the session is considered a separate session. HHS will be issuing guidance on this requirement.

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

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

6. Attachment. Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011—Questions and Answers.

**Unemployment Compensation (UC) Program Integrity
Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)
Questions and Answers**

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**Unemployment Compensation (UC) Program Integrity
Amendments made by the Trade Adjustment Assistance Extension Act of 2011
Questions and Answers**

A. Mandatory Penalty Assessment on Fraud Claims/Overpayments

1. Appeals

Question: May an individual appeal the mandatory “penalty” on fraud overpayments?

Answer: Yes. While an individual may appeal a penalty assessment, the percentage of the penalty is not an issue on which an appellate authority has any discretion since it is set by Federal law. The individual may, however, raise an issue concerning whether the amount on which the penalty is assessed was correct. Under all state UC laws, individuals may also appeal an overpayment determination, and whether or not it constituted fraud. If the decision changes the overpayment determination from fraud to non-fraud, the mandatory Federal penalty would not be applicable. This requirement applies to any fraud overpayment determination made after October 21, 2013, or earlier if the state enacts legislation with an earlier effective date, as one of the conditions for the state to continue to receive UC administrative grants.

2. Federal UC Programs

Question: Does the requirement that states immediately deposit receipts of the Federally-mandated penalties on fraud overpayments into the unemployment fund of the state apply to the Federal UC programs (i.e., Disaster Unemployment Assistance (DUA); Trade Readjustment Allowances (TRA); UC for Federal Employees (UCFE); UC for Ex-Servicemembers (UCX); Federal Additional Compensation (FAC); and Emergency Unemployment Compensation (EUC))?

Answer: Yes. Although the repayment of the amount of the actual overpayment must be made to the fund from which the payment was made, the penalty mandated under TAAEA must be deposited into the state’s account in the Unemployment Trust Fund (UTF) and used for the payment of UC. This is because section 251(b)(1) of the TAAEA requires that the state must “deposit any such penalty received in the same manner as the State ... deposits such penalties under the provisions of State law implementing section 303(a)(11)” of the Social Security Act (SSA).

3. Reporting for Federal UC Programs

Question: Are states required to report the penalty amount on a fraud overpayment for Federal UC claims on the Employment and Training Administration (ETA) 2112, *Unemployment Insurance (UI) Financial Transaction Summary*?

Answer: Yes. States must report any recovered penalty amounts deposited into the state’s account in the UTF on line 12 of the ETA 2112 report (OMB No. 1205-0154). Instructions for the completion of the ETA 2112 report are contained in UI Reports Handbook No. 401, Section II-1-1.

4. Overpayment Waivers

Question: May the state waive the Federally-mandated penalty?

Answer: No. Section 303(a)(11) of SSA has no provision allowing for a waiver of this penalty. However, if the state has a fraud penalty in its statute greater than the 15 percent Federally-mandated penalty, any amount above the 15 percent may be waived in accordance with the state UC law.

B. Prohibition on Noncharging Due to Employer Fault

1. Combined Wage Claims (CWC)

- a. **Question:** When an out-of-state employer on a CWC is determined to be at fault for failing to respond timely or adequately to a request for information about a claim, how will the paying state notify the transferring state that this (out-of-state) employer must be charged?

Answer: The paying state must transmit a copy of the employer's charge notice to the transferring state or include notification of the charges in the comments section of the IB-6, Statement of Benefits Paid to Combined-Wage Claimants, sent to the transferring state. We are also exploring other options to facilitate this needed exchange of information between states.

- b. **Question:** What if the separating employer is an out-of-state employer with no base period wages to transfer on a CWC (i.e., the wages are outside of the base period of the CWC), and this employer, or the employer's agent, is determined to be at fault for failing to respond timely or adequately to the agency's request for information relating to a claim?

Answer: The noncharging prohibition applies only when an employer is potentially chargeable. In the example cited above, there would be no charging of benefit payments because the employer is not subject to the paying state's law and is not chargeable under the transferring state's law. If feasible, such employer's account may be "flagged" in the event a later claim for UC is filed and the wages from this separating employer are used in establishing a new claim.

2. Employer Notification of Charges

Question: What type of notification must states provide to the employer when the state determines that the employer, or the employer's agent, was at fault for failing to respond timely or adequately to a request for information relating to a claim, which caused an overpayment?

Answer: A state must follow its own law concerning notification of charges to an employer, or its agent. This notice must provide identifying claimant information such as the claimant name, social security number, and the reason(s) for the determination.

3. Employer Appeals

- a. **Question:** In the case of a CWC, if an out-of-state employer from the transferring state (i.e., the state that transfers wages to the paying state) files an appeal about charges from a CWC, which state (the paying state or the transferring state) is responsible for conducting the appeals hearing?

Answer: The employer may appeal the chargeability of the overpaid benefits and the appeal would be heard by the paying state, since the paying state is using the wages and has responsibility under its law to charge or non-charge the employer's account for the CWC.

- b. **Question:** May an employer appeal the state's determination that the employer (or its agent) is at fault for failing to respond timely or adequately to the agency's request for information relating to a claim?

