No. 98633-9

SUPREME COURT OF THE STATE OF WASHINGTON

UNEMPLOYMENT LAW PROJECT,
MCKEEZI TAYLOR BARRAZA,
and MARIANNE WHITE,

Petitioners,

v.

SUZAN LEVINE,
COMMISSIONER FOR THE WASHINGTON STATE
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

MOTION FOR ACCELERATED REVIEW AND IMMEDIATE RELIEF

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INTRODUCTION

Petitioners move for accelerated review and immediate relief. This Court should promptly enforce Employment Security Department (ESD) Commissioner Suzan LeVine's duty to ensure that unemployment compensation payments are made when due and to protect due process. ESD's failure to make timely payments irreparably harms many unemployed workers statewide. Many unemployed workers are getting nothing back for their efforts at a time when they desperately need assistance. This is unacceptable and cannot persist. This Court is the appropriate forum to restore public trust and ensure that the unduly delayed payments are promptly processed.

The Court's review of this matter cannot wait. Many claimants cannot meet their immediate, most basic needs and Commissioner LeVine has a clearly established duty to act in accordance with the law. Thus, the mandamus relief petitioners seek is warranted.[1]

[1] After this action was filed, Commissioner LeVine held two press conferences. The press conferences are available at https://www.tvw.org/watch/?eventID=2020061131 ("June 11 press conference") and https://www.tvw.org/watch/?eventID=2020061147 ("June 18 press conference").

IDENTITY OF MOVING PARTIES AND BACKGROUND FACTS

Petitioner Unemployment Law Project (ULP) advises and represents workers across Washington State who, after losing their jobs, are denied unemployment benefits in hearings and appeals. Tirpak Dec., ¶ 2. ULP has a special interest in this action because of its unique role as a not-for-profit law firm providing services to Washington workers adversely affected by ESD's decisions.[2] Simply put, ULP cannot do its job if ESD does not do its job. *See* Tirpak Suppl. Dec., ¶ 7.

Hundreds of unemployed workers called ULP because ESD failed to communicate with them, or the communications from ESD caused confusion.[3] ESD sent out contradictory notices and multiple requests to verify identity with the submission of personal documents without confirming receipt or resolving the issue with claims (i.e., releasing payments) after receipt; it suspended claimants with approved benefit claims for multiple weeks and denied claimants the opportunity to appeal the suspension of payments or denial of benefits. *See* Tirpak Dec., ¶¶ 6, 9,

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[2] *See* http://www.unemploymentlawproject.org/our-services/ ("Through our helpline, we provide FREE information, advice and referrals on a number of unemployment topics.").

[3] Petitioners included in the record representative declarations from some of the witnesses who contacted ULP and were adversely affected by ESD's acts and omissions. Not all are cited in this motion, but all are relevant. *See, e.g.*, Bradford Dec., ¶ 11; Abbit Dec., ¶ 10; Feliciano Dec., ¶ 13; Jolma Dec., ¶ 11; Peters Dec., ¶ 9; Svoboda Dec., ¶ 10; Wake Dec., ¶ 16. "Appendix C" (lettering continued from the Petition) contains a list of the declarations filed in this action to date. In addition to the declarations in the record, other statements ULP collected from witnesses are being shared directly with the Office of Attorney General for immediate attention.

12; *see also, e.g.*, Altona Dec., ¶ 7. Some claimants submitted a request for an appeal, and they did not receive a notice of hearing from the Office of Administrative Hearings. *See, e.g.*, Harrington Dec., ¶¶ 7, 16, 26. Others report having their bank accounts frozen and flagged for "suspicious activity" without any recourse. Paracuelles Dec., ¶¶ 13-15; *see also* Swanner Dec., ¶¶ 8-10.

In the last several weeks, ULP received hundreds of calls *daily*. Tirpak Suppl. Dec., ¶ 1.[4] Our federal and state constitutions require ESD to provide petitioners McKeezi Taylor Barraza and Marianne White, as claimants, with due process protections; in addition, federal law entitles all unemployed workers to prompt payment of their unemployment benefits when due. These petitioners, like scores of others, are being denied basic

[4] ESD did not answer many of the calls made by distraught claimants who submitted their various forms of identification (sometimes through unsecure channels) and never received confirmation of receipt. *See, e.g.*, Glenn Dec., ¶¶ 10-11. At various points, ESD restricted inbound calling as well. *See* June 18 press conference *supra* n.1, at 34:30-35 min. (explaining additional restrictions beginning on June 24); *see also* Harrington Dec., ¶ 19 (describing struggles of contacting ESD).

ESD's approach to identity verification also put unemployed workers who have limited or no access to the internet or a computer in an incredibly difficult situation. In some cases, workers need to provide a signature to ESD, requiring a printer and a scanner or fax machine. *See, e.g.*, Harrington Dec., ¶¶ 11-12; DeMaddalena Dec., ¶ 16 ("It is very difficult to respond to requests for information, signatures and respond in general when the libraries are closed and one does not have access to electricity."). Similarly, when claimants are locked out of their e-services account, it makes it almost impossible to accomplish tasks. *See, e.g*., Paracuelles Dec., ¶ 7; *see also* Petrish Dec., ¶ 8.

Regarding the contradictory and repeat notices, Commissioner LeVine instructed that at least some people should ignore them until ESD provides further guidance. *See* June 11 press conference *supra* n.1, at 9-11 min. (describing problems with vendor and promising more instruction to claimants); *see also* Tirpak Suppl. Dec. ¶ 6 (discussing danger of not filing an appeal). It is unclear if ESD gave further instruction.

guarantees of our unemployment compensation program, Title 50 RCW, and will continue to suffer until provided effective relief. *See* Barraza Suppl. Dec., ¶ 6. Even once ESD provides them with their unemployment compensation payments, they will face the uncertainty that similar suspensions of payments could recur and the possibility of experiencing further arbitrary action. *See* White Suppl. Dec., ¶ 19.

ESD experienced unprecedented strains on its operations, technology glitches, and a massive fraud, but these events do not excuse the hardship ESD forced on unemployed workers who simply sought their unemployment compensation payments. *See, e.g.*, Radovich Dec., ¶ 8. In normal times, unemployed workers enjoy the benefits of administrative proceedings when their unemployment compensation payments are denied, including immediate access to due process protective procedures and timely relief; the nature of the forum also creates opportunities for the staff and volunteer attorneys at ULP to assist claimants denied benefits, and generally poses fewer burdens to a pro se claimant than pursuing relief in court. Tirpak Suppl. Dec., ¶ 5; *see* WAC 192-04-110 (concerning representation); *see also* Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131, 161-62 (2008) ("the public assistance appellant faces an

extraordinarily daunting battle to prevail in the administrative hearing process.").

