

VERMONT DEPARTMENT OF LABOR
PROPOSED CHANGES TO VERMONT EMPLOYMENT SECURITY
BOARD RULES 2 & 32

RESPONSIVENESS SUMMARY

The Vermont Department of Labor, Vermont Employment Security Board held a public hearing on proposed amendments and additions to the Vermont Employment Security Board Rules 2 & 32 on April 30, 2025 at the Department's central office (5 Green Mountain Drive, Montpelier, VT) and offered remote interactive attendance via Microsoft Teams. Public comment was solicited in this hearing and through notices posted on the Secretary of State and the Department's website. The public comment period closed on May 7, 2025.

The Board received one written comment from Vermont Legal Aid. No oral comments were received at the public hearing. The Board's response to the written comment appears below.

SUMMARY OF PUBLIC COMMENTS AND THE BOARD'S RESPONSES

1. The proposed amendments to Rule 2 (Definitions) are listed below:

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H. "Contrary to equity and good conscience" means in one or more of the following circumstances exists:

1. The individual recipient of overpaid benefits can demonstrate that receipt of notice that benefits would be paid, or actual receipt of the incorrect payment, caused them to detrimentally rely upon the benefits. The individual relinquished a valuable right or changed positions for the worse, such as refusing other state benefits as a result of their unemployment benefits; incurring more expensive obligations such as a new apartment lease in reliance of the unemployment benefits; or taking on a new loan that repayment of overpaid benefits would result in defaulting on loan payments.
2. Repayment of overpaid benefits would result in significant and unconscionable financial hardship for the individual. Repayment of overpaid benefits would result in an inability to pay the individual's ordinary and necessary living expenses, such as housing, food, medical bills, child care, and essential utilities. When assessing the individual's financial circumstances, the Department may review the individual's sources of income and monthly financial obligations and the individual's current reliance or receipt of other state assistance.

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L. "Fault" in 21 V.S.A. § 1347(f)(1)(A) as "no fault of the person" means that the individual overpaid benefits is without fault for the overpayment. An individual may be determined without fault where they provided all information correctly as requested by the Department, but the Department failed to properly process the information. In determining fault, the Department may consider whether the individual provided incorrect information due to education, literacy, or language barriers. Fault on the part of the Department shall not relieve the individual of liability to repay overpaid benefits where the individual is also at fault. An individual may be found at fault where:

1. The individual disclosed information to the Department they knew or should have known to be incorrect; or

2. The individual failed to disclose information they knew or should have known to be material or requested by the Department; or
3. The individual accepted benefits they knew or should have known to be incorrect.

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Comments from Vermont Legal Aid regarding amendments to Rule 2:

The Department adopted and has been using the federal “without fault” and “against equity and good conscience” standard outlined in UIPL 20-21, Change 1, to determine whether repayment of CARES Act benefits should be waived. Our understanding from our conversations during the legislative session was that the standard would be the same for state UI overpayment waivers.

The Department’s UI Bulletin 552 explains what “without fault” and “contrary to equity and good conscience” mean. These terms should not have a different meaning in the ESB rules. The definitions in the proposed rule change differ from UI Bulletin in a few ways:

- 1. UI Bulletin 552 says repayment would be contrary to equity and good conscience if it would cause financial hardship. The proposed rule says, “significant and unconscionable financial hardship,” a more stringent standard than the Department has been using for CARES Act waiver applications. The standard should be the same.*
- 2. UI Bulletin 552 says financial hardship will be found if the claimant is currently getting public benefits, or if their income is below 185% of the FPL, or if the claimant provides evidence that their prospects of future employment are limited. The proposed rule does not define financial hardship in these ways and says only that the Department “may consider” receipt of financial assistance. The UI Bulletin’s reasonable, objective standards the Department has been using to determine financial hardship for CARES Act waivers should be codified in the rule.*
- 3. In assessing fault, the proposed rule does not require the Department to consider these factors that are in UI Bulletin 552:*
 - a. Departmental delay in determining eligibility (which can cause an overpayment to be larger than it would have been if the determination had been timely).*
 - b. Conflicting or confusing information provided by the Department.*

c. Whether the claimant tried in good faith to get clarification as to what was needed but could not reach the Department.

