

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

Assistant Secretary for
Employment and Training
Washington, D.C. 20210



July 31, 2020

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: JOHN PALLASCH 
Assistant Secretary for Employment and Training

SUBJECT: Response to Office of Inspector General Draft Audit Report
Number 19-20-006-03-315 – *COVID-19: More Can Be Done to Mitigate Risk to Unemployment Compensation Under the CARES Act*

The U.S. Department of Labor's (Department) Employment and Training Administration (ETA) appreciates the opportunity to respond to the Office of Inspector General's (OIG) Draft Audit Report (Report) titled *COVID-19: More Can Be Done to Mitigate Risk to Unemployment Compensation Under the CARES Act*, Report Number 19-20-006-03-315, and its recommendations. ETA also reiterates the agency's views expressed in its joint response with the Department's Office of the Solicitor 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.

At the outset of the COVID-19 pandemic, ETA recognized the OIG's important 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 shares the OIG's concerns relating to fraud and abuse in UI programs and recognizes that ETA must remain vigilant in overseeing these programs. As a result, ETA proactively engaged with the OIG in an ongoing effort to coordinate and share relevant information to combat these abuses.

ETA shares the OIG's concerns set forth in its Report regarding potential fraud in the Pandemic Unemployment Assistance (PUA) program, arising from the self-certification eligibility process established by the CARES Act. For this reason, ETA has acted to address improper payments and fraud in the UI system stemming from the CARES Act and the PUA program, in particular, and will continue to expand upon these efforts. ETA continues to work with states to ensure full compliance with and faithful execution of the CARES Act and the Department's operating guidance provided to the states in UI Program Letters (UIPL) No. 16-20; 16-20, Change 1; and 16-20, Change 2, as well as program integrity guidance provided under UIPL No. 23-20.

ETA's response to the OIG's findings and recommendations contained in the body of the Report follows.

Similar to the OIG’s Alert Memorandum, referenced above, the OIG again suggests, in its latest Report, that ETA’s guidance is incorrect with regard to the requirement related to documentation to determine PUA eligibility. Additionally, the OIG infers that ETA has authority to issue stronger guidance or to allow states to implement additional measures of their own, as the program is at risk for significant fraud and other improper payments.

As noted in its response to the OIG’s Alert Memorandum, ETA’s interpretation of PUA’s statutory requirements is based on the interpretation of the Department’s Solicitor, who is the sole arbiter of legal interpretations with regard to the programs administered by the Department. 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 are to continue to follow the procedures in the Department’s existing guidance. ETA’s guidance with regard to self-certification is based on the current statutory framework for the PUA program. The risk for fraud is found in the statute itself, not in the Department’s interpretation of the statute. The Department cannot unilaterally change policy decisions made by Congress. ETA did agree to implement the OIG’s recommendation to consult with and provide technical assistance if Congress wishes to amend the self-certification provision to require submission of documentation substantiating an individual’s previous employment or self-employment. ETA has fulfilled this commitment as Congress has considered new COVID-19-related legislation.

In the Report, the OIG suggests that additional guidance from the ETA Office of UI (OUI) could better assist states in mitigating the risk of fraud and indicates that ETA’s guidance did not sufficiently address the risk of fraud, waste, or abuse given the PUA program’s reliance on self-certification. ETA respectfully disagrees with this assertion.

ETA includes program integrity language in all of the primary guidance documents associated with implementation of CARES Act programs and provisions. In addition, ETA issued UIPL No. 23-20, which specifically addresses program integrity for both the regular UI program and the CARES Act programs. This UIPL discusses administrative issues that have arisen in CARES Act program administration and encourages states to use the many fraud and overpayment prevention tools available as detailed in the guidance. In addition, as part of ETA’s proactive response to the structure of the PUA program and concern with potential fraud in the self-certification process, in UIPL No. 16-20, Attachment I, and UIPL No. 16-20, Change 2, Attachment I, ETA requires states to include fraud warnings in the system through which individuals submit self-certifications during the PUA application and continued claims processes. This warning includes a statement that fraud may result in criminal sanctions and serves as a reminder to individuals that there are significant consequences to intentionally submitting a self-attestation that is not accurate.

