Forging a Fair and Balanced State Response to Unemployment Insurance Overpayments

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Federal Push to Recover Overpayments

- Obama Administration initiative seeks to recover $125 billion in overpaid benefits across federal programs, including UI
- Executive Order 13520 (Nov. 2009) calls for balanced approach to reduce overpayments that “must protect access to Federal programs by their intended beneficiaries”
- Improper Payments Elimination and Recovery Act (IPERA), signed in July 2010, sets strict timeframes and standards for federal agencies to reduce overpayments to negotiated levels, not higher than 10% of all claims
Key Features of Federal UI Initiative

- To comply with IPERA, USDOL pledged to reduce “improper” UI payments to 9.8% of FY2011 benefits (July 2010 to June 2011: 11.97%)
- USDOL issued a detailed strategic plan to reduce overpayments by states, including new performance standards (UIPL 34-11), state “action plan” and state “task force” mandates (UIPL 19-11), and more extensive oversight for the most “high risk” states
- Federal RFP ($600K) will fund vendors of financial records to pilot program tracking bank records of UI claimants to verify employment status
New Federal Laws Regulate UI Overpayments

Treasury Offset Program (TOP): On February 14, 2011, Treasury Department began accepting referrals of “legally enforceable” UI debts from states to be offset against individual’s income taxes

1. 2010 law (P.L. 110-328) expands TOP to include non-fraud overpayments due to failure to report earnings, not just fraud
2. 2010 law also eliminated 10-year limitation on collection
3. Worker must be provided 60 days notice to “present evidence” challenging state’s offset determination that debt is past due and legally enforceable (31 CFR 285.8(3)(i),(ii))
New Federal Laws Regulate UI Overpayments

UI Program Integrity Provisions of Trade Act (P.L. 112-40, Sections 251-252): Creates new state requirements regulating UI overpayments and employer abuses (signed October 21, 2011)

1. **Worker Penalty:** In fraud cases, state laws must impose at least 15% penalty of amount of overpaid benefits on worker (effective by October 2013)

2. **Employer Charge:** Claim must be “charged” to employer’s UI account if company or third-party representative failed to respond “timely or adequately” to state agency’s request for information and there was “pattern” of doing so (Note: law also states that nothing prohibits states from eliminating more onerous “pattern” requirement)
Rush to Judgment Against the Unemployed

Rampant Fraud Narrative:

- Vice President Biden made statement to press implying UI system plagued with fraud:

  “Unemployment checks are going to people in prison. Unemployment checks are going to graveyards. You know the old joke about headstones vote? Well guess what, headstones are now collecting unemployment insurance in some places. And it's a gigantic waste.” (White House Program Integrity Meeting, Sep. 14, 2011)

- The Oregonian (print ed., Oct. 28, 2011): Characterizes state’s overpaid benefits (majority non-fraud) as “ill-gotten gains”
Reframing the Narrative

“Whole Truth” About Fraud and Error in UI Program:

1. Fraud accounted for 23.6% percent of UI overpayments in CY 2010, or 2.7% of all UI benefits paid

2. Workers lose out on more in benefits that are improperly denied or underpaid ($2.18 billion in CY 2010) compared to overpayments due to fraud ($1.56 billion) (Slide 17)

Under- vs. Overpayments, 2010 ($ mil.)

- Improperly Denied Claims:
  - 3.18% ($1,846.8)
  - 0.58%, $334.1

- Paid Claims:
  - 2.69% ($1,562.0)

- All Overpayments (including Fraud):
  - 11.41% ($6,624.9)

Note: Underpayments on improperly denied claims based on NELP calculations of Denied Claims Accuracy data from above report and include Monetary and Separation denials. Source: U.S. DOL Calendar Year 2010 Benefit Accuracy Measurement Data Summary.
While UI Claims Increased, Fraud Rates Mostly Held Steady (2000-2010)

Source: U.S. DOL Calendar Year 2010 Benefit Accuracy Measurement Data Summary and 394 Handbook
Causes of Overpayments (Fraud and Non-Fraud), 2010 ($ mil.)

Note: All Other Issues includes: Other Eligibility Issues ($264.5); Other Issues ($237.2); Deductible Income ($123.8); and Dependents Allowance ($35.6)

Source: U.S. DOL Calendar Year 2010 Benefit Accuracy Measurement Data Summary
Causes of Underpayments (on Paid Claims), 2010 ($ mil.)