These items in the Department's UI Bulletin are fair and reasonable factors to consider when assessing whether a claimant is at fault. They should be codified in the rule, along with the literacy or language barriers considerations that are already in the proposed rule.

4. The proposed rule altogether omits the 3rd prong of "contrary to equity and good conscience" that is in the UI Bulletin and UIPL 20-21, Change 1: other circumstances under which recovery would be "unconscionable under the circumstances." This prong and the circumstances described in the UI Bulletin should be incorporated into the waiver rule.

Response from the Board:

1. The Board elected descriptors of "significant and unconscionable" to financial hardship to distinguish between inconvenience felt by any claimant ordered to repay overpaid benefits and the specific hardship that would befall claimants who would be uniquely disadvantaged by such order. The term "unconscionable" was specifically added to echo the broader aim of "equity and good conscience."
2. The Board did not elect to use state and federal guidance on CARES Act overpayment waivers as that guidance was adopted to address pandemic-related overpayments from a new, COVID-era unemployment benefit system. The Department does not have direct access to federal databases recording receipt of certain federal public assistance and would place the burden on the claimant to supply that information.

Further, the Board did not adopt language from previous guidance that found equity & good conscience met if the claimant's future employment prospects were limited. The Board concluded this language to be overly broad, not contemplated in the statute, and potentially difficult to apply for fact-finding adjudicators.

3. The Board did not elect to assess fault by considering delays in determining eligibility; conflicting or confusing information provided by the Department; or inability reaching the Department to supply information. These factors were specifically relevant to the unprecedented volume of unemployment claims filed during the early

stages of the COVID-19 pandemic and the speed at which a novel unemployment benefit system was erected during a state of emergency, as well as significant staffing shortages that resulted in substantial delays and communication issues.

4. The Board did not elect to include an additional, overly broad definition of “equity and good conscience” as “other circumstances under which recovery would be unconscionable under the circumstances.” The additional definition would not provide clear guidance to adjudicators and could result in inconsistent application of the standard against the intent of the legislature.

Comments from Vermont Legal Aid on Proposed addition of Rule 32:

We have included the following Act 184 requirements in our proposed revisions, as they were omitted from proposed Rule 32:

- *At the time of the overpayment determination, the Department shall consider whether repayment should be waived based on available information (Act 184, p2-3).*
- *Notice denying a waiver application must give “enough information to ensure that the person can understand the reason for the denial” (Act 184, p3).*
- *The Department may not attempt to recover an overpayment or withhold any amounts of UI until there has been a final overpayment determination and the person’s right to appeal has been exhausted (Act 184, p4).*
- *The Department may not attempt to recover an overpayment or withhold any amounts of UI while an application is pending a determination by the Department (Act 184, p4).*
- *If a waiver is granted on appeal, VDOL must refund any amounts that were recovered or withheld (Act 184, p4).*
- *The Department shall give anyone who has an overpayment and is not currently receiving benefits the option of entering into or modifying a repayment plan with reasonable weekly, biweekly, or monthly payments that permit the person to continue to afford the person’s ordinary living expenses. (Act 184, p5).*

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Response from the Board:

The Board does not object to inclusion of the procedural language from Act 184 (2024) in Rule 32. However, the Board did not amend its proposed rule text at this stage, as the language repeats directives already found in statute as amended by Act 184, 21 V.S.A. § 1347(f) – (j). The Department shall implement the statutory directives in its implementation of the overpayment waiver procedure.

Additional comments from Vermont Legal Aid on Proposed addition of Rule 32:

The Department's CARES Act application form is helpful because it tells the person what information they need to provide. Presumably there will be a similar form for state UI waiver applications. The availability of an application form should be reflected in the rules, using language similar to the appeal form language in ESB Rule 14. It should be available online but also at physical offices for people who have limited tech access or ability.

Act 184 provides that a person may request a waiver "at any time" after the overpayment determination. Proposed ESB Rule 32(B)(1) should also reflect that an individual may submit a waiver application "at any time." Because a claimant may need to apply for a waiver after the initial determination, billing statements should also include information about how to apply.

Response from the Board:

The Board did not elect to include information in Rule 32 regarding accessing the waiver application. The Board concluded that the Department itself is best situated to craft and implement the application form. Further, the Department is best situated to develop processes for comprehensive and accessible access to application forms, along with dissemination of instructions for submission of applications and communication with claimants and individuals using the applications.