Answer: Yes. The employer may appeal the determination by the state that the employer was at fault for "failing to respond... timely and adequately...." However, the remedy, that is, the prohibition on noncharging, is not an issue on which an appellate authority has any discretion since it is set by Federal law. This requirement relates to any overpayment determination made after October 21, 2013, or earlier if the state enacts legislation with an earlier effective date, as one of the conditions for the state to continue to receive administrative grants.

4. Reimbursing Employers

- a. **Question:** If a reimbursing employer has been determined to be at fault for failing to respond timely or adequately to a request for information resulting in an overpayment (and this fault was part of a pattern) but the state later recovers the overpayment, may the state apply a credit to the reimbursing employer?

Answer: No, if a pattern has been established the state may not apply a credit to the reimbursing employer.

As with contributory employers, the reimbursing employer may appeal the state's determination that the employer was at fault. If the appellate authority upholds the determination, the appellate authority is required under Federal law to deny the credit to the reimbursing employer. This requirement applies to any overpayment determination made after October 21, 2013, or earlier if the state enacts legislation with an earlier effective date, as one of the conditions for the state to continue to receive administrative grants.

- b. **Question:** Are section 501(c)(3) non-profit organizations, governmental agencies, or Indian Tribes that elect to be contributory employers instead of reimbursing employers treated any differently than for-profit employers determined to be at fault for failing to respond timely or adequately to information requests by the agency (resulting in a UC overpayment)?

Answer: No. Employers that "elect" to be treated as contributory employers must be treated the same as all other employers for this purpose, because all employers must be rated over the same time period using the same factor(s) (including noncharging) which bear a direct relation to the employers' experience with unemployment.

5. **Pattern of Failing to Respond Timely and Adequately to Requests for Information**

Question: If a state decides to adopt a standard that includes a “pattern” of failing to respond timely and adequately to information requests, what period of time does the state need to evaluate?

Answer: Each state must develop its own definition of what it means to establish a pattern of failing to respond timely and adequately to requests for information including the period of time involved.

6. **Employer Agents**

Question: Is the state’s evaluation of an employer’s agent failing to respond timely or adequately to the agency’s requests related to the agent’s overall pattern for all of its client employers or related to each individual client employer the agent represents?

Answer: A state may evaluate the agent’s overall pattern, or at its option, the agent’s pattern related to each individual client employer that it represents. NOTE: The Department has modified its initial interpretation provided in section 5.D of UIPL No. 02-12. Because the statute does not explicitly require charging of benefits if the agent has a pattern overall and a particular client employer does not have a pattern, we have changed our interpretation to permit states maximum flexibility.

7. **Monetary Determinations**

Question: The state agency uses an affidavit of earnings/wages submitted by the claimant when the employer does not file a timely contribution report or fails to report the claimant on the contribution report. If it is later determined that the affidavit of wages was incorrect, causing an overpayment, would the prohibition on noncharging be applicable?

Answer: The employer’s failure to file a timely contribution report or to include a claimant on a timely filed contribution report, by itself, is not subject to the prohibition on noncharging. However, if, for example, because of a contribution report delinquency, the state agency requests information from an employer (or the employer’s agent) and the employer or agent fails to respond timely or adequately to that request, the prohibition on noncharging may apply depending on whether the state law requires a pattern of such failure and whether such pattern has been established.

C. Reporting of Rehired Employees to the Directory of New Hires

1. **Question:** Why will the Department of Health and Human Services (HHS), as opposed to the Department, provide guidance to those states that may need state statutory changes to address the expanded scope of individuals reported to the State Directory of New Hires?

Answer: The statute makes HHS responsible for determining if statutory changes are required in the state.

2. **Question:** Are states permitted to establish a penalty for an employer that fails to report properly or timely to the Directory of New Hires?

Answer: Yes. Section 453A(d) of the SSA (42 U.S.C. 653A(d)) allows states to impose the following penalties for an employer failing to properly or timely report new hires. See below:

(d) Civil money penalties on noncomplying employers—

The State shall have the option to set a State civil money penalty which shall not exceed -

- (1) \$25 per failure to meet the requirements of this section with respect to a newly hired employee; or
- (2) \$500 if, under State law, the failure is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report.

D. Consequences for Failure to Implement the Program Integrity Changes

1. **Question:** What are the consequences if a state fails to implement the mandatory penalty for fraud overpayments?

Answer: A state's failure to implement the penalty would be grounds for initiating conformity proceedings to deny certifying the state for grants for the administration of the state UC law until such time as the law conformed to the requirements of Section 303(a)(11), SSA.

2. **Question:** What are the consequences if a state fails to provide that an employer's account will not be relieved of charges relating to a payment from the state unemployment fund as required by Section 3303(f)(1), FUTA?

Answer: A state's failure to prohibit relief from charging would be grounds for initiating proceedings to withhold the certification that permits all contributing employers to take the "additional" credit provided for in Section 3302(b), FUTA. The withholding of certification would remain until such time that the state passes legislation conforming with Section 3303(f), FUTA.