

June 5, 2020

MEMORANDUM FOR: SCOTT S. DAHL
Inspector General

FROM: KATE O'SCANNLAIN
Solicitor



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SUBJECT: Response to the Office of Inspector General's (OIG) Alert
Memorandum: *The Pandemic Unemployment Assistance Program Needs Proactive Measures to Detect and Prevent Improper Payments and Fraud*, Report Number: 19-20-002-03-315

The Department of Labor's (Department) Employment and Training Administration (ETA) and Office of the Solicitor (SOL) appreciate this opportunity to respond to the OIG's Alert Memorandum titled *The Pandemic Unemployment Assistance Program Needs Proactive Measures to Detect and Prevent Improper Payments and Fraud*, Report Number 19-20-002-03-315 (Memorandum) and to its recommendations.

At the outset, ETA and SOL recognize the OIG's crucial role under the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (CARES Act), in helping to combat fraud and abuse within the Unemployment Insurance (UI) program. ETA and SOL share the OIG's concerns relating to fraud and abuse in the UI programs and recognize that ETA must remain vigilant in overseeing its programs. To that end, ETA proactively engaged with the OIG in an ongoing effort to coordinate and share relevant information to combat against these abuses.

ETA and SOL also share the OIG's concerns set forth in its Memorandum regarding potential fraud in the Pandemic Unemployment Assistance (PUA) Program arising from the self-certification eligibility process that the CARES Act established. For this reason, ETA has been taking active measures to address improper payments and fraud in the UI system stemming from the CARES Act in general and the PUA program in particular, and will continue to expand upon those efforts. Specifically, we carefully considered the OIG's recommendations to: (1) consult Congress regarding the PUA self-certification requirements, (2) consider utilizing Section 2102(a)(3)(A)(ii)(I)(kk) or Section 2104(f) of the CARES Act as alternative tools to require

documentation of employment, and (3) request legislative action from Congress to curtail improper or fraudulent PUA payments.

Finally, we understand that the OIG recognizes that the Department is the sole arbiter of policy pronouncements and legal interpretations, and is thus singularly charged with providing guidance to the States for administering the self-certification eligibility process under the PUA statute. This is important, so that States know they may continue to follow the procedures in the Department's existing guidance. Having said that, at the suggestion of the OIG, we will engage Congress about ways they may want to legislatively enhance the fraud prevention and program integrity requirements of the CARES Act. We plan to continue aggressive outreach and technical assistance to all states to curtail improper or fraudulent PUA claims. As part of that technical assistance, we will remind States to look for other mechanisms for ensuring integrity of payments for PUA, including availing themselves of relevant data sources on the employment history of these claimants.

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The discussion below includes: (1) the Department's detailed legal analysis setting forth the Department's position that the PUA program does not require proof of employment to establish and maintain eligibility, (2) a description of the documentation that ETA agrees is required as part of the PUA eligibility and benefit calculation process, and (3) steps ETA is taking to address fraud and improper payments in the PUA program.

I. BACKGROUND

To support states' implementation of the PUA program, the Department issued two pieces of guidance: Unemployment Insurance Program Letter (UIPL) No. 16-20 and UIPL No. 16-20, Change 1, providing operating guidance to the UI system. Specifically, the guidance provides, in accordance with the statute, that to be a "covered individual" under PUA, an individual must be ineligible for regular UI benefits and self-certify that he or she is unemployed or partially unemployed and unable to work or unavailable to work due to one of the specific COVID-related reasons enumerated in the CARES Act or the Department's guidance. States have implemented these provisions and are currently paying PUA benefits to individuals meeting these eligibility requirements.

Prior to issuing the Memorandum, ETA, SOL, and the OIG discussed the issues outlined in the Memorandum and questions related to ETA's and SOL's interpretation of the CARES Act, specifically the interpretation in Question 18 of Attachment I to Unemployment Insurance Program Letter (UIPL) 16-20, Change 1. Question 18 in that document states:

Question: DUA requires that an individual provide proof of employment or commencement of employment within 21 calendar days. Is PUA the same?