ETA notes that issuance of guidance is not the only mechanism to support states in mitigating the risk of fraud. ETA has actively worked on many fronts to address potential fraud in all of the CARES Act programs—particularly the PUA program. In particular, ETA is actively partnering with the OIG’s Office of Investigations – Labor Racketeering and Fraud to ensure state cooperation in detecting and investigating fraud, as well as access to the necessary state UI data

and information to prevent and detect fraud, to communicate fraud schemes in real-time, investigate and prosecute fraud schemes, and to identify effective fraud prevention and detection strategies and disseminate those to states.

ETA has also worked with the UI Integrity Center to refocus its resources to provide tools and resources for states to combat fraud in the context of the COVID-19 pandemic 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 addresses and email domains;
 - A multi-state claims data cross-match that enables data analytics to detect fraud;
 - A Fraud Alert System to enable states to communicate fraud schemes in real-time with each other and the OIG; and
 - Implementation of a national identity verification tool to support all states that is now available for state implementation.
- Weekly state calls to share and communicate fraud prevention strategies that include the OIG;
- Virtual state consultation services to provide targeted technical assistance, operational best practices, and technical guides to prevent and detect fraud;
- Coordinating communications and operating procedures to streamline work with financial institutions related to detection and recovery of fraudulent payments; and
- A suite of fraud investigation online training modules for state staff.

ETA also continues to provide technical assistance and oversight 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 newly issued UIPL related to CARES Act programs.

The OIG's Report suggests that ETA's PUA program guidance and its overall integrity guidance do not adequately assist states in identifying individuals who refuse to return to work and continue to receive program benefits. The OIG indicates that ETA's guidance does not encourage states to proactively contact employers, especially large employers with a multitude of laid-off or furloughed employees, to determine if individuals have been offered reemployment and refused to return to work.

ETA respectfully disagrees with the OIG's assertion. As the Report notes, ETA's guidance in UIPL No. 23-20 strongly encourages states to request information from employers on workers' refusal to return to work. ETA does not have legal authority to compel states to require employers to report this information. ETA indicated to the OIG previously that contacting every employer in the state, even if limited to large employers, was extremely resource intensive and a challenging strategy to implement as states are already struggling to manage the unprecedented workload. With that said, ETA will commit to reminding states of the need for UI, employment services, and business service teams to better coordinate information and outreach with regard to

states and businesses reopening. ETA is committed to working with states to identify, promote, and implement effective methods to secure employer reporting on this issue.

The OIG's Report noted a recommendation from the Government Accountability Office's June 25, 2020, report, recommending that ETA work with the Small Business Administration (SBA) and the U.S. Department of the Treasury (Treasury) to provide Paycheck Protection Program (PPP) information to state UI agencies. This information could be used by the states to cross-match against its beneficiary rolls and identify potential overpayments for further investigation. ETA consulted with SBA and Treasury, and it will issue additional guidance regarding the PPP and its intersection with UI programs.

The OIG's Report suggests leveraging the Department's Enterprise Risk Management (ERM) Council to better understand and mitigate the risks presented by UI CARES Act programs. ETA has already been using the Department's ERM process to support the identification and mitigation of risks for both the regular UI program and the CARES Act programs.

The OIG's Report asserts that ETA is leveraging existing tools to combat fraud, but more needs to be done. As noted above, ETA is doing more than leveraging existing tools. ETA actively works with the UI Integrity Center; the Department's OIG, Office of Investigations – Labor Racketeering and Fraud; and states to identify strategies to address fraud and to support states in implementing those strategies through weekly calls and other coordination meetings. In addition, ETA actively works to promote state use of the full range of information and resources available through the UI Integrity Center to support fraud prevention and detection. The UI Integrity Center has worked to develop new tools to address fraud detection, including the Fraud Alert System and identity verification functionality. The UI Integrity Center is also offering customized intensive technical assistance designed to address fraud to states that request it.

The Report indicates that ETA should work to ensure the OIG's access to state claimant data that can be used to identify and disrupt fraudulent schemes that threaten the integrity of UI programs, including those under the CARES Act. ETA has been working with the OIG for close to two years to address this issue and agrees that data access is key to supporting the OIG in its role to address fraud in UI programs. ETA continues its commitment to resolve this issue.

The OIG Report also indicates that ETA's oversight plan for the CARES Act programs does not: (1) establish performance measures for the timeliness of determinations and payments or measures for improper payment detection and recovery; (2) include program payments in their annual estimate of UI improper payments; or (3) include additional measures to enhance the accuracy and completeness of program reporting.

