VERMONT
DEPARTMENT OF LABOR

U.I. Bulletin 552
June 24, 2022

SUBJECT: Overpayment Waivers for CARES Act Programs

PURPOSE

To provide instructions and outline the circumstances where it is permissible for staff to waive an overpayment of benefits received under one of the Unemployment Insurance (UI) programs established through the federal CARES Act.

This bulletin applies to federal CARES Act overpayments alone and not to regular UI benefits (except for the first week of regular UI as identified below). Staff should approach all regular UI overpayments and waivers in alignment with current Department procedures and expectations.

BACKGROUND

Regular UI benefits are paid using employer contributions collected and deposited into the State's UI trust fund. These benefits are considered State dollars when determining overpayment recovery and waiver.

CARES Act programs are federal programs funded through federal congressional appropriations and, therefore, must meet federal program requirements when establishing an overpayment and determining whether the overpayment may be waived.

On May 5, 2021, the United States Department of Labor (USDOL) issued guidance to states for waiving recovery of overpayments for CARES Act Programs. See UIPL 20-21. USDOL issued additional instructions on February 7, 2022, clarifying the provisions related to overpayment waivers and required collections activities for CARES Act programs. See UIPL 20-21, Change 1.

CARES Act Programs include the following: PUA, FPUC, MEUC, PEUC, and the first week of regular UI that is reimbursed in accordance with Section 2105 of the CARES Act.[1]

[1] Under the CARES Act, Congress authorized reimbursement to states for the first week of regular benefits paid to UI claimants. Because these funds were reimbursed to states using federal dollars, any first week of regular UI benefits would be considered as part of the federal CARES Act and would need to comply with this guidance for overpayment establishment and waiver.

The Department is issuing this guidance to ensure that staff are following a comprehensive and consistent process when establishing and waiving CARES Act overpayments.

As a reminder:

- PUA = Pandemic Unemployment Assistance
- FPUC = Federal Pandemic Unemployment Compensation
- PEUC = Pandemic Emergency Unemployment Compensation
- MEUC = Mixed Earners Unemployment Compensation

GUIDANCE

What is an Overpayment

The term "improper payment" refers to both an overpayment and an underpayment of unemployment insurance benefits. An overpayment occurs, and must be established, when it is determined that an individual received payment to which they were not entitled.[2]

As required by Department policy and federal guidance, an overpayment must be established when it is determined that the individual was not eligible for the underlying benefit.

Waiver of CARES Act Overpayments

Under UIPLs 20-21 and 20-21, Change 1, for PUA, FPUC, MEUC, PEUC, and the first week of regular UI that is reimbursed in accordance with Section 2105 of the CARES Act, a state may only waive repayment of an overpayment if the state determines that:

1) the payment of such compensation was without fault on the part of any such individual; and
2) such repayment would be contrary to equity and good conscience.

In order to waive an overpayment, staff must find that the two criteria above are met. It is not enough that the claimant be without fault. There **must** be a finding that repayment of such amount would **also** be contrary to equity and good conscience. This must be documented in the overpayment case file as described below.

[2] See UIPL 20-21, Change 1 page 6.

How to Determine Fault

As identified above, in order to waive an overpayment for a CARES Act program, staff must first make a finding that the claimant is not at fault for the overpayment. According to UIPL 20-21, Change 1, "When establishing an overpayment, the state must determine who is at fault for the overpayment (i.e., individual, employer, state, or a combination thereof) and whether the overpayment is the result of claimant fraud; not all overpayments are fraudulent. If an overpayment is the result of claimant fraud[3], states may not waive recovery activities for the overpayment."[4]

If the claimant is at fault for the overpayment, or if the overpayment is the result of claimant fraud, staff **may not** waive the overpayment.

The Department does not have a formal definition of "without fault." However, "generally, an individual is considered to be without fault when the individual provided all information correctly as requested by the state, but the state failed to take appropriate action with that information or took delayed action when determining eligibility."[5]

A claimant may also be without fault when the individual provided incorrect information "due to conflicting, changing, or confusing information or instructions from the state; the individual was unable to reach the state despite their best efforts to inquire or clarify what information the individual needed to provide; or other similar difficulties (e.g., education, literacy, and/or language barriers) in understanding what information the state needed from the individual to properly determine eligibility for the CARES Act UC programs."[6] Claimants who do not speak English as their first language or cannot read often do not understand instructions when provided, which could mean they are not at fault in causing the overpayment.

Staff should make case-by-case, fact-specific determinations when examining fault v. non-fault. Staff may rely on verbal or written statements from individuals in making these determinations and should examine the relevant aspects of the claim for corroborating evidence, such as the information provided by the claimant and the notes associated with the underling claim.

