

# Understanding and Improving Overpayment Waivers for Federal and State Unemployment Insurance Benefits

*Unemployment insurance, including the federal pandemic programs that workers fought for and won, were a lifeline throughout the past two years and kept millions of workers out of poverty.<sup>1</sup> Now, many of the same workers who relied on these benefits to support themselves and their families during the crisis are being told they must pay these benefits back. Many of these so-called “overpayments” are the result of ever changing federal and state guidance surrounding the federal pandemic programs and simple mistakes and misunderstandings. This factsheet will help claimants and advocates understand if, when, and how these overpayments can be waived, as well as provide recommendations for policy changes to protect workers from these overpayments.*

## Overpayment Waiver 101

---

An overpayment occurs when unemployment insurance (UI) benefits have been paid out to a claimant and it is later found that the claimant was not entitled to those benefits, or a portion of those benefits. This can happen for a variety of reasons, including confusing and unclear agency procedures and guidance. However, just because an overpayment is found, it does not always mean the claimant has to repay the benefits. Rather, a state agency may “waive” the overpayment, known as an “overpayment waiver.” When and how a claimant can receive an overpayment waiver depends on many factors, including:

- Whether the overpayment was due to fraud or fault on behalf of the claimant;
- The state they received UI benefits from; and
- What type of UI benefits they were overpaid.

### ***Fraud v. Non-Fraud:***

Generally, overpayments fall into two categories: fraud and non-fraud. State law determines what is “fraud,” but recent U.S. Department of Labor (U.S. DOL) guidance provides two helpful definitions:

- “Eligibility fraud occurs when benefits or services are acquired as a result of false information being provided with the intent to receive benefits for which an individual would not otherwise be eligible.”
- “ID fraud occurs when one person or group of persons use(s) the identifying information of another person to illegally receive benefits. ID fraud also occurs

when an individual's UI account is hacked or taken over by a person or group and the benefit payments are re-directed to another account by changing key user data after the claim has been established (e.g., banking information). In addition to using stolen identities or misusing an individual's identity, synthetic ID fraud occurs when real and/or fake information is combined to create false identities, . . . ."<sup>2</sup>

A state agency **can never waive an overpayment that was caused by fraud and must apply a minimum of a 15% penalty.**<sup>3</sup> So, it is important for a claimant to challenge any underlying fraud determination if they want to seek an overpayment waiver and avoid heavy penalties, among other reasons. It is also important to ensure state law provides a clear and restrictive definition of what constitutes fraud and that state agencies apply the standard on a consistent basis.

***Overpayment waiver of state unemployment benefits:***

Each state has the power to determine if, when, and how overpayment waivers will be granted for regular state unemployment insurance benefits, with only limited federal requirements or guidance. The main restriction is that the U.S. DOL has a long-standing interpretation that federal law requires that if a state is going to waive an overpayment, it must do so on an individual, case-by-case determination.<sup>4</sup> In other words, states cannot grant blanket waivers for regular unemployment insurance overpayments.<sup>5</sup> Below we explain how this is different for the federal pandemic programs. Currently, all but 12 states have a permanent overpayment waiver provision. The 12 states without these provisions are Delaware, Kentucky, Missouri, Montana, Nebraska, New Mexico, New York, Oklahoma, Puerto Rico, Texas, Virginia, and West Virginia.<sup>6</sup> However, even without a waiver provision, some states still do not collect all overpayments. For example, in New York, the state agency cannot recover overpayments where the claimant received the benefits in good faith and did not make a factually false statement or willful misrepresentation.<sup>7</sup>

When and how overpayment waivers are granted vary from state to state. Overall, states tend to utilize two general criteria and will waive overpayments when: (1) the overpayment is through "no-fault of the claimant"; and/or (2) repayment would be "against equity and good conscience."<sup>8</sup> Some states only utilize the first criteria. For example, in New Hampshire, overpayments are waived if the agency finds that they claimant was without fault in causing the overpayment.<sup>9</sup> Other states, like Connecticut, include not only that repayment of benefits would be against equity and good conscience but also if repayment would "defeat the purpose of the benefits."<sup>10</sup> Even when states tend to have similar statutory language, broad agency discretion in defining and applying these standards means that there can be great disparity and access to waivers across states for very similar circumstances. This includes what type of evidence the agency requires to prove these criteria and how accessible their waiver application is.<sup>11</sup> Below we outline some model policies states can adopt to protect workers and ensure proper and timely overpayment waivers.