Answer: No. PUA does not require proof of employment. Instead, PUA requires that the individual self-certify that one of the COVID-19 related reasons identified in section 2102(a)(3)(A)(ii)(I) applies to his or her situation.

Beginning May 7, 2020, ETA engaged with OIG about Question 18. OIG representatives inquired whether the Disaster Unemployment Assistance (DUA) requirement at 20 CFR 625.6(e)(2)—that an individual submit documentation substantiating his or her employment within 21 days or be determined to be ineligible—was also applicable in the PUA context.

At that time, the OIG asserted that because Section 2102(h) of the CARES Act directs that the DUA regulations at 20 CFR part 625 govern where there is no conflict with Section 2102, Section 625.6(e)(2) would apply. SOL replied that the DUA regulations do not apply where: (i) the CARES Act states otherwise, or (ii) there is a conflict between the CARES Act and the regulations. SOL then explained how section 2102 and the DUA regulations conflict: under the CARES Act, “the Secretary shall provide” PUA benefits if the claimant is a “covered individual.” *See* Sec. 2102(b), (c). As described below, the second requirement is met through self-certification, which by definition does not require additional documentation.

SOL and ETA explained their interpretation and prepared a legal analysis; while OIG raised concerns with the possibility that fraud will arise from that interpretation, it did not offer any support or an analysis for its alternative interpretation. ETA and SOL agreed with the OIG that the provisions of 625.6(e)(1) apply to wage determinations and that individuals are required to submit documentation of wages if they receive a benefit amount above the minimum available benefit amount.

Both ETA and the OIG recognize and agree that the current statutory construct may introduce a degree of risk for fraud. However, as explained below, ETA and SOL continue to believe that SOL’s interpretation is the most legally sound and appropriate reading of this provision, and reflects the policy choice Congress made.

II. LEGAL ANALYSIS OF WHETHER DOCUMENTATION OF EMPLOYMENT MAY BE REQUIRED AS A CONDITION OF ELIGIBILITY

The OIG’s Alert Memorandum tells States “to implement measures, such as requiring claimants to document earnings to substantiate the initial WBA determination, to establish and maintain integrity in the PUA program.” For the reasons set forth below, SOL advises that neither ETA nor the States have the authority to require submission of this documentation for the purposes of determining an individual’s *eligibility*, either initial or continuing, for benefits.

Based upon the plain wording of the statute, Congress intended self-certification to be an intrinsic aspect of the CARES Act. To be eligible for PUA benefits under the CARES Act, an individual must be a “covered individual,” which is defined at Section 2102(a)(3)(A). Under this provision (which is set forth below with emphasis supplied), a “covered individual” is one who:

- (i) is not eligible for regular compensation or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107; *and*

(ii) (I) provides *self-certification* that the individual is otherwise able to work and available for work within the meaning of applicable State law, except the individual is unemployed, partially unemployed, or unable or unavailable to work because” of one of the listed COVID-19 related reasons; *or*

(II) the individual provides *self-certification* that the individual “is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under section 2107 and meets the requirements of subclause (I).

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.

The non-discretionary nature of these benefits is reiterated in paragraph (c) of the provision: such assistance “*shall be available* to a covered individual” for the statutory period provided that the “covered individual’s unemployment, partial unemployment, or inability to work caused by COVID-19 continues.” CARES Act Sec. 2102(c)(1)(A) (emphasis added).

It is true that the CARES Act refers to the DUA regulations when discussing the method of calculating benefits. In paragraph (d), the CARES Act explains how benefits are to be calculated. The PUA program relies on the benefit calculation provisions of DUA and explicitly references 20 CFR 625.6 when discussing how benefits are calculated. Section 625.6(e)(2) states: “[a]ny individual who fails to submit documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment shall be determined ineligible for the payment of DUA for any week of unemployment.” 20 CFR § 625.6(e)(2). However, Congress mandated that the DUA regulations govern *except where the CARES Act states otherwise*, or there is a conflict between those regulations and the CARES Act. *See* CARES Act Sec. 2102(h). Under the CARES Act, Congress specifically set forth only two eligibility requirements 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). 20 CFR § 625.6(e)(2) conflicts with the language of the CARES Act and per the terms of the CARES Act may not be applied here; therefore, the imposition of a documentation requirement would exceed ETA or the State’s authority.