On June 10, 2020, ESD announced, "If you were receiving benefits but they were paused on the weekend of May 15 due to our efforts to combat imposter fraud, we expect to have those claims resolved by Friday, June 19, so payments can start again for legitimate customers."[5] On June 20, ESD updated its Operation 100% page, explaining that, "Operation 100% started with the goal of resolving or paying all claims for those in adjudication who applied between March 8 and May 1" and that ESD did not hit its goal of June 15.[6] As of June 15, 2020, 81,508 applied for benefits between March 8 and June 15 and have still not been paid; 33,393 were paid previously and had their payments suspended; from the same webpage cited at footnote 6:

WeeksWaiting	
0	4
1	345
2	331
3	378
4	533
5	995
6	3,517
7	6,816
8	7,779
9	4,727
10	4,411
11	2,663
12	740
13	83
14	71
Grand Total	33,393

[5] https://esd.wa.gov/unemployment/unemployment-benefits-fraud (accessed 6/23/20).
[6] https://esd.wa.gov/unemployment/adjudication (accessed 6/23/20).

Recently, Commissioner LeVine recognized that ESD is not on track to resolve the claims of the 33,393 people by the end of the month, but said these claims would be resolved by July 13, 2020. *See* June 18 press conference *supra* n.1, at 21-22 min. For too many that is far too late.

The exact measures ESD took to combat the fraud and the precise number of people ESD adversely affected in the process are unclear, so determining whether these payments were in fact held up because of the fraud remains elusive. *Regardless*, the law requires claimants to be timely paid. ESD frequently holds up unemployment compensation payments in a manner unmoored from any authority of law.

ARGUMENT

"[T]he Great Depression of the 1930's spawned such economic regulators as … unemployment compensation. These and similar measures have insured that cyclical economic recessions do not degenerate into depressions." *Ferree v. Fleetham*, 7 Wn. App. 767, 771, 502 P.2d 490 (1972) (citations omitted). Our legislature did not adopt the Employment Security Act (ESA) in 1939 only for it to deprive those in need of many of its basic guarantees during a period of mass unemployment. Rather, our legislature instructs the Court that Title 50 RCW "shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010.

The ESA "provides substantive rules about which unemployed workers are eligible for benefits and the amount of benefits to be paid. It also includes specific procedural statutes for administering Washington's unemployment compensation program." *Stewart v. State, Dep't of Employment Sec.*, 191 Wn.2d 42, 46, 419 P.3d 838 (2018). Just as the unemployed worker must follow these procedures, so must ESD. *See In re Jullin*, 23 Wn.2d 1, 15, 158 P.2d 319 (1945) ("While the administration of the unemployment compensation act is entrusted to the commissioner, [the commissioner's] administration thereof must be in accordance with the provisions of the act itself and the rules prescribed thereby."). Enforcing Commissioner LeVine's legal obligations will ensure that Washington maintains an adequate, responsive unemployment insurance program.

Petitioners can readily satisfy the three elements necessary for mandamus relief. First, Commissioner LeVine has a clear non-discretionary duty to act provided by federal and state law; second, there is not a plain, speedy, and adequate remedy in the ordinary course of the law because the petitioners have no right or opportunity to administratively appeal or otherwise expeditiously enforce Commissioner LeVine's duty; and third, petitioners are beneficially interested as claimants and as a legal service provider for claimants that employs Washingtonians. *See Burrowes v.*

Killian, 195 Wn.2d 350, 356, 459 P.3d 1082 (2020) (quoting *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 588-89, 243 P.3d 919 (2010)).

Countless Washington workers are unemployed, through no fault of their own, and not receiving their benefits in a timely or dignified manner. *See, e.g.*, Riegert Dec., ¶ 10; *see also* Tirpak Suppl. Dec., ¶ 1. Workers rely on unemployment benefits to avoid catastrophic financial doom. *See, e.g.*, Burris Dec., ¶¶ 8-10. Unemployed workers need relief from their impoverished conditions. *See, e.g.*, DeMaddalena Dec., ¶¶ 13, 15.

The United State Supreme Court recognizes a protected due process right requiring notice and opportunity for hearing prior to seizure of property:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of [their] possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose more particularly, is to protect his use and possession of property from arbitrary encroachment ... [T]he prohibition – ... against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is [theirs], free of government interference.

Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). In *Lynch v. Household Finance Corp.*, the United States Supreme Court also recognized:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to

> speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a *welfare check*, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized

405 U.S. 538, 552, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972) (emphasis added); *see Goldberg v. Kelly*, 397 U.S. 254, 261-62 & n.8, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (finding that the termination of an entitlement created by statute "involves state action that adjudicates important rights" and stating that welfare benefits are "more like 'property' than a 'gratuity'"). Courts in Washington have similarly recognized such unconstitutional deprivations are not permissible; the Thurston County Superior Court permanently enjoined the ESD Commissioner *and all successors* to protect due process, specifically requiring both adequate notice and an opportunity to be heard by continued claim recipients. *See* Appendix B to Pet. for Writ of Mandamus (*O'Brien, et al. v. ESD*, No. 83-2-00818-0 (1988)).[7] It is unclear why ESD is not making conditional payments to all continued claim recipients. *See* WAC 192-100-070

[7] *O'Brien* dealt with ESD suspending unemployment benefit payments for "continued claim recipients." The order defined continued claim recipients as those who had been previously approved for monetary benefits and who have gathered waiting period credit. *See* Appendix B to Pet. for Writ of Mandamus (*O'Brien, et al. v. ESD*, No. 83-2-00818-0 (1988)); *see also* WAC 192-100-020 (defining continued claim recipient); *cf. Castro v. Sugarman*, 684 F. Supp. 646, 650 (W.D. Wash. 1987) ("The burden is always upon those administering the plan to see to it that the needy are paid what they are entitled to when they are entitled to it." (quoting *Tambe v. Bowen*, 662 F. Supp. 939, 941-42 (W.D.N.Y. 1987)).

(defining conditional payment); *see* June 11 press conference *supra* n.1, at 14:15-14:45 min. (explaining some are receiving conditional payments).