***Overpayment waiver of federal pandemic unemployment insurance programs:***

As with the waiver of overpayments of state unemployment insurance benefits, each state has the power to determine whether to waive overpayments of the federal pandemic programs. However, federal law sets out the authority of when and how the overpayments can be waived. Even states without state overpayment waiver laws can choose to waive overpayment for the federal programs under federal law. U.S. DOL "strongly encourages" states to waive recovery of federal pandemic overpayments when appropriate.<sup>12</sup> The federal

pandemic programs include Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation (PEUC), Pandemic Unemployment Compensation (PUC), Mixed Earners Unemployment Compensation (MEUC), and the first week of regular UI that was reimbursable during the pandemic.<sup>13</sup>

*New Guidance.* New guidance by the U.S. DOL clarifies when states may waive these non-fraud overpayments.<sup>14</sup> First, the guidance reiterates that States have essentially three options when it comes to waiving non-fraud overpayments of the federal pandemic programs, or as they refer to them, the “CARES Act programs”:

1. Option 1: Issue the blanket waivers identified in this UIPL and prior guidance (seven scenarios total, see below). States do not have to issue blanket waivers for all scenarios but can choose which ones to implement or not.
2. Option 2: Determine overpayment waiver of the CARES Act programs on an individual, case by case basis (can combine option #1 and #2).
3. Option 3: Exercise no waiver of overpayments for the CARES Act programs.

If a state does grant overpayment waivers of these programs, they must do so **retroactively to all overpayments created since the beginning of the CARES Act programs**.<sup>15</sup> This means some claimants may be getting money back from the state. Moreover, the guidance reiterates a state’s right to grant a waiver at the same time the overpayment is established. This means the state does not have to wait for, or require, a claimant to apply for a waiver. Rather, the state agency can both establish the overpayment and waive the overpayment at the same time. This includes the ability to send a single notice that both establishes the overpayment and waives recovery.<sup>16</sup> To promote administrative efficiency and avoid confusion, states should proactively determine if the claimant is eligible for waiver at the time of determining the overpayment and send the single notice when possible.

*Blanket Waivers.* Importantly, unlike with state unemployment insurance, the federal guidance provides states with seven scenarios where it is permissible to grant “blanket waivers” or, in other words, the state may waive several overpayments all at once without doing an individual determination on a case-by-case basis.

These seven scenarios are:

1. Individual answered “no” to being able to work and available for work and the state paid PUA or PEUC without adjudicating the eligibility issue.
2. The individual was eligible for payment under an unemployment benefit program, but through no fault of the individual, they were instead incorrectly paid under either the PUA or PEUC program at a higher Weekly Benefit Amount (WBA).
3. The state paid the wrong amount of a dependents’ allowance (DA) on a PUA or PEUC claim because the state used the wrong amount when calculating the DA.
4. Individual answered “no” to being unemployed, partially unemployed, or unable or unavailable to work because of the approved COVID-19 related reasons and the state paid PUA anyway.
5. The state paid the individual a minimum PUA WBA based on Disaster Unemployment Assistance (DUA) guidance that was higher than the state’s minimum PUA WBA, which resulted in an overpayment.
6. The individual submitted proof of earnings to calculate their PUA WBA. However, through no fault of the individual, the state’s instructions were either inadequate or

the state incorrectly processed this calculation using self-employment gross income instead of net income or documents for an inapplicable tax year.

7. The individual submitted proof of self-employment earnings for MEUC eligibility. However, through no fault of the individual, the state's instructions were either inadequate or the state incorrectly processed this calculation, resulting in the individual incorrectly being determined eligible for MEUC.<sup>17</sup>

The U.S. DOL also left the door open for states to propose additional scenarios that should be eligible for blanket waivers. To do so, the state can submit a form, which is Attachment II to the UIPL, to [covid-19@dol.gov](mailto:covid-19@dol.gov) with a copy to the appropriate ETA Regional Office.<sup>18</sup> The U.S. DOL has said they will try to approve or disapprove the proposal within 14 days.<sup>19</sup> Advocates that identify additional scenarios should reach out to their state agency and urge them to submit a request that the scenario be added to the allowable blanket waivers.