- Underreports Base Period Wages: $236.0, 70.6%
- Overreports Wages while Collecting UI: $60.4, 18.1%
- All Other Issues: $37.7, 11.3%

Total: $334.1

Note: All Other Issues includes: Other Issues ($29.7); Deductible Income ($5.7); Able and Available ($1.2); and Misclassified Worker ($1.1)
Source: U.S. DOL Calendar Year 2010 Benefit Accuracy Measurement Data Summary
## Targeted “High-risk” States (2010, $ millions)

<table>
<thead>
<tr>
<th>State</th>
<th>Benefits Paid</th>
<th>Overpayment Rate</th>
<th>Fraud Rate</th>
<th>Underpayment Rate (Paid Claims)</th>
<th>Underpayment Rate (Denied Claims)</th>
<th>Total Wages Underreported</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>$1,093.5</td>
<td>55.50%</td>
<td>3.23%</td>
<td>0.12%</td>
<td>3.95%</td>
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<td>Louisiana</td>
<td>$431.9</td>
<td>51.40%</td>
<td>9.74%</td>
<td>1.85%</td>
<td>9.41%</td>
<td>$9.4</td>
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<tr>
<td>New Mexico</td>
<td>$309.7</td>
<td>27.35%</td>
<td>5.08%</td>
<td>0.82%</td>
<td>4.05%</td>
<td>$3.6</td>
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<tr>
<td>Alabama</td>
<td>$488.1</td>
<td>20.84%</td>
<td>1.79%</td>
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<td>Tennessee</td>
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<td>Ohio</td>
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<td>1.16%</td>
<td>9.19%</td>
<td>$28.0</td>
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<td>Texas</td>
<td>$2,915.6</td>
<td>13.77%</td>
<td>0.74%</td>
<td>0.35%</td>
<td>5.08%</td>
<td>$57.9</td>
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<td>Florida</td>
<td>$2,270.7</td>
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<td>1.57%</td>
<td>0.15%</td>
<td>1.15%</td>
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<td>California</td>
<td>$8,876.7</td>
<td>6.81%</td>
<td>3.26%</td>
<td>0.44%</td>
<td>2.61%</td>
<td>$8.3</td>
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<tr>
<td><strong>United States</strong></td>
<td><strong>$58,040.9</strong></td>
<td><strong>11.41%</strong></td>
<td><strong>2.69%</strong></td>
<td><strong>0.58%</strong></td>
<td><strong>3.18%</strong></td>
<td><strong>$4,436.0</strong></td>
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</tbody>
</table>

Source: U.S. DOL Calendar Year 2010 Benefit Accuracy Measurement Data Summary

1 Based on NELP analysis of state Denied Claims Accuracy data from above report and include Monetary and Separation denials; 2 Equals total wages underreported, according to state audits of employer records. Source: ETA 581 Contributions Operations Report.
Five Steps to Protect Workers and Improve UI Program Integrity

- **Step 1**: Engage states to prevent confusion leading to overpayments.
- **Step 2**: Clearly differentiate fraud and non-fraud overpayments.
- **Step 3**: Require strong fact-finding, notice and hearing Rights
- **Step 4**: Adopt strong protections waiving non-fraud overpayments.
- **Step 5**: Hold employers and third-party agents accountable for fraud and abuse
Step 1: Engage State Agencies to Prevent Confusion Leading to Overpayments

- Advocates should call on state agencies and new state task forces to evaluate all claims instructions (handbooks, online systems, etc.) and revise material where there’s common confusion, inappropriate literacy levels, etc.
- For example, many claimants are overpaid because of confusing instructions related to reporting part-time or contract work income while collecting UI.
- Many eligibility review and online filing systems are difficult to navigate; advocates should play vital role in needed process re-engineering (currently ongoing in many states).
Step 2: Clearly Differentiate Fraud from Non-Fraud Overpayments

- Illinois Regulation: “A good faith mistake of fact by the claimant in the filing of his claim for benefits which results in an overpayment of benefits does not constitute fraud.”