Commissioner LeVine's failure to comply with her fiduciary duty to process and promptly pay unemployment benefits "when due" in accordance with 42 U.S.C. § 503 creates an emergency situation in the lives of the many Washingtonians who require prompt payment of their unemployment benefits for sustenance. *See California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 130, 91 S. Ct. 1347, 28 L. Ed. 2d 666 (1971); *Fusari v. Steinberg*, 419 U.S. 379, 387-88, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975) ("The basic thrust of the statutory 'when due' requirement is timeliness." (citing *Java*, 402 U.S. at 130-33)); *see also* 20 C.F.R. § 650.3(a). This Court must "give effect to the congressional objective of getting money into the pocket of the unemployed worker *at the earliest point that is administratively feasible*. That is what the Unemployment Insurance program was all about." *Java*, 402 U.S. at 135 (emphasis added); *see also Philbrook v. Glodgett*, 421 U.S. 707, 714, 95 S. Ct. 1893, 1899, 44 L. Ed. 2d 525 (1975) ("Unemployment compensation programs, financed by employer contributions, are intended to operate without regard to need and be available to a recipient as a matter of right." (citing *Java*, 402 U.S. 121). Commissioner LeVine's duty to act is clear; ESD must cease withholding unemployment compensation payments and provide a right to

be heard.[8] *See also City of Redmond v. Moore*, 151 Wn.2d 664, 670, 91 P.3d 875 (2004) ("Though the procedures may vary according to the interest at stake, '[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)) (internal marks omitted and alterations in original)).

Without the prompt provision of unemployment compensation benefits and the attendant due process protections, petitioners and claimants seeking assistance from ULP may face financial ruin. Commissioner LeVine's duty to act in accordance with the law is clear. Under the circumstances, a mandamus action allows petitioners to obtain plain, speedy, and adequate relief. Petitioners request (1) accelerated review pursuant to RAP 18.12 and (2) immediate relief as the Court finds just and proper.

A. Accelerated Review

This Court should exercise its discretion to accelerate review under RAP 18.12 and enter orders pursuant to that discretion "in order to serve the

[8] The Department of Labor's interpretation of federal law is consistent and binding. Among other things, it requires ESD to make reasonable attempts at notice and make prompt payment by the end of the week following when an issue of ineligibility is detected with a continued claim. Unemployment Insurance Program Letter (UIPL) No. 01-16, Change 1 (Jan. 13, 2017), at 3, 6-7 (attached as "Appendix D"); *see also* UIPL No. 04-01 (Oct. 27, 2000) (attached as "Appendix E").

ends of justice." RAP 1.2(c). Immediate attention is required because many are in dire conditions because Commissioner LeVine has not satisfied her duty to make prompt payment of unemployment compensation benefits when due while protecting due process. The legislature did not give Commissioner LeVine authority to withhold payments from eligible claimants and ESD did not articulate any specific authority to do so.[9] ULP's advocates are regularly hearing distressing tales of workers' desperate attempts to provide ESD information needed to file their claim and get prompt payments of benefits. Tirpak Suppl. Dec., ¶ 2. Claimants are desperately trying to pay their bills and feed their families. *See, e.g.*, Ebert Dec., ¶ 12.

Frequently, ESD suspended payments without any communication or payment date in sight. *See, e.g.*, Mair Dec., ¶ 7; Robinson Dec., ¶ 9. Some claimants have compounding issues, and ULP cannot provide meaningful assistance without a right to appeal. Tirpak Dec., ¶ 12; *contra* RCW

[9] *See* June 4 press conference, https://www.tvw.org/watch/?eventID=2020061023, at 78-79:30 min. (explaining, in response to a question about the legal grounds for withholding payments, ESD has a "commitment to U.S. Department of Labor to make sure we are not distributing fraudulent funds."). At the same press conference, Commissioner LeVine explained that ESD identified approximately 25,000 claims involved in the identity verification as fraudulent and those claims will be removed from the queue. *Id*. at 18:10-19:15 min. It is unclear why the claims not identified as fraudulent have not been processed. The Department of Labor prohibits states from relying on fully automated fraud determinations and requires *prompt payment* (in practice, 7-10 days maximum). *Supra* n.8 (Appendix D, at 4, 6).

50.32.020 (concerning filing of benefit appeals). Washington's unemployed workers require this Court's immediate intervention.

B. Immediate Relief

This is a serious, unexpected, and often dangerous situation requiring immediate action. Tragically, Washington's money was stolen. This breach devastated everyone. But ESD cannot make eligible claimant's bear the responsibility by withholding their benefits. Increasingly, ESD's failure to protect due process and promptly pay unemployment compensation irreparably harms unemployed workers. Consequently, the people of our State need to know what ESD will do to ensure it makes prompt payments and protects due process. Adequate relief cannot be given if this action is considered in the normal course because delay results in financial ruin for many.

Petitioners request this Court order ESD "to report to the Court … all steps that have been taken and will be taken" to ensure that ESD protects due process rights and makes prompt payment of unemployment compensation benefits as required by the law. *Cf*. Order on Motion, *Colvin et al. v. Inslee*, No. 98317-8 (April 10, 2020) (requiring the Department of Corrections to submit reports and act according to law).

Immediate relief will ensure that Commissioner LeVine does her duty before the situation becomes more dire for those who have not received

their unemployment compensation. Commissioner LeVine should report to the Court the steps taken by ESD and steps ESD will take going forward to ensure prompt payment of benefits and timely due process. To the extent ESD intends to excuse its actions because of technological glitches (e.g., for contradictory notices, repeated notices, overpayment threats, and disconnections on ESD's phone line), such deficiencies should also be reported, along with the corrective actions taken to date and remaining.[10] Commissioner LeVine cannot delegate the individualized fraud determination to a fully automated system. *Supra* n.8 (Appendix D, at 4).

The impact of COVID-19 underscores the need for timely, reliable payment of unemployment compensation. Recently, our State agencies were directed to furlough workers, so many more may need to rely on ESD in the coming days.[11] Many of Washington's unemployed workers are experiencing an economic emergency, and their unemployment compensation payments are overdue.

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[10] ULP experiences strains on the administration of its services when ESD does. *See* Tirpak Suppl. Dec., ¶ 4. ULP and other stakeholders can more effectively face the increase of appeals and need for representation with increased transparency. For example, it would be beneficial to see data regarding how many ESD staff members answered the customer service phones each month; data regarding procedures and length of time for access to services by claimants with limited to no English proficiency; and data about requests for hearings and how many of those hearings requested by claimants were actually sent to the Office of Administrative Hearings.

[11] Directive of the Governor, 20-08 (June 17, 2020) ("Furloughs and General Wage Increases").

Our State was a victim of crime, and, less directly, so were the unemployed workers personally impacted by ESD's response to the crime.[12] This Court can ensure that these unemployed workers' voices are heard; the unique circumstances (i.e., overseas perpetrators) likely will preclude any opportunity to be heard in the criminal justice system. *But see* WASH. CONST. art. I, § 35 (constitutional safeguards "ensur[ing] victims a meaningful role in the criminal justice system and to accord them due dignity and respect"). ESD left many unemployed workers in the dark as to when their unemployment compensation payments will be paid or why their payments are held up. The Court should act immediately. *Cf. McCleary v. State*, 173 Wn.2d 477, 546, 269 P.3d 227 (2012) ("While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all.").

