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ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 10-20

TO: STATE WORKFORCE AGENCIES

FROM: JOHN PALLASCH

Assistant Secretary

SUBJECT: Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)

1. **Purpose.** To provide guidance to states regarding unemployment compensation (UC) flexibilities related to COVID-19.
2. **Action Requested.** The Department of Labor's (DOL's) Employment and Training Administration (ETA) requests State Workforce Administrators to provide information contained in this Unemployment Insurance Program Letter (UIPL) to appropriate program and other staff in the state's workforce system.
3. **Summary and Background.**
 - a. Summary: This UIPL provides guidance to states regarding UC eligibility for individuals affected by COVID-19.
 - b. Background: The Administration is actively working with states to ensure they have the guidance needed about UC flexibilities related to COVID-19 in order to assist individuals affected by the disease. The Unemployment Insurance (UI) program requires individuals to be able and available for work and to actively seek work (we refer to these as the *able, available, and work search requirements* throughout this UIPL). However, states have significant flexibility in implementing these requirements, as well as in determining the type of work that may be suitable given the individual's circumstances. In short, an individual may be quarantined or otherwise affected by COVID-19 but still eligible for UC, depending on state law. To clarify, UI is not intended to be used as paid sick leave.

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4. Guidance and Information.

This UIPL provides guidance on the following UC issues related to COVID-19:

- a. Determining whether an individual is “unemployed”;
- b. Determining if the individual is able to work, available for work, and actively seeking work;
- c. Examples for assessing UC eligibility;
- d. Employer charging, with consideration for impact on trust fund solvency;
- e. Impact of eliminating the waiting week; and
- f. Promotion of Short-Time Compensation.

a. Determining whether an individual is “unemployed”

The Department has a longstanding legal interpretation of federal UC law that "unemployment" includes a reduction of both work hours and earnings.

The Department first defined "unemployment" in 1950 in its model for state legislation to meet the requirements of federal UC law. The model defined "week of unemployment" as "any week during which [an individual] performs less than full-time work for any employing unit if the wages payable to [the individual] with respect to such week are less than the weekly benefit amount." (Manual of State Employment Security Legislation 1950.)

The Department further clarified the meaning of the term "unemployment" in UIPL No. 08-98: "Federal law limits the payment of UC to periods in which an individual has experienced unemployment, that is, an actual reduction in hours worked." UIPL 08-98 cited, among other things, a January 31, 1939, Social Security Board statement that explained that "[S]ince ... any benefits paid under a State law must be paid with respect to unemployment, a State's plan for the payment of partial benefits must safeguard against the payment for reduced earnings without accompanying unemployment."

An individual receiving paid sick leave or paid family leave is still receiving pay. Thus, generally speaking, the individual is not "unemployed," so the individual is ineligible for UC.

b. Determining if the individual is able to work, available for work, and actively seeking work

Federal UC law requires that claimants be able to work, available for work, and actively seeking work. 42 USC 503(a)(12) (Section 303(a)(12) of the Social Security Act (SSA)). These federal requirements cannot be categorically waived or exempted for individuals affected by COVID-19. Yet states have significant discretion to establish how individuals demonstrate that they are meeting these requirements.

The Department has interpreted and enforced the federal able, available, and work search requirements since the inception of the federal-state UC program. As far back as 1939, the Chair of the Social Security Board explained in a letter to the Governor of California, "The

entire legislative history [of the UC titles of the original SSA] ...all indicate, either expressly or by implication, the compensation contemplated under [these titles] is compensation to individuals who are able to work but are unemployed by reason of lack of work."

The able and available requirements were codified in federal regulation at 20 CFR 604.4 in 2007. The regulation's accompanying notice explained, "The UC program is designed to provide temporary wage insurance for individuals who are unemployed due to a lack of suitable work. The [able and available requirements] implement this design by testing whether the fact that an individual did not work for any week was involuntary due to the unavailability of suitable work." 72 Fed. Reg. 1890 (Jan. 16, 2007). In 2012, Congress codified the able, available, and work search requirements at Section 303(a)(12) of the SSA.

Federal UC law makes some exceptions to these requirements, such as for state-approved training. (Section 3304(a)(8) of the Federal Unemployment Tax Act (FUTA)). Federal UC law also permits some substitutions for these requirements, such as participation in the Short-Time Compensation program. (Section 3306(v)(5) of FUTA) However, exceptions to this requirement are limited to those included in FUTA or SSA and there is no exception from the able, available, and work search requirements for an individual affected by COVID-19.

Even so, states have flexibility to determine what type of work is suitable for an individual and what it means for that individual to be able, available, and seeking work, even when quarantined or otherwise affected by COVID-19.

Under 20 CFR 604.5(a), a state may consider an individual available for work under any of the following circumstances:

- (1) The individual is available for any work for all or a portion of the week claimed, provided that any limitation placed by the individual on his or her availability does not constitute a withdrawal from the labor market.
- (2) The individual limits his or her availability to work which is suitable for such individual as determined under the State UC law, provided the State law definition of suitable work does not permit the individual to limit his or her availability in such a way that the individual has withdrawn from the labor market ...
- (3) The individual is on temporary lay-off and is available to work only for the employer that has temporarily laid off the individual.

Further, the regulations explicitly address individuals whose most recent separation occurred due to illness or physical injury, explaining that they may be considered able to work and available for work until such time as they are offered suitable employment and decline it due to that illness or injury (20 CFR 604.4(b)). In addition, federal law requires that an individual actively search for work. However, as with the able and available requirements, states have considerable discretion to determine the types of suitable work which individuals must seek.

Taken together, the federal UC framework gives states significant flexibility to determine standards for ability to work, availability to work, and suitable work in the context of COVID-19.

c. Examples for assessing UC eligibility

The following scenarios are meant to help states assess UC eligibility for individuals affected by COVID-19. In each, the individuals may be unemployed as they have reduced hours and pay.