The eligibility provision of the CARES Act directly conflicts with the DUA regulation’s requirement for providing substantiating documentation of employment to establish eligibility. Application of 20 CFR § 625.6(e)(2) would add an eligibility requirement in contravention of the statutory direction that benefits be available after the two eligibility criteria listed in the CARES

Act are met. Thus, imposition of the DUA requirement by ETA or the States would violate section 2102(b) of the CARES Act, and Section 2102(h) would not apply.

Further, while ETA has authority to issue guidance and other operating instructions to implement the provisions of Title II, Subtitle A, of the CARES Act, guidance imposing the requirement at 20 CFR § 625.6(e)(2) would be outside of ETA's authority as the agency must give effect to the unambiguous expressed intent of Congress. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). It is only when the statute is silent or ambiguous, that the agency has the authority to fill in the gaps. *Id.* at 843. If the meaning of the statute is plain, there is no ambiguity to resolve and ETA has no authority to fill in the gaps. *Id.*; *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

"Self-certification" is defined by the Oxford Dictionary as "the practice of making an official declaration that something complies with regulatory standards or procedures without independent substantiating evidence." <https://www.lexico.com/en/definition/self-certification>. Accessed June 1, 2020; *see also* Black's Law Dictionary (11th ed. 2019) ("The signing of a form or note to verify that one has done something or to explain why one has not done something."). The plain meaning of Section 2102(a)(3)(A)(ii) is clear—an individual is a "covered individual" and eligible for PUA benefits if they, among other things, provide self-certification of their eligibility. There is no statutory ambiguity as to how the requirement is fulfilled; thus, neither the States nor ETA have authority to interpret that language to include an additional requirement such as substantiating documentation of employment.

a. Contrasting Section 2102 of the CARES Act with Section 410 of the Stafford Act further supports ETA's Position

Contrasting Section 2102 of the CARES Act with the Stafford Act provisions on unemployment, which are the statutory basis for the DUA program and regulations, is helpful to understanding the arguments above.

The Stafford Act provision authorizes the provision of assistance as the President considers appropriate:

[W]hile such individual is unemployed 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) or waiting period credit. Such assistance as the President shall provide shall be available to an individual as long as the individual's unemployment caused by the major disaster continues or until the individual is reemployed in a suitable position....

42 U.S.C. § 5177(a).

This provision, which corresponds to Section 2102(a)(3)(A)(ii) of the CARES Act, merely says that benefits are provided "as long as the individual's unemployment caused by the major disaster continues." The Stafford Act left ETA almost complete discretion on how to determine

whether an individual's unemployment is caused by the disaster in the regulation. ETA, in exercising that discretion, allowed an initial self-certification to be followed up by substantiating documentation within 21 days. This is contrary to CARES Act Section 2102, where Congress specifically established the two eligibility criteria, including that one is met through self-certification, which left ETA without discretion to interpret or add to the eligibility requirements.

b. Alternative tools suggested by the OIG in its Memorandum may not be used to require documentation of employment as a condition of eligibility

In its Memorandum, OIG suggested two alternative tools that ETA may use to require documentation of employment as a requirement of eligibility for PUA benefits: (1) use of the Secretary's authority in Section 2102(a)(3)(A)(ii)(I)(kk) and (2) use of Section 2104(f) of the CARES Act, the provision governing fraud in the context of the Federal Pandemic Unemployment Compensation (FPUC) program.