Finally, ESD enacted an emergency regulation—effective May 20, 2020—specifically dealing with suspending payments to individuals *suspected of fraud*: WAC 192-140-096. It's unclear whether ESD relied on the May 20, 2020 emergency regulation to suspend the hundreds of thousands of claimants' payments (including retroactively). *See also* WAC

[12] It appears that the fraudulent activity has ceased. *See* June 18 press conference *supra* n.1, at 49-50 min (ESD stopped the fraudulent payments from going out). The State's trust fund also appears to be faring well. *See* Tirpak Suppl. Dec., ¶ 9.

192-100-050 (defining fraud); WAC 192-120-030 (requiring adequate notice). If ESD did, it's saying it had an individualized suspicion of fraud (which it did not communicate to the claimants). *See* WAC 192-140-096(1) ("Starting with the week ending May 16, 2020, if the department discovers it has reason to suspect that your claim has been fraudulently filed, the department will…"). If ESD did not, then it likely acted without authority of law.[13] Either way, the emergency rule supports immediate relief.

Petitioners do not challenge Commissioner LeVine's authority to enact reasonable emergency regulations pursuant to RCW 34.05.350, so long as such regulations are enacted with good cause, are followed, and do not run contrary to constitutional due process protections and federal law. *See also* RCW 50.12.010; RCW 50.12.040.[14] Here, the emergency regulation *provides the maximum period of time payments may be withheld*.

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[13] It is unclear if requesting claimants to verify their identities is a "request for information *about* the suspected fraud [that justified ESD's suspension of benefits]." WAC 192-140-096(2) (emphasis added). Thus, ESD either did not act with authority of law or did so arbitrarily.

If a claimant does not respond to ESD's request for information concerning the suspected fraud within a week, ESD "presume[s]" ineligibility or disqualification and will deny benefits. WAC 192-140-096(2)(a). The "denial will last for an indefinite period of time," unless ESD on redetermination finds the claimant provided sufficient ("enough") information showing the claimant did not fraudulently file their claim. WAC 192-140-096(2)(b)-(c). Such serious and open-ended consequences, which run contrary to the legislative intent contained in RCW 50.01.010, compel a narrow construction.

[14] In enacting the rule, ESD also relied on the Department of Labor's interpretation (noted *supra* n.8). *See also* WSR 20-12-002 (Rule-Making Order, CR-103E, May 20, 2020), available at https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/rule-making/cr-103e-fraudulent-claims-wsr-20-12-002.pdf (accessed 6/23/20).

See WAC 192-140-096(4) (When "the department has not issued a determination denying benefits prior to the end of the following week, the department will pay the suspended weekly benefits by a payment method of the department's choosing."); *supra* n.8 (Appendix D, at 4, 6). ESD is not following its own rule.

Many unemployment compensation payments remain long overdue—beyond the period authorized by ESD's May 20 regulation. Earlier this month, ESD said it expected to resolve the issue by June 19 for claimants whose payments were suspended *the weekend of May 15*. This Court should immediately require ESD to comply with its clear duty.

CONCLUSION

Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of Washington. Our legislature enacted unemployment compensation laws to lighten the burden that "so often falls with crushing force upon the unemployed worker and their families." RCW 50.01.010. Because Commissioner LeVine failed to do her duty to make prompt payments and protect due process, Washington's unemployed workers require this Court's immediate intervention.

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DATED this 23rd day of June, 2020.

THE SHERIDAN LAW FIRM, P.S.

By: *s/ John P. Sheridan*

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CERTIFICATE OF SERVICE

I, Tony Dondero, certify under penalty of perjury under the laws of the State of Washington and the United States that, on June 23, 2020, I served the document to which this Certificate is attached to the party listed below in the manner shown.

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Dated this 23rd day of June 2020.

s/Tony Dondero _____
Tony Dondero,
Legal Assistant

Appendix C

DECLARATIONS FILED IN THIS ACTION

1. Declaration of McKeezi Taylor Barraza
2. Supplemental Declaration of McKeezi Taylor Barraza
3. Declaration of Alvin Deveaux Hill
4. Declaration of John Tirpak
5. Supplemental Declaration of John Tirpak
6. Declaration of Marianne White
7. Supplemental Declaration of Marianne White
8. Declaration of Billie Abbit
9. Declaration of Chelsea Altona
10. Declaration of Jeremy Bradford
11. Declaration of William F. Burris, Sr.
12. Declaration of Michael DeMaddalena
13. Declaration of Kelli C. Ebert
14. Declaration of Flavia Feliciano
15. Declaration of Chynna Glenn
16. Declaration of Thomas Harrington
17. Declaration of Jordan Jolma
18. Declaration of Christine Mair
19. Declaration of Fabian Pascuelles
20. Declaration of Randall Peters
21. Declaration of Nicholas Petrish
22. Declaration of Miroslava Radovich
23. Declaration of Marissa Riegert
24. Declaration of Nadya Robinson
25. Declaration of David Svoboda
26. Declaration of Amy Swanner
27. Declaration of Shanyece Wake

Appendix D

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION UI
	CORRESPONDENCE SYMBOL OUI/DL
	DATE January 13, 2017

ADVISORY: **UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 01-16, Change 1**

TO: STATE WORKFORCE AGENCIES

FROM: PORTIA WU
Assistant Secretary

SUBJECT: Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers

1. **Purpose.** To respond to questions from state workforce agencies about prior guidance provided to state agencies regarding the requirements of Federal law pertaining to protecting individual rights in state procedures to prevent or recover unemployment compensation (UC) overpayments.

2. **References.**
   - Sections 303(a)(1) and 303(a)(3), Social Security Act (SSA);
   - Computer Matching and Privacy Protection Act of 1988 (CMPPA) as amended, 5 USC 552a(o)-(r);
   - Employment Security Manual Sections 6010-6014, Standard for Claim Determination—Separation Information, Codified as Appendix B of 20 CFR 614, 617, and 625);
   - Unemployment Insurance Program Letter (UIPL) No. 1145, *Procedures for Implementation of the Java Decision*;
   - UIPL No. 23-80, *Implementation of Waiver of Overpayment Provisions in State UI Laws*;
   - UIPL No. 04-01, *Payment of Compensation and Timeliness of Determinations during a Continued Claims Series*;
   - UIPL No. 19-11, *National Effort to Reduce Improper Payments in the Unemployment Insurance (UI) Program*;
   - UIPL No. 02-12, *Unemployment Compensation (UC) Program Integrity – Amendments made by the Trade Adjustment Assistance Extension Act of 2011 (TAAEA)*; and
   - UIPL No. 01-16, *Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures.*

3. **Background.** On October 1, 2015, the U.S. Department of Labor (Department) issued UIPL No. 01-16 to remind state agencies of the requirements of Federal law pertaining to protecting individual rights in state proceedings to prevent or recover UC overpayments. Because the

RESCISSIONS	EXPIRATION DATE
None	Continuing

requirements articulated in the UIPL represented pre-existing interpretations of Federal law or updates to those interpretations, the guidance became effective upon issuance. However, the Department recognizes that some states may need to change their business processes to comply with Federal law as interpreted in UIPL No. 01-16. We expect that states will make a good faith effort and take immediate steps to make the necessary operational changes as soon as reasonably possible.