"Not all non-fraud overpayments are without fault on the part of the individual."[7] Similarly, not all at-fault overpayments are fraudulent.

REMINDER:

- Claimant must be without fault to waive an overpayment.

[3] Fraud is defined as an intentional misrepresentation or failure to disclose a material fact with respect to a claim for benefits.
[4] See UIPL 20-21, Change 1 page 7.
[5] Id., page 9.
[6] Id., page 10.
[7] Id.

- Overpayments where a claimant is at fault, including fraud overpayments, cannot be waived.

What is Contrary to Equity and Good Conscience

If the staff member has found that the overpayment was without fault on the part of the claimant, staff **may** waive the overpayment if there is a further finding that repayment would be contrary to equity and good conscience.

Because Vermont law does not define the term "equity and good conscience" in relation to the UI program, USDOL guidance requires the state to utilize the following provisions in determining what circumstances would qualify as contrary to equity and good conscience:

1) The overpayment would cause financial hardship to the person for whom it is sought; OR
2) The recipient of the overpayment can show (regardless of their financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment either they have relinquished a valuable right or changed positions for the worse; OR
3) Recovery would be unconscionable under the circumstances.

As one can see above, the circumstances that meet the definition of contrary to equity and good conscience need further definition. Therefore, examples are provided within this UI Bulletin (below) to identify when repayment of a CARES Act related overpayment may be waived.

Circumstances Where Overpayment May be Waived

As a reminder, in order to waive an overpayment, staff must find that the claimant is without fault for the established overpayment.

Waivers must be based upon consideration of the totality of the circumstances, including the circumstances surrounding the overpayment and the claimant's personal financial circumstances.

1) Financial Hardship

Staff can presume that repayment would cause a financial hardship under any one of the following circumstances:

- The claimant attests that they are currently recipients of additional federal or state economic assistance. This may include SNAP, TANF, LIHEAP, Medicare, SSI, or SSDI.

- The claimant has established by evidence or testimony, presented orally or in writing, that the individual's prospects of employment are severely limited as a result of physical or mental disability, poor health, or any other circumstance that would be detrimental to the individual's employability.
- The claimant's income is below 185% of the federal poverty level.
- A review of the individual's income and debts (including copies of pay records and bills) reflects the hardship caused by having to repay an overpayment because the individual needs much of their current income and liquid assets (including the CARES Act benefits received) to meet ordinary and necessary living expenses and liabilities. Examples of debts may include items such as utility bills, childcare expenses, student loans, medical bills, etc. [8]

In the event a claimant does not fall under one of the above circumstances, a claimant may request a waiver due to financial hardship by filling out an overpayment waiver form. The form, provided to staff, will be reviewed based on the totality of the circumstances and the facts of the case. The form must be reviewed and signed off by the supervisor of the Program Integrity Unit, the UI Assistant Director of Quality Control & Fraud Prevention, or the UI Director's Office.

2) *Recipient has Relinquished a Right or Changed Position*

Staff can waive repayment of an overpayment when it has been established by evidence or testimony that that individual substantially, detrimentally, and irreversibly changed such individual's position in reliance upon the receipt of unemployment benefits.

Examples that may meet the above criteria include:

- The individual passed up additional assistance because they received CARES Act benefits and thought they would not need additional financial assistance, or the amount of assistance they received was reduced because they received the CARES Act benefit.
- The individual relied on the benefit payment and has invested said payment received into starting a new business or requiring repayment may cause the individual to default on established obligations in starting said business, such as a business loan.
- The individual incurred a financial obligation such as signing an apartment lease or home mortgage.

[8] Id., page 11.

3) *Recovery Would be Unconscionable*

Staff can presume that repayment would be unconscionable and may waive an overpayment under the following circumstances:

- When staff can identify that the overpayment is due to errors in the Department's information technology platform or programming and not due to any action or part that can be attributed to the claimant.
- If the overpayment was due to a delay by the Department in adjudicating the issue and thereby the delay created or increased the overpayment. <u>In this event, staff may waive all but the first two weeks of overpaid benefits.</u>
- When staff can identify that the Department was aware of the issue creating the overpayment but the Department consciously chose to waive the issue and pay the weekly benefit payment.
- "It would be extremely unfair to require repayment when the individual was not at fault for receiving the overpayment." [9]

<u>Process</u>

Staff shall include standard language on each overpayment determination issued from the UI Division that identifies how a claimant can request a waiver of an overpayment of benefits. This language will be provided to staff for use (see attachment IV).