*Individual Determinations.* When doing individual determinations on a case-by-case basis, states can either use the definitions contained in their state law, provided the state law, at a minimum, adheres to the minimum federal requirements of the CARES Act. In other words, they allow waivers when the overpayment is “without fault on the part of the claimant” and recovery would be “against equity and good conscience.”<sup>20</sup> Or, the state may adopt the federal standards.<sup>21</sup>

Under federal standards, an overpayment is “without fault of the claimant” when “the individual provided all the 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.”<sup>22</sup> This includes if:

- 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 ask 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.<sup>23</sup>

Repayment would be “contrary to equity and good conscience” when at least one of three circumstances exists:

- Recovery would cause financial hardship to the claimant;
- The claimant can show (regardless of their financial situation) 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
- Recovery would be unconscionable under the circumstances.<sup>24</sup>

As states can choose to either apply federal standards or use their own state law, advocates should push the state to use the one that would provide greater relief. Additionally, we have included suggested policy changes below that could improve state law to include even broader and more worker-friendly standards.

[Click here](#) for a template letter to send to your state agency and governor asking them to adopt all the provisions of the new guidance and waive all overpayments of federal benefits to the greatest extent possible.

## Due Process and Collection of Overpayments

---

Claimants must be provided due process throughout the overpayment determination, waiver, and collection process. Although federal law mandates proper notice and appeal rights, the implementation of the guidance varies greatly across the states.<sup>25</sup> Claimants regularly complain about confusing and frightening overpayment notices that leave them perplexed about what they did that caused the overpayment or what they must do to correct the problem. Thus, states must create and implement robust standards, including plain language notices, available in multiple languages and provided to claimants in multiple ways (e.g., email, text, mail, online platform, etc.).

State law should also ensure that claimants are given a reasonable time to appeal, protest, or request redetermination of the overpayment and waiver determination. Federal law sets a 30-day notice requirement in cases where a state has not established a specific notice period.<sup>26</sup> However, states are allowed to set shorter deadlines if they wish. Thirty days should be the minimum for all states and states should allow an appeal, protest, or request for redetermination after 30 days if the claimant has “good cause,” including if they never received the initial notice.

Once an overpayment is found, states may start to seek collection of the overpayment.<sup>27</sup> If the state allows a waiver, collection cannot begin until the time to request a waiver has elapsed or, if an individual applied for a waiver, a determination is made on the waiver.<sup>28</sup> However, it is up to each state to determine whether to cease collection during any appeal of a waiver determination.<sup>29</sup> To avoid administrative burdens and unnecessary stress on claimants, state law should mandate that collection shall cease until the overpayment determination and waiver process is final.<sup>30</sup> This means collection shall cease while there is a pending appeal or either the overpayment or the underlying disqualification or if there is a pending waiver application or an appeal of a waiver denial. Collection shall cease even if the pending appeal is untimely. Collection shall only proceed when there is a final determination that the debt is in fact owed and all appeals are exhausted.

Collection of overpayments can take many forms, including direct repayment, offset from future benefits, through civil action, and through the Treasury Offset Program (TOP).<sup>31</sup>

## Conclusion and Policy Recommendations

---

Because states have broad discretion with regard to overpayment waivers, there is a lot of opportunity for advocates to push for reform, and states have the power to adopt waiver standards that center equity, ease administrative burdens, and ensure workers are not forced to pay for unintentional mistakes.

All states should have an overpayment waiver provision in state law that ensures all non-fraud overpayments may be waived. A state can choose to waive all overpayments that are

without fault on behalf of the claimant or, as is typical, require that they not only be “without fault” of the claimant, but also that recovery would be against “equity and good conscience.” Below we outline some model definitions for these two criteria.<sup>32</sup>

State law should define “without fault” to include any circumstance where the claimant provided, or attempted to provide, all information correctly as requested by a state, but the state failed to take appropriate action with that information or took delayed action when determining eligibility and any instance where the overpayment was due to state or employer mistake. This should include:

- If the claimant 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 barriers, including language, education, or literacy barriers;
- The overpayment was due to agency error or mistake; and
- The employer provided incorrect or untimely information.

To establish any one of these bases, the state should accept a written statement, signed by the claimant as sufficient proof.

For the second criteria, states should define when recovery of the overpayment would be against “equity and good conscience,” to include when:

- The claimant is receiving, or has received in the past year, any public assistance or safety net programs (i.e., SNAP, Medicaid, TANF, WIC, LIHEAP, and any other similar state programs);
- Recovery would cause financial hardship to the claimant;
- Regardless of their financial situation, the claimant can show that due to the notice that they would receive the benefits, or because of the incorrect benefit payment, they have either relinquished a valuable right or changed positions for the worse;
- There is substantial delay between receipt of the benefits and the overpayment determination, including when the state fails to meet federal timeliness standards for determinations and appeals;
- The claimant certifies that the overpaid benefits were used to meet their ordinary living expenses; or
- The overpayment was caused directly by state or employer error.