The Department held a webinar in December of 2015 and a conference call in February of 2016, to explain the requirements. Numerous questions regarding the scope and implementation of UIPL No. 01-16 arose from those discussions and subsequent state inquiries to the Department. This Change 1 to the guidance is being issued to inform all states of the questions received and the Department's answers to these questions.

4. **Action Requested.** State Administrators are requested to provide this guidance to the appropriate staff.

5. **Inquiries.** Inquiries should be directed to the appropriate Regional Office.

6. **Attachment**. Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers

Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers

I. Questions about claimant and employer notifications and responses

1. If the employer does not specify the amount of wages earned during each week in its response to a request for a claimant's employment and wage information, may the state estimate the weekly wage by prorating the wages among the weeks in the calendar quarter that the individual worked for the employer?

In general, if the state does not have sufficient information to correctly assign wages earned to a particular week, then the state may not prorate wages among weeks in a calendar quarter. However, under certain limited circumstances, wages may be prorated.

States must always make a reasonable attempt to get the weekly wage information from both the employer and the employee. If neither party responds and the state only has quarterly wage information, that is insufficient for purposes of determining whether there was an overpayment, and the amount of the overpayment, for the week(s) in question because the state does not know how much the individual earned during each week in the quarter.

If a party responds to the state agency and provides earnings during a pay period, though still not the weekly wage, prorating may be possible. The state must make an additional reasonable attempt to get the weekly wage information from both the employer and the employee. If neither party provides information about the weekly earnings, the state may prorate the earning among the weeks in the pay period as long as the pay period is no longer than one month. If the state knows when the individual started working for the employer, the state must factor that in when allocating the earnings among the weeks in the pay period. Whenever a state prorates weekly earnings, it must notify the claimant, provide the claimant an opportunity to rebut the information, and explain the consequences of having earnings during weeks for which the individual claimed UI benefits.

If the state obtains information showing that the individual earns an annual salary, the state may calculate the weekly salary based upon the annual salary if the state has information sufficient to determine whether the individual worked full-time or part-time during the week, and if the individual worked part-time, how many hours the individual worked. The state would also need to know when the individual started working in order to determine the first week during the calendar quarter that was potentially overpaid.

2. If an issue is detected involving an individual who was working while claiming benefits, is it sufficient if the state contacts only the employer before making an overpayment determination?

No. States must also contact the individual when conducting fact finding to determine whether an overpayment determination should be issued. As UIPL No. 01-16 explains, before an

overpayment may be established, "an individual must be given an opportunity to be heard, timely notice of the interview, and an opportunity to present evidence." Similarly, the CMPPA requires the agency to notify the individual of the issue and provide him/her the opportunity to contest it before a determination is made. This requirement applies to both Federal programs when cross-matching against a Federal database, and regular state UC programs pursuant to state agreements with the Department of Health and Human Services (HHS), for access to the National Directory of New Hires (NDNH).

3. If the employer responds with what appears to be sufficient information before the end of the period of time provided by statute or regulation for the parties to respond, may the state adjudicate the overpayment and/or the fraud if the individual has not yet responded?

No. The determination of overpayment and/or fraud may not be made before "both parties" have had an opportunity to be heard. (See *California Human Resources Dept. v. Java*, 402 U.S. 121 (1971).) Implicit in this requirement is that the parties are notified of any potential issue(s) and given a reasonable amount of time to respond. Thus, if the response period has not ended, the other party's (or parties') opportunity to respond has not expired, and the state may not make an official determination until either all parties have responded, or the response period has expired.

4. Sometimes, even after a state's best efforts, one of the parties may not receive actual notice (e.g., they move with no forwarding address, they fail to provide the agency with updated contact information, etc.). How is "giving notice" defined?

States must make reasonable attempts to notify the individual and other interested parties of an issue, and those attempts must be documented in the record, including when a state is not able to contact the individual. Reasonable attempts should include contacting the individual by e-mail or telephone if the state agency has this contact information. The state agency must also take reasonable steps to ensure the contact information it has is accurate, which may include notifying claimants at the time of filing of the initial claim that contact and address information must be updated if it changes during the benefit year. E-mail, phone, or other steps to confirm contact information may be necessary particularly if the overpayment is being investigated after the claimant's benefit year ended.

5. When pursuing recovery of overpayments via offsets, must the state wait until the notice of determination of overpayment has been received by the claimant, or wait until the determination is final, before initiating recovery efforts?

The answer is "no" in both circumstances. Unless prohibited by state law, the state may take action(s) to recover the overpayment once the determination has been issued to the claimant. States are permitted, but not required, to wait until the determination is final (i.e., all appeals have been exhausted or time to file an appeal has run out) before initiating recovery.

6. If there is a hit against a new hires directory, may the state stop payment if the state has sent the claimant a letter or notice asking for more information and the claimant provides no response?

Yes. The state may stop payment of benefits for failure to report (i.e., respond to a request for information) provided that the state advised the claimant of the consequences for failing to respond and provided adequate opportunity for the claimant to respond within a reasonable time pursuant to state law or regulation prior to stopping payment. The state must also issue a determination containing appeal rights. However, the state may not stop payment based on the underlying issue, recover any overpayments, or adjudicate the underlying issue raised by the "hit", until the hit has been independently verified, appropriate fact finding has occurred, and a determination has been made.

7. If the state has a hit from a cross-match conducted against the state's wage records, which were provided by an employer, does the state have to double-check with the employer (call them back)?

Yes. The state must contact the employer, or make reasonable attempts to contact the employer, to verify the information and weekly earnings before establishing an overpayment. In addition, the state must contact the claimant and provide an opportunity for the claimant to respond to the information before making a determination and establishing an overpayment.

8. UIPL No. 01-16 states, in relation to the NDNH, that pursuant to CMPPA, "the individual must be provided either 30 days or, if provided by statute or regulation, another period of time to respond to the issue." If the state statute says that the individual has seven (7) days to respond to a notification, would that supersede the 30-day requirement?

Yes. CMPPA provides that there is a 30-day notice requirement in cases where a program has not established a specific notice period. Therefore, if the state statute or regulations provides for a shorter notice period, that shorter period applies.