Overpayment waiver requests will go to a member of the Program Integrity Unit or PUA Unit, respectively, for review based on the guidance issued above. This will allow for consolidation of information and consistency of implementation.

In limited circumstances, and with supervisor approval, staff may examine an overpayment determination for waiver eligibility at the time of issuing the determination.

As part of an overpayment waiver determination, staff who are reviewing a determination shall make a finding that the claimant is or is not at fault for the underlying overpayment and give reasoning why. Separately, staff shall also make a finding that the overpayment is or is not waived. In the event the overpayment is waived, staff shall make a finding that requiring the overpayment would be contrary to equity and good conscience and indicate which of the three criteria has been met. In the event the overpayment is not waived, staff shall make a finding and give reasoning as to why recovery would not be against equity or unconscionable.

Each waived overpayment shall include information on how the individual can request a reconsideration of the approved waiver if the individual does not wish to have recovery of the

[9] Id.

overpayment waived. Each determination finding that the claimant is ineligible for a waiver shall contain standard Department notice of the claimant's right to appeal the waiver denial.

Documentation

As mentioned above, when reviewing an overpayment waiver, staff shall provide within the waiver determination a finding of whether the claimant was at fault as well as a finding of whether requiring repayment would be contrary to equity and good conscience.

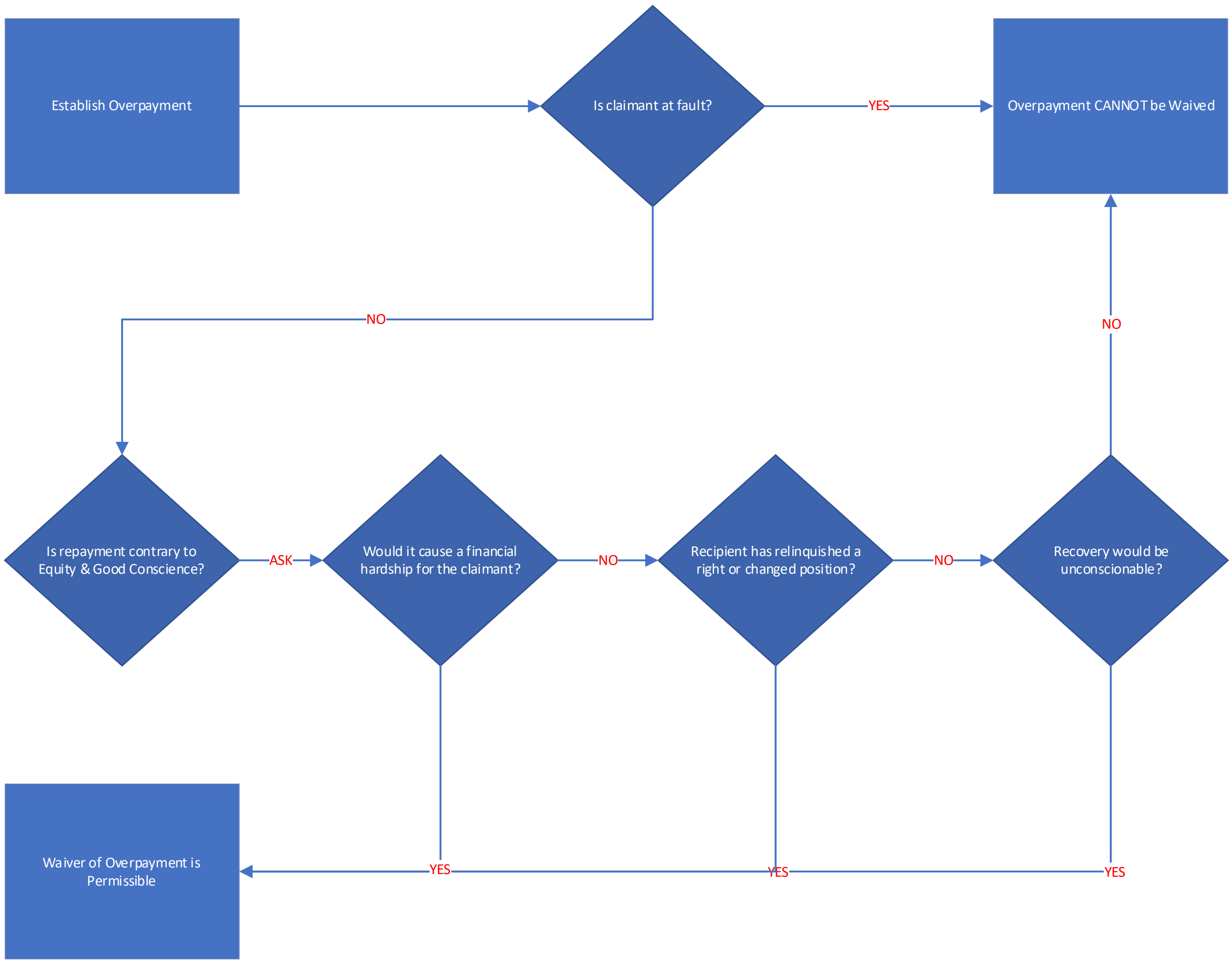
Although it is not required in every instance that staff include documentation to demonstrate how the staff member made a determination that repayment would be contrary to equity and good conscience, staff are encouraged to request and receive documentation in most circumstances. For example, staff could request that the individual provide documentation of eligibility for additional economic assistance or documentation of how the individual made a financial commitment based on the receipt of benefits, such as a lease or loan documents. Staff should also conduct a review of wage record and household expenses in every instance to determine financial hardship.