First, Section 2102(a)(3)(A)(ii)(I)(kk) of the CARES Act, which is included in a list of PUA-qualifying COVID-related reasons for unemployment, provides:

(kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section

The placement of this paragraph—at the end of the list of PUA-qualifying COVID-related reasons for unemployment—means that the criteria the Secretary is authorized to create are additional COVID-related reasons for unemployment, not general rules of eligibility. This conclusion, in addition to being the plain meaning of the language in light of the structure of the statutory provision, arises from the *ejusdem generis* canon of statutory interpretation, which explains that a catch-all in a list must be interpreted consistently with the remainder of the list. See “*Ejusdem generis*,” 2A Sutherland Statutory Construction § 47:17 (7th ed.) (“where general words follow specific words in an enumeration describing a statute's legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”) Thus, this provision does not give the Secretary unrestricted authority to include additional eligibility requirements as the OIG suggests. To use this authority to implement a new eligibility requirement, especially one that appears to be contrary to the statute itself, would not comply with the CARES Act.

Second, Section 2104(f) of the CARES Act defines fraud for the purposes of the FPUC program and provides remedies where fraud has been committed. It is not clear how ETA could use this as a tool to require individuals to submit documentation substantiating employment for the purposes of PUA. Under Section 2104(b) and (g) of the CARES Act, an individual is automatically eligible for FPUC if they are eligible for benefits under one of a number of other programs, including PUA. However, the payment of FPUC benefits does not alter the eligibility requirements for any of those programs. Nor does the FPUC fraud provision provide ETA any authority to require documentation that is not already required for those other programs. The FPUC fraud provision instead provides remedies that may be used if fraud occurs with respect to FPUC benefits.

In short, we respectfully conclude that neither of the additional tools OIG suggested may be used to require documentation of employment as an eligibility requirement.

III. ETA CONCURS WITH THE OIG THAT DOCUMENTATION IS REQUIRED BY THE CARES ACT FOR CERTAIN PURPOSES UNDER THE PUA PROGRAM

As explained above, because Congress mandated that eligibility is established by self-certification, ETA and the States may not require documentation substantiating an individual's employment or self-employment as an eligibility requirement for PUA benefits. However, some information about employment and documentation of wages is required during the PUA process for other purposes.

As a preliminary matter, we concur with the OIG that when a State is determining the benefit amount an individual may receive, the DUA regulations at 20 CFR § 625.6(e)(1) apply. That provision requires documentation for any amount over the minimum weekly benefit. This DUA requirement does not conflict with the PUA statute. In fact, 20 CFR § 625.6 is explicitly referenced at Section 2102(d) of the CARES Act as the manner by which benefits are calculated. Thus, States are required to obtain documentation of wages for any benefit amount above the minimum weekly benefit amount and, if such documentation is not obtained, must immediately reduce future benefit payments to the minimum benefit available. *See* 20 CFR § 625.6(e)(3). An overpayment for the benefits paid over the minimum weekly amount must also be created by the State. Neither the CARES Act nor the regulations implementing DUA provide for waiver of these overpayments. *See* 20 CFR § 625.14.

In addition, the first requirement for PUA eligibility is that the State determine whether the individual is eligible for regular UI benefits. Requirements for determining eligibility for regular UI vary by State, but generally, this requires capturing information from both the claimant and the claimant's most recent employer(s) regarding the dates of employment, the reason for the individual's separation from employment, and the hours and wages received. In UIPL 16-20, Attachment I, ETA allows States to use alternative paths in determining that an individual is not eligible for regular UI, however, these paths must still ensure that an individual is not eligible for regular UI so some level of information collection or documentation is required.

Further, ETA notes that the benefit reduction provisions of DUA, 20 CFR § 625.6(f) and 20 CFR § 625.13(a), also apply in determining the benefit amount payable under PUA. *See* UIPL 16-20, Attachment I. This requires the State to determine whether the individual has wages from other employment or income from other specified sources, for example, a pension or annuity, and reduce the benefit amount available to the individual accordingly. States must implement these requirements in determining the benefit amount payable to an individual and must obtain any documentation necessary to substantiate their determination.