Again, the state agency should accept a written statement, signed by the claimant as sufficient proof to establish any one of these bases.

In addition to having strong policy language, states should also improve the administration of overpayment determinations and the waiver process. This includes having the agency assess claimant eligibility for a waiver during the overpayment determination process, rather than requiring claimants to individually request a waiver. While this is preferred because it lessens the burden on claimants having to apply for a waiver and increases administrative efficiency, if a state does require claimants to apply for a waiver, or needs further information to process the waiver, they should request as little information as is

needed. It is important that states respect a claimant's privacy rights and not require unnecessary and burdensome production of personal financial statements and documents.

State agencies should also ensure there are no collection activities while there is a pending appeal of either the overpayment or the underlying disqualification or if there is a pending waiver application or an appeal of a waiver denial. Collection should cease even if the pending appeal is untimely. It is important that collections only be allowed when there is a final determination that the debt is in fact owed and appeals are exhausted.

[Click here for model policy language](#). This model legislation would establish a permanent right to request an overpayment waiver of state and federal pandemic unemployment insurance benefits in state law. Please note that drafting overpayment waiver legislation can vary from state to state depending on state-specific legal and policy issues.

Please contact us at [jgerry@legalaidthatwork.org](mailto:jgerry@legalaidthatwork.org) regarding more information on how to adapt or customize this model

## Endnotes

---

<sup>1</sup> Amy Traub. "7 Things We Learned About Unemployment Insurance During the Pandemic," National Employment Law Project, November 16, 2021, [thingshttps://www.nelp.org/publication/7-things-we-learned-about-unemployment-insurance-during-the-pandemic/](https://www.nelp.org/publication/7-things-we-learned-about-unemployment-insurance-during-the-pandemic/).

<sup>2</sup> Unemployment Insurance Program Letter (UIPL) No. 20-21, Change 1 at p. 7

<sup>3</sup> *Id.*; see also UIPL 01-16 at 6 for further discussion on agency requirements when making a fraud determination.

<sup>4</sup> See 42 U.S.C. 503(a)(1),(5) and (g); see also [UIPL 20-21, Change 1](#).

<sup>5</sup> *Id.*

<sup>6</sup> See <https://oui.doleta.gov/unemploy/pdf/uilawcompar/2021/complete.pdf> at Chapter 6. Virginia does have a temporary overpayment waiver provision that expires on July 1, 2022.

<sup>7</sup> See NY Labor § 597

<sup>8</sup> See <https://oui.doleta.gov/unemploy/pdf/uilawcompar/2021/complete.pdf> at Chapter 6, Tables 6-1 and 6-2 for detailed analysis of each state's overpayment waiver laws.

<sup>9</sup> N.H. Rev. Stat. Ann § 282-A:165, II

<sup>10</sup> Conn. Agencies Regs. § 31-273-4

<sup>11</sup> See also Maine's streamlined online wavier application as one example: <https://www.maine.gov/unemployment/owr/>

<sup>12</sup> See [UIPL 20-21, Change 1](#) at pp. 4-6

<sup>13</sup> Repayment of the Lost Wages Assistance Program (LWAP) is different as that program was through FEMA funds. For guidance about the LWAP please visit, <https://www.fema.gov/disaster/coronavirus/governments/supplemental-payments-lost-wages-guidelines>

<sup>14</sup> [UIPL 20-21, Change 1](#)

<sup>15</sup> *Id.* at 6

<sup>16</sup> *Id.* at 15 and Attachment III

<sup>17</sup> *Id.* at p. 12-13.

<sup>18</sup> *Id.* at p. 13-14.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at p. 16

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 9

<sup>23</sup> *Id.* at 10

<sup>24</sup> *Id.* at 10-11 and Figure 1, which includes specific examples

<sup>25</sup> UIPL 01-16 and UIPL 01-16, Change 1

<sup>26</sup> *Id.*

<sup>27</sup> UIPL 01-16 at 4

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Massachusetts House Bill 4202 as a good example of recently introduced legislation to improve state overpayment waiver provisions.