

Unemployment Compensation Conformity Issues and Challenges

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UC INTEGRITY

- Trade Adjustment Assistance Extension Act of 2011 enacted on October 21, 2011. (P.L. 112-40)
- UIPL 2-12 – Initial guidance.
- UIPL 2-12, Change 1 - Responds to questions from state workforce agencies.

15 % Penalty on Fraud OPs

- States must begin assessing a penalty on fraud overpayments established after 10/21/2013.
- The monetary penalty must be not less than 15 percent of the amount of the erroneous UC payment.
- The 15 percent penalty amount is the minimum amount required; state may impose a greater penalty.

15 % Penalty on Fraud OPs

- Penalty amounts must be deposited in the states account in the UTF.
- Use of penalty funds is limited to the payment of UC.
- States must apply the same penalty to any Federal UC program fraud overpayment.
- Conformity with 303(a)(11), SSA, necessary for receipt of UI administration grants.

Prohibition on Relief from Charging

- A state must not relieve an employer of charges (noncharging) when the employer, or an agent of the employer, at minimum:
 - Is at fault for failing to respond timely or adequately to a state agency request for information relating to a UC claim that was subsequently overpaid; and
 - Has established a pattern of failing to respond timely or adequately to state agency requests for information relating to UC claims.
- Note: UIPL 02-Change 1 clarified that with respect to employer agents 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.

Prohibition on Relief from Charging

- States establish the definition of a “pattern of failing to respond” “timely or adequately.”
- States may impose a stricter standard, such as the first instance of failure to respond timely or adequately.
- States must implement this prohibition on overpayments established after 10/21/2013.
- Conformity with 3303(f), FUTA, necessary for employers in a state to receive the “additional” FUTA credit.

NDNH Reporting

- Expands the definition of “newly hired employee.” 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 (as defined above) must be reported to the state directories of new hires.
- Enhances a state’s ability to detect and prevent overpayments when states conduct cross-matches with their state directory of new hires, or the NDNH.

MERIT SYSTEM REQUIREMENTS

- “Such methods of administration (including...methods related to the *establishment and maintenance of personnel standards on a merit basis...*) as are reasonably calculated to insure full payment of [UC] when due” (303(a)(1), SSA).
- Title II, Intergovernmental Personnel Act of 1970, gives authority to Office of Personnel Management (OPM) to prescribe standards for federally required merit personnel systems operated by state agencies. (5 CFR 900.603)

MERIT SYSTEM REQUIREMENTS

OPM identified six principles for merit staffing:

- (a) open recruitment and competitive appointments based of their relative knowledge, skills and ability
- (b) providing equitable and adequate compensation
- (c) Training employees, as needed, to ensure high quality performance
- (d) Retaining, correcting and separating employees on the basis of the adequacy of their performance
- (e) assuring fair treatment of applicants (EEOC criteria) and complying with other nondiscrimination laws
- (f) No coercion for partisan political purposes or using their official authority for political purposes.

MERIT SYSTEM REQUIREMENTS

- Inherently governmental means the activity is “so intimately related to the public interest as to mandate performance by government employees.”
- UIPL 12-01 - “Inherently Governmental” activity fall into two categories:
 - The act of governing –these generally involve making decisions that bind the government to take some action, or not to take some action.
 - Actions significantly affect the life, liberty or economic interests of persons.
- OPM has agreed with DOL that most state agency positions must be merit staffed.

MERIT SYSTEM REQUIREMENTS

- Circular A-76 Revised May 29, 2003
- The activity must involve the exercise of *substantial* discretion in the performance of the activity.
- Exemption: OPM rule provides that even in grant programs that have a merit staff requirement, a “reasonable number of positions”, may be exempted. (For example, policy making or legal positions).

MERIT SYSTEM REQUIREMENTS

Commercial Functions:

- A commercial activity can be a recurring service that can be performed by private entities.
- Not so intimately related to the public interest to mandate the performance by government personnel.
- They may be found within or throughout organizations that perform inherently governmental work.
- Examples of commercial functions: IT functions, security and building maintenance.
- OMB Circular A-76 offer guidance on which functions are, or are not, inherently governmental. We evaluate state efforts to contract work consistent with A-76.

MERIT SYSTEM REQUIREMENTS

- **UIPL 12-01** - adjudication of claims, providing advice to claimants which affects their eligibility for benefits, hearing appeals, assessing taxes, managing the trust fund are inherently government and may not be outsourced.