With regard to program performance, development of formal performance measures is a complex and lengthy process that involves baselining data, statistical analysis, and benchmarking—it can take as long as a year or more to accomplish. Therefore, it is impractical to develop such measures in the context of a temporary program. The program will have reached an endpoint before the measures and targets can be properly established. As a result, ETA is employing other strategies to ensure states are implementing the CARES Act programs accurately. These strategies include: conducting a review of all states' implementation of key

elements of the PUA program (given it has the most new features) in May and June of 2020 and working with states to make course corrections, where necessary; developing program implementation checklists for states that will be released shortly as a form of technical assistance; and developing a set of monitoring tools that include both a risk assessment and a comprehensive monitoring tool that will be ready to launch by the end of August 2020. ETA's monitoring activities will also include case reviews to determine the states' accurate application of the law and the Department's guidance.

With regard to establishing mechanisms to estimate improper payments, ETA concurs there needs to be a continued and sustained focus on identifying potential root causes for improper payments and fraud, as well as developing and implementing strategies to address these root causes. ETA also acknowledges its responsibilities to develop methodologies for the CARES Act programs, as required in the Office of Management and Budget (OMB) Circular A-123, Appendix C. As required and to establish mechanisms to estimate improper payments, ETA has taken the first step and developed a program inventory, which was submitted to the Department's Office of the Chief Financial Officer on June 19, 2020. ETA is committed to conducting a risk assessment within the first year of the programs.

ETA notes that it is not possible to use the Benefit Accuracy Measurement (BAM) program as the vehicle to estimate improper payments for the CARES Act programs, as suggested by the OIG. The BAM program is fully customized to support estimation of improper payments in the regular UI program, and it is impossible to simply overlay it onto the CARES Act programs. A statistical methodology for estimating improper payments for the CARES Act programs is a complex endeavor that must be built from the ground up. It would require the development of a statistical sampling process and case investigation processes tailored to the specific eligibility requirements associated with the CARES Act programs; the development and implementation of information technology systems at both the state and federal levels to support reporting and data analysis; and states hiring and training staff to conduct the audits. As noted above, ETA is currently taking the required steps, pursuant to OMB's Circular A-123, Appendix C, to estimate improper payments under the CARES Act programs. However, because this is a lengthy process, ETA is also focusing on other more appropriate approaches to identify and address root causes of improper payments in the CARES Act programs, including partnerships with the UI Integrity Center, the OIG, and states. ETA is also requiring states to report on overpayment detection and recovery activities in the CARES Act programs.

With regard to the OIG's suggestion that ETA implement additional measures to enhance the accuracy and completeness of program reporting, it is impractical to establish a data validation program similar to the regular UI program for many of the same reasons it is challenging to establish a BAM-like program or develop new performance measures. Therefore, as noted above, ETA plans to incorporate oversight of state reporting in its monitoring for the CARES Act programs as well as in its provision of technical assistance.

ETA Responses to the OIG’s Recommendations:

OIG Recommendation 1: Amplify its guidance to states that strongly encourages them to enlist employers to assist state officials identify the continued eligibility of individuals who refuse to return to work by providing technical assistance and sharing best practices on processes and messaging that will increase employer reporting.

ETA Response: ETA concurs with this recommendation.

OIG Recommendation 2: Include CARES Act UI transactions in the BAM or develop an alternative methodology to reliably estimate improper payments for those programs.

ETA Response: ETA respectfully disagrees with this recommendation for the reasons stated above. ETA will, however, maintain its continued and sustained focus on identifying potential root causes for improper payments and fraud and developing and implementing strategies to address these root causes in partnership with states and the OIG. ETA will also continue to meet the requirements provided in Appendix C of OMB Circular A-123 with regard to the process of developing improper payment estimation methodologies for new CARES Act programs.

OIG Recommendation 3: Develop oversight processes that ensure states are administering the CARES Act UI programs so as to ensure payments to eligible individuals in a timely manner and that states are submitting accurate reports.

ETA Response: ETA concurs with this recommendation.

OIG Recommendation 4: Issue guidance directing states to provide access to state UI claimant data, in order to prevent and detect fraud.

ETA Response: ETA concurs with this recommendation. ETA has issued prior guidance to states that mandates they provide data and information to the OIG. ETA remains committed to supporting the OIG’s efficient access to UI data to prevent and detect fraud.

In conclusion, ETA will continue to work collaboratively and proactively with the OIG, states, and other partners to ensure the integrity of the CARES Act UI programs and to prevent, detect, and prosecute fraud.