

MEMORANDUM

To: Secretary Marty Walsh, United States Department of Labor
CC: Suzi LeVine, Mr. Brian Deese, Dr. Cecelia Rouse, and Dr. Susan Rice
From: NELP Social Insurance Team
Subject: States Canceling CARES Act Agreements Early (Revised and Updated)
Date: May 12, 2021

Question: Several States are terminating their CARES Act (CARES) agreements early and stopping payment of PUA, FPUC, PEUC, and MEUC before the scheduled termination of the programs (September 6, 2021). Are there any options for unemployed individuals to continue to receive PUA while the federal program continues to be available?

Short Answer: Yes, there must be. Please note, we have added a clarification starting on P.2 regarding PUA payment to a covered individual must also include an additional \$300.

DOL's Quandary

The CARES Act places the burden on the Secretary of Labor to provide PUA to all who are eligible:

*(b) Assistance for Unemployment as a Result of COVID-19.--Subject to subsection (c), the Secretary **shall** provide to any covered individual unemployment benefit assistance while such individual is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which the individual is not entitled to any other unemployment compensation (as that term is defined in section 85(b) of title 26, United States Code) or waiting period credit. [15 USC 9021\(b\)](#)*

Further, CARES states: "the assistance authorized under subsection (b) shall be available to a covered individual". [15 USC 9021\(c\)](#).

The ETA and Office of the Solicitor (SOL) acknowledge this non-discretionary nature of PUA in a [June 5, 2020, memo](#) to the DOL Office of Inspector General:

The Secretary of Labor (Secretary) must provide PUA benefits to an individual who is determined to be eligible under the method described above. Under Section 2102(b), the Secretary "shall" provide to any covered individual unemployment benefit assistance while such individual is unemployed, partially unemployed, or unable to work for the weeks of such unemployment with respect to which he or she is not entitled to any other unemployment compensation. The relevant language is not discretionary.

Further, ETA/SOL argue in the same memo:

Under the CARES Act, Congress specifically set forth only two eligibility requirements¹ to be a "covered individual," at which point payment of PUA benefits becomes mandatory, the second of which is that under section 2102(a)(3)(A)(ii) an individual "provides self-certification" that the reason they are unemployed, partially unemployed, or unable to work is one of the reasons listed in section 2102(a)(3)(A)(ii)(I)(aa)-(kk).

Memo from DOL Solicitor and ETA in response to OIG Report Number: 19-20-002-03-315, June 5, 2020, p.4. Available here:

<https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=19-20-002-03-315&y=2020&t=x>

In addition, the plain language of the CARES Act makes clear that any PUA payment to a covered individual must also include an additional \$300. The PUA Section of the CARES Act explicitly states that the amount of PUA shall be:

(A)(i)the weekly benefit amount authorized under the unemployment compensation law of the State where the covered individual was employed, except that the amount may not be less than the minimum weekly benefit amount described in section 625.6 of title 20, Code of Federal Regulations, or any successor thereto; **and**

(ii)the amount of Federal Pandemic Unemployment Compensation under section 9023 of this title . . .

15 USC 9021(d)(A)(emphasis added). Thus, DOL's duty to provide PUA to covered individuals means PUA recipients should, as part of their PUA payment, receive the PUA weekly benefit amount plus the additional \$300 designated in section 9023. Moreover, as this language is contained in the PUA section and not the FPUC section of CARES, it would apply even if a state terminated its agreement to pay FPUC.

All States currently have active CARES agreements. Recently several States announced they are terminating their agreements early -- stopping the federal assistance to unemployed workers in their State. This leaves DOL in a quandary because they are obligated to provide assistance to "any covered individual" for the duration of the program. Here are two options for resolving this quandary.

Option One: Require States to Continue Paying PUA

DOL could require canceling States to continue paying PUA. Under this option DOL could allow a State to terminate their FPUC, PEUC and MEUC agreements but require it to continue to administer PUA benefits.

The CARES agreements themselves appear to allow States to terminate ALL CARES programs early. However, the CARES Act itself does not support the same State discretion for the PUA program.

The section of CARES creating the FPUC program contains the following provision:

¹ Arguably, a third PUA eligibility requirement, to provide proof of previous employment, was added in the [Continued Assistance Act](#). While this requirement was added in December, 2020, after the ETA/SOL memo was written it does not impact DOL's no-discretionary burden under section 2102 of CARES to provide PUA to any covered worker.