9. Under the CMPPA, must the state provide both the claimant and the employer 30 days to respond?

The CMPPA provision applies to notice to the claimant only. However, Federal UC law, while not specifying a number of days, still requires that the employer be provided a reasonable period of time to respond to a notice.

10. Is it true that reporting requirements may be used only to deny benefits, NOT to establish overpayments?

Yes. After the claimant has been provided an opportunity to respond, the state's reporting requirement may be used to stop payment of UC for failure to report or contact the agency for any week until such time that the individual reports or contacts the agency as directed. However, the failure to report is not sufficient to make a finding as to whether or not any prior weeks of benefits were improperly paid. The state is required to make a separate determination based on the facts to determine whether an overpayment has occurred. Once the state has notified all the necessary parties of the issue, and given them an opportunity to respond, the state may make an overpayment determination based on available information if sufficient. The state may establish an overpayment if there is sufficient information to support the determination.

11. If the agency discovers that the amount of UC benefits paid was miscalculated and overpaid due to an obvious agency error, does the agency have to provide notice before issuing the overpayment determination?

Claimants must be provided an opportunity to be heard regarding any issue(s) that affects their benefit rights, including the establishment of an overpayment on a claim that resulted from an agency error. There may be limited circumstances, however, when an obvious administrative error is made on a claim(s) and the state wants to take quick action to correct it; examples include errors that occur due to a computer programming issue such as duplicate wages on a monetary determination(s), or duplicate funds loaded on a claimant's debit card for the same week. Under such circumstances, the state may correct the error before notifying the claimant. However, the state must provide the claimant(s) with information regarding the error, and also advise the claimant of any overpayment waiver provisions that may apply and provide the opportunity to appeal the overpayment determination.

II. <u>Questions about automation</u>

1. Concerning the independent verification necessary from computer cross-matching, UIPL No. 1-16 says that "[s]tates may not make determinations of overpayments and/or fraud using automated systems without staff intervention." May non-fraud overpayment determinations be made without staff intervention if the claimant was notified, provided an opportunity to rebut, but did not respond?

Under certain limited circumstances, a non-fraud overpayment determination may be made without staff intervention. The state must make a reasonable attempt to contact the claimant, provide the claimant adequate notice of the issue, and attempt to obtain from the claimant all information needed. If the claimant fails to respond AND the state has sufficient information from the employer or other party to determine the existence and amount of the overpayment for a given week, the state may issue a non-fraud overpayment determination without further staff action.

2. Are there any circumstances under which the state may issue a fraud determination that is fully automated?

No. As stated in UIPL No. 01-16, because fraud determinations generally "require the state agency to make determinations of credibility and intent, determinations of fraud must be made by agency staff. Such fraud determinations may not be made by an automated system."

3. Will the Department determine whether specific products or services offered by vendors comply with the requirements of UIPL No. 01-16?

No. States must ensure that the services and products provided by vendors comply with all applicable Federal and state laws, regulations, and policies. Even when the Department provides funding to a state for a specific automation project, the state must ensure that the project meets all requirements. The Department will provide technical assistance to states as they work with

their vendors to validate that the approach complies with the requirements of UIPL No. 01-16. This does not preclude the Department from determining, as part of oversight of Federal grants, after vendor performance has begun or been completed, that the vendor's products or services do not meet Federal law requirements.

4. One state suggested there may be a conflict between UIPL No. 01-16 and UIPL No. 19-11 regarding stopping payments on NDNH hits. How do states instruct vendors when contracting for implementation of automated systems?

There is no conflicting guidance between these UIPLs. UIPL No. 19-11 does not address "stopping payments on NDNH hits." However, it does specify that:

> Cross-matching with State Directories of New Hires (SDNH) and National Directories of New Hires (NDNH), followed by immediate contact with the claimant when there is a match to let the claimant know there is a potential overpayment, is considered to be one of the most effective strategies for addressing this root cause.

This instruction is consistent with UIPL No. 01-16. States need to make immediate contact to obtain the necessary information to verify or rebut the information from the crossmatch. Any contract with vendors to design and implement automated systems must meet the requirements of UIPL No. 01-16 in this regard.

III. Questions about the Computer Matching and Privacy Protection Act requirements.

1. How is "independent verification" on page 5 of the UIPL defined?

States must verify a cross-match with information from a different source, such as the employer or the claimant. If verification by either one is sufficient to verify the cross-match hit, a determination on the underlying issue can be made if the other party does not respond as long as both the employer and claimant have been given a sufficient opportunity to respond. A cross-match hit alone is not sufficient to establish an overpayment and verification against another database is also not sufficient.

2. Under the CMPPA, which UC programs are "Federal benefit programs"?

"Federal benefit program" means any program administered or funded by the Federal government, or by any agent or state on behalf of the Federal government, providing cash or in-kind assistance in the form of payments, grants, loans or loan guarantees to individuals (page 5 of the Computer Matching Agreement). Federal UC programs to which these provisions apply were identified in UIPL No. 02-12. They are:

- UC for Federal civilian employees (5 USC 8501 *et seq.*);
- UC for ex-servicemembers (5 USC 8521*et seq.*);
- Trade readjustment allowances (19 USC 2291-2294);
- Disaster unemployment assistance (42 USC 5177(a));

• Any Federal temporary extension of UC;
• Any Federal program which increases the weekly amount of UC payable to individuals; and
• Any other Federal program providing for the payment of UC.

3. Why does the CMPPA apply to state regular UC programs when states match against the NDNH?

The NDNH is administered by HHS. HHS, under its own authority (Section 453(j)(8)(D), SSA) has mandated that state benefit programs accessing the NDNH comply with the CMPPA as a condition of such access. Before the state may match against the NDNH, it must, in accordance with the CMPPA, submit a signed Computer Matching Agreement (CMA), which will be provided to the state by HHS upon request. The CMA sets out the legal framework for the match. It also includes a Security Addendum, which specifies the physical, administrative, and technical security requirements. The CMPPA already applies to all Federal benefit programs, including Federal UC programs. Thus, states must agree to adhere to the CMPPA requirements when using the NDNH to identify state UC program overpayments when they sign the CMA.

IV. Questions about timeliness

1. Should an issue that is created by the claimant's self-disclosure prevent payment of future weeks of benefits, or should we continue to pay benefits even though the claimant has created the eligibility issue that could result in the improper payment of subsequent weeks of benefits?

As noted in UIPL No. 04-01, "sometimes the question of eligibility affects future weeks. In such circumstances, not issuing payment for these later weeks because of the earlier eligibility issue is acceptable until a timely determination is made. However, if a timely determination cannot be made, payments must continue to be paid based on the existing determination of eligibility that is in effect. However, when the question of eligibility does not affect later weeks, states must make payment for the later weeks without delay." As stated in UIPL No. 04-01, a determination is timely where it is issued by the end of the week following the week the issue is detected.