Federal law permits states to exercise the flexibilities described below. An individual need not quit or be discharged to potentially be eligible for benefits. Therefore, we encourage states to review their laws in light of COVID-19's effects. Other scenarios than these may arise. We encourage states to contact DOL for technical assistance.

Scenario 1: Employer temporarily ceases operations.

An employer or employing unit temporarily shuts down due to COVID-19 with the expectation that the individual will return when business resumes.

Federal law would permit a state to treat the separation here as a temporary layoff. States have significant discretion to determine able, available, and work search requirements, and they can determine that the suitable work for this individual is the job he or she intends to return to after business resumes. As provided in 20 CFR 604.5(a)(3), individuals are able to and available for work if their employer temporarily laid them off and the individuals remain available to work only for that employer. Thus, for states that take this approach, individuals may only need to be able and available for that job and, to meet the work search requirement, take reasonable steps to preserve their ability to come back to that job.

Scenario 2: Individual is quarantined and will return to employer.

An individual is quarantined by a medical professional or under government direction, and the employer has instructed the individual to return to work after the quarantine is over or has not provided clear instruction to do so.

Federal law would permit a state to treat the separation for the period of the quarantine as a temporary layoff. Again, states have significant discretion to determine able, available, and work search requirements, and can determine that the suitable work for this individual is the job he or she intends to return to after quarantine ends. Therefore, for states taking this approach, individuals may only need to be able and available for that job and, to meet the work search requirement, take reasonable steps to preserve their ability to come back to that job. However, if the individual does not return to the employer after the quarantine ends, the state will need to reassess eligibility.

Scenario 3: Individual is not returning to the employer.

An individual is quarantined by a medical professional under government direction or leaves employment due to a reasonable risk of exposure or infection (i.e.; self-quarantine) or to care for a family member and either does not intend to return to the employer or the employer will not allow the individual to return.

Federal law would permit a state law to determine whether the separation here is a quit or a discharge and whether the circumstances are allowable under the state's good cause/just cause provisions. If permitted under the state's good cause/just cause provision, states should consider how they will adjudicate the reasonableness of an individual's separation for reasonable risk of exposure. One such factor could be considering if the individual is in a population that is particularly susceptible to COVID-19.

An individual who leaves work with good cause, however, must still meet all other eligibility requirements to receive benefits, including the able, available, and work search requirements. For example, if state law permits, states may determine that a quarantined individual is still able, available, and seeking work, provided it is work that is suitable for an individual who is quarantined and that limitation does not constitute a withdrawal from the labor market. (20 CFR 604.5(a)(1)).

d. Employer charging and trust fund impacts

Many states do not charge individual employers for benefit costs under certain limited circumstances. These "noncharging" provisions are found in practically all state experience-rating laws. When determining, in the context of COVID-19, whether certain unemployment benefits should be charged to employers, states should consider how to fairly distribute the costs to employers.

If states consider changing their laws to increase availability of UI benefits in the context of the COVID-19 virus, they should also consider the impacts on trust-fund solvency. There are currently 21 states and jurisdictions below the recommended solvency standard and only 31 states that meet the eligibility criteria for interest-free borrowing. (*State Unemployment Insurance Trust Fund Solvency Report*, Feb. 2020).

e. Impact of eliminating the waiting week

In most states, an individual who is otherwise eligible for benefits must first serve a waiting period. This is not federally required, although it is a longstanding practice in the UI program that may give states time to assess eligibility and deter fraud. However, to facilitate individuals' ability to comply with quarantine orders, states should consider temporarily waiving such requirements.

States should understand that if they trigger Extended Benefits while the waiting week is waived, they will not be reimbursed for the federal share of the first week of all Extended Benefit claims. (Section 204(a)(2) of the Federal-State Extended Unemployment Act of 1970).

f. Promotion of Short-Time Compensation

The Short-Time Compensation (STC) program, also known as worksharing, helps employers avert layoffs. The program allows employers with a state-approved STC plan to reduce the hours of their employees in lieu of layoffs, while permitting these employees to receive payment for partial unemployment. Employees benefit because they do not suffer a complete loss of employment and they are paid STC when their hours are reduced. Employers benefit because they are able to reduce labor costs temporarily while still maintaining their skilled workforce. In this way, STC protects employer investments in recruiting and training.

In the context of COVID-19, STC can be an important resource for employers whose business temporarily declines. STC provides a safety net to employees with reduced hours; it helps employers retain their workforce; and it saves jobs. There are currently 28 states who have enacted or amended STC laws in response to changes made by Congress in the Middle Class Tax Relief and Job Creation Act of 2012. We strongly urge states to consider implementing and promoting use of the STC program to avert layoffs where possible.

5. **Inquiries.** Please direct inquiries to the appropriate Regional Office.

6. **References.**

- Section 303, Social Security Act, 42 USC § 503
- Section 3304 Federal Unemployment Tax Act (FUTA), 26 USC § 3304
- Section 3306 Federal Unemployment Tax Act (FUTA), 26 USC § 3306
- Federal-State Extended Unemployment Act of 1970, 26 USC § 3304 note
- 20 CFR Part 604
- Unemployment Insurance Program Letter 08-98, “*Unemployment Compensation (UC) – Payment Only for Periods of Unemployment*”
<https://wdr.doleta.gov/directives/attach/UIPL8-98.cfm>
- Manual of State Employment Security Legislation 1950 (Blue book)
https://oui.doleta.gov/dmstree/pl/blue_book.pdf
- *State Unemployment Insurance Trust Fund Solvency Report* (Feb. 2020)
<https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2020.pdf>