Cameron Wood, UI & Wages Division Director

Attachments:

- Attachment I: Flow Chart of Overpayment Decision-making
- Attachment II: Examples of Fault v. Non-Fault
- Attachment III: Examples of Overpayment Waiver Scenarios
- Attachment IV: Template Determination Language

FLOW CHART OF OVERPAYMENT WAIVER DECISION MAKING



Attachment II

EXAMPLES OF FAULT V. NON-FAULT

What is Fault?

For starters, there must be a finding that the claimant is without fault for the underlying overpayment. A claimant is at fault when the claimant made false or misleading statements, failed to be able and available without compelling reasons beyond the claimant's control, failed to report hours worked or earnings received, failed to fulfil the work search requirement, failed to attend RESEA or other reemployment services, refused an offer of suitable work without reasonable basis.

A primary reason a claimant may be without fault is when the claimant timely notified the Department of an issue that was subsequently ignored in order to process and pay the claim, when a programming error cause an incorrect or duplicate payment to issue to the claimant, the claimant took an action at the direction of Department staff, including contracted staff, or when there was an unreasonable Department delay in adjudicating or determining an issue. In addition, a claimant may be without fault if there was a reasonable misunderstanding of the program requirements coupled with an attempt to outreach to the Department for clarification.

The fact that incorrect information was provided does not automatically mean the claimant committed fraud. In the event a claimant provided incorrect information, staff should review with the claimant the reasoning for failing to provide the correct information to help determine whether the failure was an intentional act. An intentional failure to provide information to the Department as requested, such as wages earned or hours worked, should be treated as an intentional misrepresentation and result in a fraud determination.

Attachment III

EXAMPLES OF COMMON OVERPAYMENT SCENARIOS

Example 1: Department Information Technology Programming Errors

Scenario – Throughout the pandemic period, as the Department worked to program the additional tiers of the PEUC program, errors occurred where claimants were paid duplicate weeks or were paid at incorrect weekly benefit amounts.

Fault – Absent information indicating otherwise, if the overpayment was the cause of a system error, this would not be at the fault of the claimant.

Equity & Good Conscience – In these instances, staff can presume that it would be contrary to equity and good conscience to require the individual to repay the benefits received under the *third* definition. Requiring the claimant to repay the amount would be unconscionable under the circumstances as the claimant was auto enrolled in each relative program and the claimant can not be held responsible for the errors of the Department in setting up the respective CARES Act programs.

Example 2: Adjustment of Wages to Reduce a WBA

Scenario – The Employer Services Unit makes an adjustment to the wage record that results in a decrease weekly benefit amount for the claimant.

Fault – Absent information indicting otherwise, the claimant is not at fault for the wage reports submitted by their employer. However, this may change if the individual claimant or a family member of the claimant is the individual who submits the reports as the employer. In that event, staff should investigate further to determine fault.

Equity & Good Conscience – Under this scenario, again, it would be unconscionable to require a claimant to repay the overpayment for a circumstance that was entirely out of the control of the individual.

Example 3: Able & Available Issues

Scenario – Claimant becomes separated from employment due to a COVID-19 related layoff. Later during the lifecycle of the claim, the individual becomes unavailable to work due to a separate, non-COVID related incident. The claimant fails to report to the Department the able and available issue and continues to file indicating the individual was able and available.