(a) Federal-State agreements -- Any State which desires to do so may enter into and participate in an agreement under this section with the Secretary of Labor (in this section referred to as the "Secretary"). Any State which is a party to an agreement under this section may, upon providing 30 days' written notice to the Secretary, terminate such agreement. 15 USC 9023

There is a similar opt in/opt out provision for PEUC in the CARES Act. However, the PUA section of CARES does not contain similar language. The state discretion agreement language for FPUC and PEUC is replaced in PUA with this:

The Secretary shall provide the assistance authorized under subsection (b) through agreements with States which, in the judgment of the Secretary, have an adequate system for administering such assistance through existing State agencies. 15 USC 9021(f)

With PUA the agreement discretion is taken away from the States and given to DOL. However, DOL does not have the discretion to not pay PUA to eligible individuals in a State. And, as explained above, include the additional \$300 designated in the FPUC section of CARES in those payments, even if the state opts out of the FPUC program for all other unemployment insurance claims.

As cited above the requirement to pay PUA to "any covered individual" is non-discretionary. Unlike FPUC and PEUC, PUA is not conditioned on agreements with States. There is no provision in PUA allowing States to opt in and opt out. The PUA section (15 USC 9021) does not contain the same discretionary State agreement language as is contained in the FPUC (15 USC 9023) and PEUC (15 USC 9025). Therefore, it would be in DOL's discretion not to allow States to opt out of PUA.

Option Two: Enter into Agreement with Other States to Administer PUA

Another option for DOL to meet their obligation under the CARES Act to provide PUA to every covered individual, would be to enter into an agreement with another state to administer PUA for any covered individual whose state agency has stopped administering PUA benefits.

Although the CARES Act does not specifically mention this option, there is nothing in the Act prohibiting it. Indeed, the CARES Act requires the Secretary to use its judgment and only enter into agreements to administer the CARES Act benefits with states that "have an adequate system for administering such assistance through existing State agencies". [15 USC 9021\(f\)](#). Thus, the fact that the CARES Act both mandates that DOL provide PUA benefits to every covered individual and provides broad discretion to the Secretary on whether to enter into an agreement to administer PUA benefits with every state, it inherently contemplates a situation like the present where it has to enter into an agreement with a state to administer PUA benefits to individuals living and working in another state.

This interpretation of CARES aligns with principles adopted by DOL to construe provisions "liberally so as to carry out the purposes of the Act" and "so as to assure insofar as possible the uniform interpretation and application of the Act throughout the United States". [20 CFR 625.1](#)

Finally, there are precedents of States administering unemployment programs for individuals in other States. After hurricanes Katrina and Rita, which affected both the infrastructure and staff of the state UI agencies, other states stepped up to act as agents for the affected states for the processing of claims, this included regular unemployment insurance and Disaster Unemployment Assistance.

In order to entice other States to administer these PUA claims for out of state claimants, the DOL could use a portion of the \$2 billion in funds appropriated to it in the American Rescue Plan to provide one time grants and/or administrative funding to these states. Providing additional funding to states to administer these PUA claims will be important given the potential administrative burdens that would arise in trying to set up a system to allow for these out of state claims.

Hurdle to Overcome

Nothing in the CARES Act prohibits DOL from entering into an agreement with one State to pay PUA benefits to covered individuals who live or work in another State. However, as the CARES Act incorporates the Disaster Unemployment Assistance (DUA) regulations for the administration of PUA benefits, we have identified a potential legal hurdle to this option.

Pursuant to DUA regulations, “[a]n individual shall be eligible to receive a payment of DUA with respect to a week of unemployment . . . [if t]he applicable State for the individual has entered into an Agreement which is in effect with respect to that week.” 20 C.F.R. 625.4. The regulations then further define “applicable State” as follows:

20 CFR §625.12 The applicable State for an individual.

(a) Applicable State. “The applicable State for an individual shall be that State in which the individual’s unemployment is the result of a major disaster.

(b) Limitation. DUA is payable to an individual only by an applicable State as determined pursuant to paragraph (a) of this section, and—

(1) Only pursuant to an Agreement entered into pursuant to the Act and this part, and with respect to weeks in which the Agreement is in effect; and

(2) Only with respect to weeks of unemployment that begin during a Disaster Assistance Period.