2. Based on UIPL No. 01-16, is it permissible to have a stop on the claim as long as the state releases the payment, or adjudicates the claim, by the end of the week following the week in which the possible issue is detected?

Yes. As stated in UIPL No. 01-16, the provisions of UIPL No. 04-01 still apply in this situation.

3. What is meant by the requirement that the state issue a decision no later than the end of the week following the week the issue is detected? Must a payment be issued within 7 to 10 days? Can an example be provided?

If a determination of ineligibility has not yet been made, a benefit payment must be made by the end of the week following the week in which an issue is detected. In practice, that means that states would have at most 7-10 days to make a determination of ineligibility in order to not issue the benefit payment. For example, if an issue is detected via cross-match with the NDNH on a

Tuesday during week five of the claim, the state must either make a determination or make a payment by the end of the following week, in this case on Friday of week six, which is 10 days later. Absent a determination of ineligibility during a continued claim series, there is a presumption of continued eligibility and benefit payments must be issued timely.

V. Questions about offsetting benefits and waivers.

1. May states offset benefits prior to the appeal period ending?

Yes. Unless prohibited by state law, states may offset benefits prior to the appeal period ending if all of the proper procedures have been followed including notifying the individual, providing him/her with an opportunity to contest, and issuing an overpayment determination. However, states are not required to offset at that time and may instead wait to begin recovery until the overpayment is final, i.e., the appeal period for the overpayment determination ends, or if an appeal is filed, until the appeal decision is issued.

2. In our state, there is no limit to the period of time during which an individual may request a waiver of recovery. An individual may request a waiver anytime until the debt is recovered or determined to be unrecoverable. UIPL No. 01-16 provides that "until the period for a waiver request has elapsed, or, if an individual applies for a waiver, the waiver determination is made, states may not commence recovery of overpayments." Does this mean that we can never initiate recovery of the overpayment?

No. For purposes of complying with the requirements of UIPL No. 01-16 concerning recovery of overpayments, in states whose laws permit individuals to request a waiver of recovery at any time under certain circumstances, the state may commence recovery of overpayments after the period of time during which an individual may file a timely appeal of the overpayment ends and the overpayment becomes final under state law. Thus, if an individual did not file a timely appeal of the overpayment, the state may commence recovery after the period for filing a timely appeal ends. If an individual filed a timely appeal, the state would need to wait to initiate recovery until an appeal decision is made affirming the overpayment determination, and the appeal decision becomes final.

Appendix E

U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D. C. 20210	CLASSIFICATION UI
	CORRESPONDENCE SYMBOL TEUL
	ISSUE DATE October 27, 2000
RESCISSIONS None	EXPIRATION DATE Continuing

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 04-01

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : GRACE A. KILBANE
Administrator
Office of Workforce Security

SUBJECT : Payment of Compensation and Timeliness of Determinations during a Continued Claims Series

1. **Purpose.** To remind States of the Department of Labor's (Department's) interpretation of the "payment when due" requirement of Section 303(a)(1) of the Social Security Act (SSA), as applied during a continued claim series, and to provide clarification concerning this interpretation.

2. **References.** Section 303(a)(1), SSA; California Department of Human Resources Development v. Java, 402 U.S. 121 (1971); Fusari v. Steinberg, 419 U.S. 379 (1975); Pennington v. Didrickson, 22 F.3d 1376 (7th Cir. 1994); 20 CFR Parts 602 and 640; Unemployment Insurance Program Letter (UIPL) No. 1145 (Procedures for Implementation of the Java Decision); UIPL No. 34-85 (Voluntary Waiver of Benefit Rights by a Claimant Pending the Outcome of an Employer Initiated Appeal); ETA Handbook No. 365 (Unemployment Insurance Quality Appraisal (no longer in effect)); ET Handbook No. 301 (UI Performs: Benefit Timeliness and Quality (BTQ): Nonmonetary Determinations Quality Review); ET Handbook No. 401 (Unemployment Insurance Reports).

3. **Background.** While conducting training for States on the new process for reviewing the quality of nonmonetary determinations, the Department became aware that, during a continued claim series, some States may not properly administer the requirements of Section 303(a)(1), SSA, concerning payment of unemployment compensation (UC) "when due." The Department has three specific concerns.

   First, some States may fail to pay benefits to claimants for weeks in which no eligibility issue exists when a determination of eligibility for a previous week is pending.

   Second, the Department has observed an inconsistency among States in the starting date used to calculate timeliness of determinations during a continued claim series, a date that should be uniformly applied.

   Third, the Department has found that, during a continued laim series, some States improperly withhold benefits from laimants when the State does not make a determination of continued eligibility in a timely fashion.

   The Department is issuing this UIPL in order to address these concerns. It clarifies UIPL No. 1145, issued in 1971 but still in effect, with respect to the date to be used for calculating timeliness of determinations during a continued claim series, and clarifies when payment may not be withheld during a continued claim series.

4. **Section 303(a)(1), SSA -- "Full Payment .... When Due."** Section 303(a)(1), SSA, requires States, as a condition of receiving Federal UC administration grants, to provide in their laws for "[s]uch 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 the 1971 decision, California Department of Human Resources Development v. Java, the Supreme Court interpreted "when due" in Section 303(a)(1), SSA, to mean "at the earliest stage of unemployment that such payments [are] administratively feasible after giving both the worker and the employer an opportunity to be heard." Although the specific holding in Java required the State to pay benefits to claimants initially determined eligible pending an employer appeal, the Court's reasoning was broader, requiring promptness at all stages of the eligibility determination and payment processes. See UIPL No. 1145, Attachment, page 1; Fusari v. Steinberg, 419 U.S. 379, 387-388 n.15 (1975); and Pennington v. Didrickson, 22 F.3d 1376, 1386 (7th Cir. 1994) (quoting Jenkins v. Bowling, 691 F.2d 1225 (7th Cir. 1982)). The Department has issued regulations interpreting the promptness requirement of Section 303(a)(1), SSA, to require payment of UC to eligible claimants, and the making of determinations, "with the greatest promptness that is administratively feasible." 20 CFR 640.3(a). In addition, in the attachment to UIPL No. 1145, the Department interpreted the promptness requirement of Section 303(a)(1), SSA, to require prompt determinations on individual claims. See pages 8 & 14, UIPL No. 1145, Attachment.

   As well as promptness, the Department has always interpreted "when due" in Section 303(a)(1), SSA, to require accuracy in order to ensure that payments are not made when they are not due. See 20 CFR 602.11(a) and 602.21(c). Proper application of Section 303(a)(1) requires an appropriate balancing of the dual concerns of promptness and accuracy in the "when due" provision.