Fault – The staff member should examine the facts surrounding each individual circumstance. These cases are most likely to be the most difficult in determining whether the individual is at fault. As a general matter, staff should apply the current Department policies and expectations when it comes to review of an able and available circumstance. A claimant who refuses to notify the Department of a circumstance that impacts the individual's ability and availability to work is generally at fault for that failure to notify. However, staff should also recognize the emergency nature of the pandemic and the potential for misunderstanding and misguidance based on the individual circumstance, including, in some cases, a claimant's limited English proficiency, low literacy, disability, or status as a first-time filer. If someone was not able and available because he or she caught COVID-19 or because the individual lacked childcare during the pandemic, this may indicate that the individual was still able and available as contracting COVID-19 or lack of childcare was identified as a qualifying scenario to receive UI or PUA benefits. However, if someone became unavailable to work due to an entirely separate event, the circumstances may indicate a different fault conclusion. For example, if the individual became hospitalized during the pandemic due to an unrelated reason for the original separation but continued to file, this may indicate fault on the claimant depending on the facts of the case.

Equity and Good Conscience – Again, staff will need to determine whether requiring a repayment would fall under one of the three circumstances identified in this guidance. Under this situation, it is unlikely to fall under the second or third scenario. However, the staff can examine whether it would result in a financial hardship to require the individual to repay the entire overpayment.

Example 4: Earnings Issues

Scenario – Claimant files for benefits failing to provide information on wages earned or hours worked on each weekly claim.

Fault – Staff should examine each individual circumstance to determine the reasoning behind the claimant failing to provide the requested information. In the event the claimant made a reasonable misunderstanding of the program rules, such as providing net instead of gross wages or providing wages on a bi-weekly basis as opposed to when earned, staff should examine whether the individual is not at fault. If there is no reasonable justification provided by the claimant, the staff member should find the claimant at fault. If there is a reasonable justification provided, the staff member may find the claimant not at fault.

Remember – Some claimants did file and receive UI benefits for a self-employed part time job while continuing to remain full time employed through their primary employer. These circumstances should be examined individually and carry more scrutiny from staff as to why the individual failed to report hours and wages.

Equity & Good Conscience – Staff may examine these circumstances under any of the circumstances outline in this guidance.

Example 5: Late Submission of a Separation Form

Scenario – The claimant applies for unemployment benefits and indicates the separation was a layoff. The employer fails to provide a separation form timely, and the individual claimant is deemed eligible for benefits. Later in the claim, the employer returns a separation form indicating the separation was due to a quit. The claimant is in paid filing status and there is a significant delay in the Department reviewing the claim.

Fault – Again, here is another scenario where the staff member will need to examine all facts of the case to determine fault. If a reasonable person would find that the separation was ambiguous and could have been interpreted as a layoff in the claimant's favor, the staff member may find that the delay in the Department adjudicating the issue after the employer returned the separation form is not the claimant's fault. However, if the facts of the case indicate otherwise and a reasonable person would have known that the separation was not due to a lack of work (e.g., it was a quit without cause or a firing) then the claimant would be at fault for the entire overpayment for failing to notify the Department at the time of the initial application and the staff member should review the claim for potential intentional misrepresentation and apply the appropriate fraud penalty.

Equity & Good Conscience – Again, as under example three above, it may not be the case that the individual can justify a waiver under the second or third definition provided in this guidance. However, due to the delay in the Department's ability to review and adjudicate the issue, the staff member may waive a portion of the overpayment up to all but the first two weeks of the overpayment. This will be based on the claimant indicating and providing evidence of a financial hardship to pay. Under limited circumstances, where there was a significant delay in the Department adjudicating the issue, staff may determine that requiring repayment of all of the overpayment would be unconscionable. Staff should seek guidance from the Program Integrity Unit supervisor in that instance.

Attachment IV

TEMPLATE DETERMINATION LANGUAGE

The below information shall go out on all determinations that include an overpayment of benefits.

WAIVER OF OVERPAYMENT: You may ask the Department of Labor to forgive your overpayment so you don't have to pay it back. You can do this by:

1) mailing the Department of Labor by US mail at Vermont Department of Labor, Attention: Overpayment Waiver Request, P.O. Box 0488, Montpelier, VT 05601-0488;

2) emailing them at LABOR.UIoverpaymentwaiver@vermont.gov; or

3) faxing them at 802-828-4198.

PLEASE NOTE: Asking to have your overpayment forgiven is not the same thing as "appealing" the overpayment. If you don't agree there was an overpayment of benefits, you must appeal within 30 days of the date of the decision that says you were overpaid.

To have your overpayment forgiven, you must show that:

(1) it was not your fault you got too much in unemployment benefits, and

(2) It would not be fair for you to have to pay it back. The legal rule is called "contrary to equity and good conscience" and you can learn more about what this means on the Department of Labor website.