CONFIDENTIALITY & DISCLOSURE

- The Department of Labor has historically interpreted the “methods of administration” provision, Section 303(a)(1), SSA, to require states to protect confidentiality of UC information.
- Regulation No. 1 (1937): Social Security Board determined that “the public interest and the efficient administration of the functions” of the Board “require that the confidential nature of all wage records and other records or information in possession of the Board, pertaining to any person, be preserved.”
- 20 CFR603: Current regulation concerning confidentiality & disclosure of UC information.

CONFIDENTIALITY & DISCLOSURE

- Statutorily required disclosures :
 - Dept. of Agriculture and State Food Stamp Agencies
 - Railroad Retirement Board
 - State Child Support Enforcement (IV-D) Agencies
 - HHS (National Directory of New Hires)
 - HUD (Public Housing Agencies)
 - TANF (Temporary Assistance for Needy Families)
 - IEVS (Income and Eligibility Verification System)
 - WIA (performance measures)
- States must also provide information to claimants and employers to allow them to participate in claims process, adjudications ,and appeals.

CONFIDENTIALITY & DISCLOSURE

- Permissible disclosures :
 - Informed consent (disclosure to the individual or employer's agent/attorney and to third parties);
 - Public official in the performance of his/her official duties; and
 - Agent or contractor of public official to whom disclosure is permitted.
 - Response to a court order or to an official with subpoena authority is also permissible (without the above restrictions).
- Must be authorized under state law.
- May not interfere with the efficient administration of the state UC law.

CONFIDENTIALITY & DISCLOSURE

- In general, payment for all costs of disclosures is required for all disclosures, except for those necessary for proper administration of the UC program, those involving only incidental costs, and some situations involving subpoenas.
- States must establish appropriate safeguards concerning disclosed confidential information including :
 - Signed agreements for disclosures
 - Use of info only for the purpose of the disclosure
 - Limiting redisclosure
 - Physical security of information
 - State audits

CONFIDENTIALITY & DISCLOSURE

Disclosure of Confidential UC Information to Private Entities Under 20 CFR 603.5(d)(2):

- UIPL No. 19-12 issued on May 23, 2012.
- Provides guidance on disclosure of confidential UC information to private entities seeking to serve as intermediaries between lenders and state UI agencies.
- Prohibits states from providing unfettered access to their database or a “mirror” database.
- Outlines requirements for informed consent, agreements, and audits. Prohibits redisclosure and co-mingling of data.
- Declares revenue from agreements to be program income that can only be used for UI program administration.

FULL PAYMENT... WHEN DUE

Section 303(a)(1), SSA :“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 to ensuring eligible claimants are paid UC promptly when determined eligible and establishing a reasonable means to enforce employer liabilities to the state unemployment fund so that UC may be paid when due , states must ensure that individuals who are not eligible are not paid UC.
- While timely claim processing, adjudication, and resolution of appeals is critical, states must protect against improper payments and fraud.

ELIGIBILITY OF ALIENS

- Section 3304(a)(14)(A), FUTA, requires that UC not be payable on the basis of services performed by an alien unless:
 - The alien was lawfully admitted for permanent residence at the time the services were performed;
 - The alien was lawfully present for purposes of performing the services; or
 - The alien was permanently residing in the U.S. under color of law (PRUCOL) at the time the services were performed.

In addition, aliens must be able and available (legally authorized to work) to be eligible for UC.

ELIGIBILITY OF ALIENS

PRUCOL is a two-part test:

- USCIS (formerly INS and now part of the Department of Homeland Security) must know of the alien's presence, and must provide the alien with written assurance that deportation is not planned, and
- The alien must be permanently residing in the U.S.

ELIGIBILITY OF ALIENS

Federal Law Requirements:

- State law must provide that base period wages are not available based on services performed by aliens who are not in one of these three categories at the time services were performed.
- State law may include any of these three exceptions.
- States may not broaden these categories to other aliens (e.g., students, tourists).
- States must use SAVE to verify work authorization— they may not make eligibility determinations based on affidavits/ without adequate documentation.

ELIGIBILITY OF ALIENS

Deferred Action Status:

- Applies to children of illegal immigrants brought to US before the age of 16
- USCIS may exercise prosecutorial discretion whether to deport or grant a 2-year deferral
- Individuals in deferred status may apply for work authorization

ELIGIBILITY OF ALIENS

Eligible individuals must:

- Have continuously resided in U.S. for at least 5 years
- Be currently in school, have graduated from high school, or obtained a GED
- Be honorably discharged from the U.S. Armed Forces or Coast Guard

ELIGIBILITY OF ALIENS

To be considered for deferral, an individual:

- Must not have been convicted of a felony, a significant misdemeanor, multiple misdemeanors, or otherwise pose a threat to national security or public safety; and
- May not be above the age of thirty.

CONTACT INFORMATION

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