5. **The Need for Payment Without Delay to Claimants in Weeks for which They Are Eligible During a Continued Claim Series.** As stated, a fundamental aspect of payment "when due," for purposes of Section 303(a)(1), SSA, is that UC is due to claimants who are eligible under State law. Eligibility for UC is determined on a week-by-week basis. During a continued claim series, a claimant must certify as to continuing eligibility for each week. If information provided by the claimant or others establishes eligibility, the State agency manifests its determination of eligibility for that week by issuing compensation to the claimant. When a question concerning continued eligibility for benefits for a given week arises, the State agency conducts an investigation of the facts and makes a determination of eligibility or ineligibility. While such a determination is pending, the State agency need not issue payment for the week in question until it issues a determination regarding eligibility, *provided* the determination is timely. Sometimes the question of eligibility affects future weeks. In such circumstances, not issuing payment for these later weeks because of the earlier eligibility issue is acceptable until a *timely* determination is made.

   When the question of eligibility does not affect later weeks, however, States must make payment for the later weeks without delay. In other words, States may not withhold payment for later weeks in which no eligibility issue exists consistent with Section 303(a)(1), SSA's requirement to pay benefits "when due." The Department clearly expressed this requirement on page 19 of the Attachment to UIPL No. 1145, stating "[w]hen the question [of eligibility] relates to eligibility or possible fraud for past weeks only, benefits claimed for current weeks *may not be suspended* while an investigation is conducted [emphasis added]." This requirement is still in force.

6. **Timely Determinations in a Continued Claim Series.** The attachment to UIPL No. 1145 interpreted the "when due" provision in Section 303(a)(1), SSA, and Java, to require prompt resolution of eligibility issues that arise during a continued claim series. That Attachment stated that such determinations would be considered to be issued "on time" within the meaning of the "when due" requirement, as interpreted in Java, if issued "no later than the end of the week following the week in which [an] issue *arises* [emphasis added]." Thus, the date on which an issue "arises" is the critical date for calculating timeliness.

The term "arises" has historically been subject to different interpretations. Some States have interpreted the "arises" date literally to mean the date a claimant engaged in potentially disqualifying behavior. Other States have applied the interpretation found in ET Handbook No. 365, Quality Appraisal, in effect from 1992-1996, which says that determinations during a continued claim series are timely if "issued within 7 days from the end of the week in which the issue is *detected*" (in the case of intrastate claims) or the State *"received notification*" of the issue (in the case of interstate claims) (emphases added). This approach interpreted the "issue arises" date in UIPL No. 1145 to mean the issue detection date. This interpretation is followed in subsequent handbooks, including ET Handbook No. 401, the UI Reports Handbook, and Handbook 301, the BTQ NonMonetary Determination Quality Review Handbook (see pages V-9 and V-10). Handbook 401 defines the issue detection date as: "the earliest date that the agency, including organizational units . . . , is in possession of information indicating the existence of a nonmonetary issue" (see page V-3-5).

Although UIPL No. 1145, Attachment, used the term "arises," taken in context, that term means, as reflected in later handbooks, the date an issue is detected by the State agency. Interpreting the "issue arises" date in the more literal manner followed by some States (meaning the date of the potentially disqualifying event) would necessarily preclude timely determinations in many cases. For example, if a claimant refused a job in week one and has until Thursday or Friday of the following week to submit a claim certification for week one, it may be impossible for the agency to gather facts and issue a decision by Friday of week two. Requiring a determination to be made in that manner is not reasonable, nor is it necessary under Section 303(a)(1), SSA. Consequently, States are to use the issue detection date as the date from which to calculate timeliness for purposes of Federal requirements.

7. **Balancing Timeliness and Accuracy: the Presumption of Continued Eligibility.** Although Section 303(a)(1), SSA, requires timely determinations regarding eligibility for individual claimants, States may, in some cases, be unable to issue a determination in a timely fashion. UIPL No. 1145 stated that before a determination is made in a continued claim series "benefits *will not be withheld*" (emphasis added) (see UIPL No. 1145, Attachment, page 19). Over the years, the Department has been asked about the meaning of this statement, especially in relation to the requirement of Section 303(a)(1), SSA, that payment not be made when it is not due.

   With this UIPL, the Department clarifies this statement in UIPL No. 1145, Attachment, concerning payment during a continued claim series. Prior to the date for timely determinations, a State is not required to pay UC without a determination. However, when the date for a timely determination has passed in a continued claim series, the State must either issue a determination of ineligibility for UC (where the facts establish ineligibility) or else pay UC immediately. Payment would occur under a presumption of continuing eligibility. The presumption means that the State has made an initial determination of eligibility and, based on that initial determination and the absence of facts clearly establishing current ineligibility, the State agency presumes the claimant's continued eligibility until it makes a determination otherwise. The presumption is appropriate in a continued claim series because a determination of initial eligibility exists on which the presumption can be based. The presumption may not be applied on an initial claim.[(1)] The presumption appropriately balances the timeliness and accuracy concerns of Section 303(a)(1), SSA.

   The presumption of continued eligibility is an expedient for the State to facilitate timely payments and may not be used as a substitute for the State completing its determination procedures. In order to avoid failing to comply with Section 303(a)(1), SSA, by paying benefits when they are not due, a State using the presumption must issue a determination as soon as administratively feasible after payment is made to verify whether the presumption was correct. In arriving at such a determination the State must follow the predetermination procedures set forth in UIPL No. 1145.

   The Department is aware that making payments based on a presumption of continuing eligibility may result in overpayments. For that reason, States must make timely determinations whenever possible. A certain number of overpayments resulting from application of the presumption of continuing eligibility, when the agency has been unable to issue a timely determination, are inevitable.

   In order to notify individuals of their rights and obligations, a State must inform claimants who receive payments under such a presumption that a pending eligibility issue may affect their entitlement and may result in an overpayment. The State may also advise claimants that they may want to defer cashing the unemployment check until their eligibility has been verified. This may help to deter losses to the State's fund and enable the claimant to immediately repay any overpayment. This procedure is consistent with Departmental guidance in UIPL No. 34-85, concerning the prohibition on voluntary waiver of benefit rights by claimants, because a determination has not yet been made.

8. **Action Required.** Administrators are to provide this information to appropriate staff.

9. **Inquiries.** Inquiries should be directed to the appropriate Regional Office.

10. **Attachment.** UIPL No. 1145.

1. This does not imply, however, that Section 303(a)(1), SSA, sets no outside time limit on individual determinations of initial claims.

THE SHERIDAN LAW FIRM, P.S.

June 23, 2020 - 1:52 PM

Transmittal Information

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