While applying these regulations to the PUA program could seem to inhibit other states from administering PUA benefits for covered individuals in the states that have terminated the program, we believe this application would be in direct conflict with the CARES Act and cannot be followed. The CARES Act is clear that the DUA regulations only apply to the extent they are not in conflict with the Act. [15 USC 9021\(h\)](#). If a State cancels or refuses to enter into an agreement to administer PUA to all covered individuals in that state, then stopping the DOL from entering into agreements with other states to administer the PUA benefits would be in direct conflict with the Secretary’s duty to provide PUA benefits to all covered individuals. Thus, we believe these DUA regulations should not prohibit DOL into entering into an agreement with another State to provide PUA to individuals that live in the canceling State. In fact, if DOL allows a State to cancel their PUA agreement, DOL would be obligated to find another State to meet their statutory duty to pay benefits to any covered individual or establish their own system to take and pay PUA claims.²

Disparate Impact

DOL should also consider that a State agency’s deliberate action to end these fully funded pandemic unemployment insurance programs, could run afoul of [Title VI of the Civil Rights Act of 1964](#) and [Section 188 of the Workforce Investment Act of 1998 \(WIA\)](#). This is because it will likely significantly and

² Although we don’t discuss in detail in this memo we think there is a possible third option for DOL to stand up their own PUA program. DOL could fill the PUA gap around State agreements and mandatory payment using their *Chevron* discretion. As ETA itself noted citing *Chevron*: “when the statute is silent or ambiguous, the agency has the authority to fill in the gaps.” See [Memo from DOL Solicitor and ETA in response to OIG Report Number: 19-20-002-03-315](#), June 5, 2020, p.5

disparately impact Black and Indigenous People of Color (BIPOC) workers as it hastens the cliff for such workers.

While the statewide unemployment rate for the states who have chosen to rescind their promise to their constituents is low, the unemployment rate for certain communities of color is still alarmingly high. Clearly, the statewide unemployment rate is an insufficient indicator of the state's real labor market conditions. For example:

- Montana, though the [statewide unemployment rate is 3.8%, the indigenous unemployment rate in Montana remains as high as 13.3% in some tribes](#). High unemployment rates continue to plague several counties, including [Big Horn and Glacier Counties \(9%\) and Lincoln County \(8.4%\)](#).
- Arkansas' [statewide seasonally adjusted unemployment rate is 4.4%](#). However, for Black workers 16 and over the unemployment rate has continuously risen from [9.1% in January 2021 to 9.6% in March 2021](#).³
- South Carolina's statewide [unemployment rate for white workers is 3.8% compared to 6.3% for Black Workers](#).
- Alabama's statewide seasonal adjusted unemployment rate was [3.8% in March](#). But in cities like Prichard, Alabama with a [89.7% Black population](#) the unemployment rate is 10% and for cities like Selma, Alabama with a high population of [Black people at 82.3%](#) the unemployment rate is 9.4%.⁴

Across the nation, high unemployment rates persist for Black workers who had the highest unemployment rate in [April's job report at 9.7%](#) followed by [Latinx workers at 7.9%](#). Compared to [white workers unemployment rate is 5.3%](#).⁵ This hastening of the cliff spurred by state agencies incomplete assessment of their states most vulnerable workers coupled with the [existing barriers workers of color already face in actually receiving UI benefits](#), will further exacerbate an already inequitable system.

Additionally, when supplemental UI programs like FPUC were enacted, it alleviated poverty and allowed for parents to afford basic household expenses. When the \$600 additional federal benefits at the end of July expired, it brought higher rates of poverty. When the current additional \$300 benefit expires, it will once again subject already struggling families to additional hardship. And if PUA ends prematurely it will surely have a detrimental impact on all, but especially on BIPOC workers and families. These states are willing to hasten the cliff using a metric that does not represent the context and experiences of Black and Indigenous workers of color.

Indigenous workers in Montana and Black workers in Arkansas, South Carolina, and Alabama, respectively will feel the disparate economic sting of these programs ending before Congress intended as the unemployment rate for BIPOC communities in those states are still much higher than the statewide rate. Ending these programs prematurely explicitly disregards the reality of BIPOC workers, it eviscerates the spirit and potential of the CAREs Act to support all workers. We need to create systems that value the dignity of ALL workers and their families.

Conclusion

³ Note that this chart lists unemployment for 16 and over for all races in Arkansas as 6.5% and not 4.4% as listed for statewide seasonal adjusted rate [here](#) (last visited 5/10/2021).

⁴ AL LMI News Issue 03 March 2021 Data, page 17, <http://www2.labor.alabama.gov/Newsletter/LMI%20Newsletter.pdf> (last visited 5/10/2021).

⁵ A prior version of this memo had cited unemployment rates for workers aged 16-19, which reveal even starker disparities in unemployment rates: [18.9% for Black workers](#) and [17% for Latinx workers](#) compared to an [11.1% unemployment rate for white workers](#).

Without exercising one of these options, or developing their own ability to take and pay claims, DOL will not only cause significant harm to our most vulnerable, it will be in direct violation of their duty to provide PUA benefits under the CARES Act. States stand to [lose an incredible amount of money](#) if they end these programs prematurely. Allowing these programs to continue to their intended date provides an abundant [opportunity for recovery in state and local communities](#). We stand at the ready to help DOL meet this crucial need.