Finally, in UIPL 16-20, Attachment I, ETA advised the States, as required in DUA at 20 CFR 625.14, that they must apply the normal State procedures to investigate and remedy fraud. The procedures for investigation of fraud are included in Appendix C of the DUA regulations and include, but are not limited to, checking paid claims for overpayments and willful

misrepresentation, investigating information on suspected benefit fraud, and investigating information obtained through comparisons of benefit payments with employment records.

IV. ETA IS TAKING AGGRESSIVE ACTION TO COMBAT FRAUD IN THE PUA PROGRAM

ETA continues to actively work with States and our law enforcement partners to combat the increase in fraud resulting, in part, from the generosity of the benefits provided under the CARES Act. In its guidance, ETA required States to implement the same required integrity and fraud prevention tools used for the regular UI program for the CARES Act programs, such as cross-matches with key data sources.

ETA has been working closely with the OIG's Office of Investigations – Labor Racketeering and Fraud, to ensure state cooperation in detecting and investigating fraud to ensure it has access to the necessary state UI data and information to prevent and detect fraud, to communicate fraud schemes in real time, and to identify effective fraud prevention and detection strategies and disseminate those to States.

ETA has refocused the resources of the UI Integrity Center to provide tools and resources for States to combat fraud in the context of COVID-19 and the CARES Act, such as continued expansion of the Integrity Data Hub, which provides multiple resources to help prevent and detect fraud, including:

- A Suspicious Actor Repository that allows States to share and cross-match with known fraud data elements to detect multi-state fraud;
- Cross-matches with suspicious Internet Protocol (IP) addresses;
- A multi-state claims data cross-match that enables data analytics to detect fraud;
- A real time Fraud Alert System to enable States to communicate fraud schemes in real time with each other and the OIG;
- Implementation of a national identity verification tool to support all States that will be ready in July 2020 for state implementation;
- Weekly state calls to share and communicate fraud prevention strategies that include the OIG; and
- A suite of fraud investigation on-line training modules for state staff.

ETA also issued UIPL 23-20 to emphasize the importance of program integrity and the need to address improper payments and fraud in the UI system. This UIPL discussed administrative issues that have arisen in CARES Act program administration and the many fraud and overpayment prevention tools available to the States.

In addition, as part of ETA's proactive response to the structure of the PUA program and the potential for fraud in self-certification, in UIPL 16-20, Attachment I, ETA requires States to include fraud warnings in the system through which individuals submit self-certifications during the PUA application process. That warning must also include a statement that fraud may result in criminal sanctions. This warning serves as a reminder to individuals that there are significant consequences to intentionally submitting a self-attestation that is not accurate.

ETA also continues to provide technical assistance to States to ensure that they are implementing the PUA program in an effective manner and continues to remind States of the importance of program integrity in each UIPL related to CARES Act programs.

Finally, based upon this recognition of increased potential for fraud, ETA will implement OIG's suggestion to consult with Congress and offer technical assistance if Congress wishes to amend the self-certification provision to require submission of documentation substantiating the individual's previous employment.

V. CONCLUSION

ETA and SOL recognize and appreciate the OIG's crucial role in helping to combat fraud and abuse under the CARES Act. Indeed, Congress appropriated \$26 million to OIG to carry out audits, investigations, and other oversight activities related to States' adherence to existing unemployment insurance (UI) laws and policies, as well as to the UI provisions of the CARES Act, including PUA. ETA recognizes and remains concerned about the potential for increased fraud and abuse resulting from the self-certification process set forth in Section 2102 of the CARES Act. Respectfully, however, ETA is unable to implement OIG's suggestion in the Memorandum that ETA or the States require documentation of employment as a requirement for eligibility for the PUA program because it is inconsistent with the CARES Act.

ETA nevertheless remains committed to working with States to ensure full compliance and faithful execution of the guidance and instructions in Unemployment Insurance Program Letter (UIPL) No. 16-20 and UIPL No. 16-20, Change 1.