- Maine Regulation: “In determining whether a claimant is at fault, the commission shall consider all pertinent circumstances, including the claimant’s age and intelligence as well as any physical, mental, educational, or linguistic limitations (including lack of facility with the English language).”
Step 3: Require Strong Fact-Finding, Notice and Hearing Rights

- States are required to make UI payments “when due” and provide a “fair hearing” consistent with due process (42 USC 503(a)(1), (3))
- States should have clear criteria to evaluate credibility of information that leads to overpayment determination, including first-hand knowledge, and specific and credible evidence
- States should provide notice and hearing before suspending, terminating or recouping benefits.
- Notice should specifically include the nature of action being taken and possible consequences, as well as:
  - Clear statement of possible fraud penalties
  - Identification of eligibility issue/summary of information that put eligibility in question
  - Action claimant must take to obtain hearing to contest proposed agency action, and information to access free legal services
Step 3 (cont.): State Examples

- Tennessee Regulation: “No benefits will be withheld from a recipient of unemployment benefits, who is subject to recoupment for overpayment of benefits, until that recipient has been apprised of such recipient’s right to have a hearing on the existence of the overpayment and/or the waiver of repayment, and been given an opportunity to exercise that right.”

- Ohio Statute: “. . . an eligibility notice must: contain in writing, a statement that identifies either a source who has firsthand knowledge of the information or an informant who can identify the source; provide specific and detailed information that may potentially disqualify the claimant; provide the name and address of the source of the informant; and appear to the director to be reliable and credible.”
Step 4: Adopt Strong Protections Waiving Non-Fraud Overpayments

- **Standard Waivers**: 27 states waive non-fraud overpayments in cases involving “equity and good conscience” and “financial hardship”

- **Limited Waivers**: 11 states strictly limit waivers, mostly to cases involving agency error or appeal reversals (AL, FL, ID, IA, MD, MN, MT, NM, NC, OH, WI)

- **No Waiver**: 13 states fail to waive non-fraud overpayments, no matter the individual’s circumstances (DE, IL, KY, MS, MO, NE, NH, NY, OK, PA, TX, VA, WV)
Step 4 (cont.): State Examples

- Connecticut Regulation: Waiver required where “one of the following conditions exists”: “prospects for securing full-time employment are severely limited,” “gross administrative error,” reversal of prior decision and inadequate notice, claimant “irreversibly changed his position,” income below 150% of poverty if overpayment exceeds given level.

- Colorado Regulation: “Requiring repayment will cause extraordinary financial hardship by depriving the claimant of the ability to provide for basic necessities that cannot be deferred, such as food, shelter, clothing, utilities and medical costs not covered by insurance.”

- Florida Statute: “Any person who, by reason other than fraud, receives benefits under this chapter to which she or he is not entitled as a result of an employer’s failure to respond to a claim within the timeframe provided . . . is not liable for repaying those benefits . . . or to have those benefits deducted from any future benefits . . .”
Step 5: Hold Employers and Third-Party Agents Accountable for Fraud and Abuse

- “Charge” Employer’s Account for Failing to Timely Respond: By October 2013, state must enact legislation conforming with the new federal law (PL 112-40)

  - Claim must be “charged” to employer’s UI account if employer or third-party representative failed to respond “timely or adequately” to state agency’s request for information and state finds there was “pattern” of doing so. The law specifically clarifies that nothing prohibits states from eliminating the “pattern” requirement.

  - Determining employer “pattern” will be administratively costly and time-consuming, thus discouraging agency findings in many cases.

  - Advocates should urge state legislatures to adopt strict liability approach – that is, employer should be charged for overpaid benefits any time initial award of benefits was based on employer’s failure to respond timely or adequately.
Step 5 (cont.): State Examples

- Hawaii Statute: “In the absence of a showing by the employer satisfying the department that he could not reasonably comply with the department’s requirement, any benefits overpaid prior to the effective date of the redetermination as a result of the employer’s failure to furnish the information as required shall be charged entirely against the account of the non-complying employer; provided that the overpaid benefits shall not, in any event, be recoverable from the claimant.”

- Iowa Statute: “An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claims matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits . . . shall be denied permission by the department to represent any employers in unemployment insurance matters.”

- Wisconsin Statute: “The department may suspend the privilege of any agent to appear before the department at hearings . . . for a specified period of time if the department finds that the agent has engaged in an act of fraud or misrepresentation or repeatedly failed to comply with department rules . . . .”