



Protecting Workers Caught in the Rush to Recoup Unemployment Insurance Overpayments

National Employment Law Project

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Overview:

- UI Overpayments 101
- Federal Push to Recover Overpayments
- Putting the Issue and Data in Perspective
- Colorado's Response
- Checklist of Model Worker Protections and Mandates Regulating Employer Abuses
- Q&A

UI Overpayments

- All state UI laws include provisions relating to detection, establishment, and recovery of overpayments
- Overpayments generally fall into two categories:
 - **Non-fraud:** Benefits which claimant was not entitled to but received as result of either claimant, agency, or employer error
 - **Fraud:** Benefits which claimant received as result of intentional misrepresentation or failure to disclose material fact

Non-Fraud Overpayments

- **Separation:** Ineligible due to voluntarily quitting employment or discharge for cause
 - Typically, award of benefits is overturned on review (appeal or redetermination) and all benefits paid to date considered overpaid
 - Most common scenario: Employer did not respond timely or adequately to original agency request for information about circumstances of separation
- **Adjustments:** Various corrections to claimants' monetary entitlements based on late information, including dependents' allowances, receipt of income from severance pay, vacation pay, employer pension, back pay awards, payment during period of disqualification
- **Misapplication of law** relating to federal extension programs (EUC08), Extended Benefits

Fraud Overpayments

- **Most Common Form of UI fraud:** Working and earning wages in same week(s) claimant filing for benefits
 - **Most frequently detected:** Claiming UI benefits after returning to work (National Directory of New Hires)
 - **Problem area:** Claimant has part-time and/or one-time earnings not reported because of lack of understanding of rules/reporting process
 - **Other forms of fraud** include failure to report refusal of work, self-employment, separation from unreported employment, use of false identity to claim benefits

Other Categories (Mostly Non-Fraud)

- USDOL requires states to randomly audit small number of *paid claims* each week (Benefit Accuracy Measurement: BAM); this data is relied on for recent national rate of improper payments
- Claims found to be overpaid for reasons such as:
 - **Work Search:** Failure to actively seek employment
 - **Failure to register with Employment Service** or Workforce Center
 - **Able & Available:** Ineligible due to not being able to work or available for work
 - **Base Period Wages:** Error in calculating claimant's weekly benefit amount based on wages earned prior to unemployment

Determinations & Recovery: Non-Fraud

- Determinations should include amount of overpayment, weeks overpaid, right to apply for waiver (if applicable)
- Recovery may be by:
 - Direct repayment
 - Offset from future benefits (25 to 100%)
 - Civil action
 - Offset with state tax refunds
- Minority of states also impose interest

Determinations & Recovery: Fraud

- Determinations should include amount overpaid, weeks overpaid, statement charging fraud, and right to be heard on initial determination
- Recovery may be by:
 - Direct repayment
 - Offset from future benefits (100%)
 - Civil action
 - Offset with state tax refunds
 - Offset with federal tax refunds (new)

Determinations & Recovery: More on Fraud

- **Financial/criminal penalties:** In most states, UI fraud is subject to financial, as well as criminal, penalties and (depending on amount of benefits) imprisonment
- **Interest:** About half states impose interest
- **Disqualification:** Majority also impose form of disqualification from future benefits or cancellation of wage credits for claimants found to have filed fraudulent UI claim

Fraud vs. Non-Fraud

- **Intentionality key element of Fraud:** Establishing that overpayment was due to agency error or claimant misunderstanding/mistake will trigger range of recovery options generally less severe and in most states, the possibility of waiver
- **Key Questions:**
 - What is action or failure to report that caused overpayment? What is actual agency requirement?
 - Did agency communicate rule in understandable way? (Consider how transmitted – telephone, on-line, agency script)
 - Did claimant understand obligation to report required information? (Consider claimant’s ability to understand message, literacy, language skills)

Federal Push to Recover Overpayments

- Obama Administration initiative seeks to recover \$125 billion in overpaid benefits last year 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 “task force” mandates (UIPL 19-11), and more extensive oversight for 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
- None of USDOL’s plans emphasize necessary protections for workers unfairly caught up in overpayment proceedings

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 (2)

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 (heads federal overpayment initiative) made statement to press implying UI system plagued with fraud:

So what's happening? Unemployment checks are going to people in prison. Unemployment checks are going to graveyards. You know the old joke about headstone's 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)

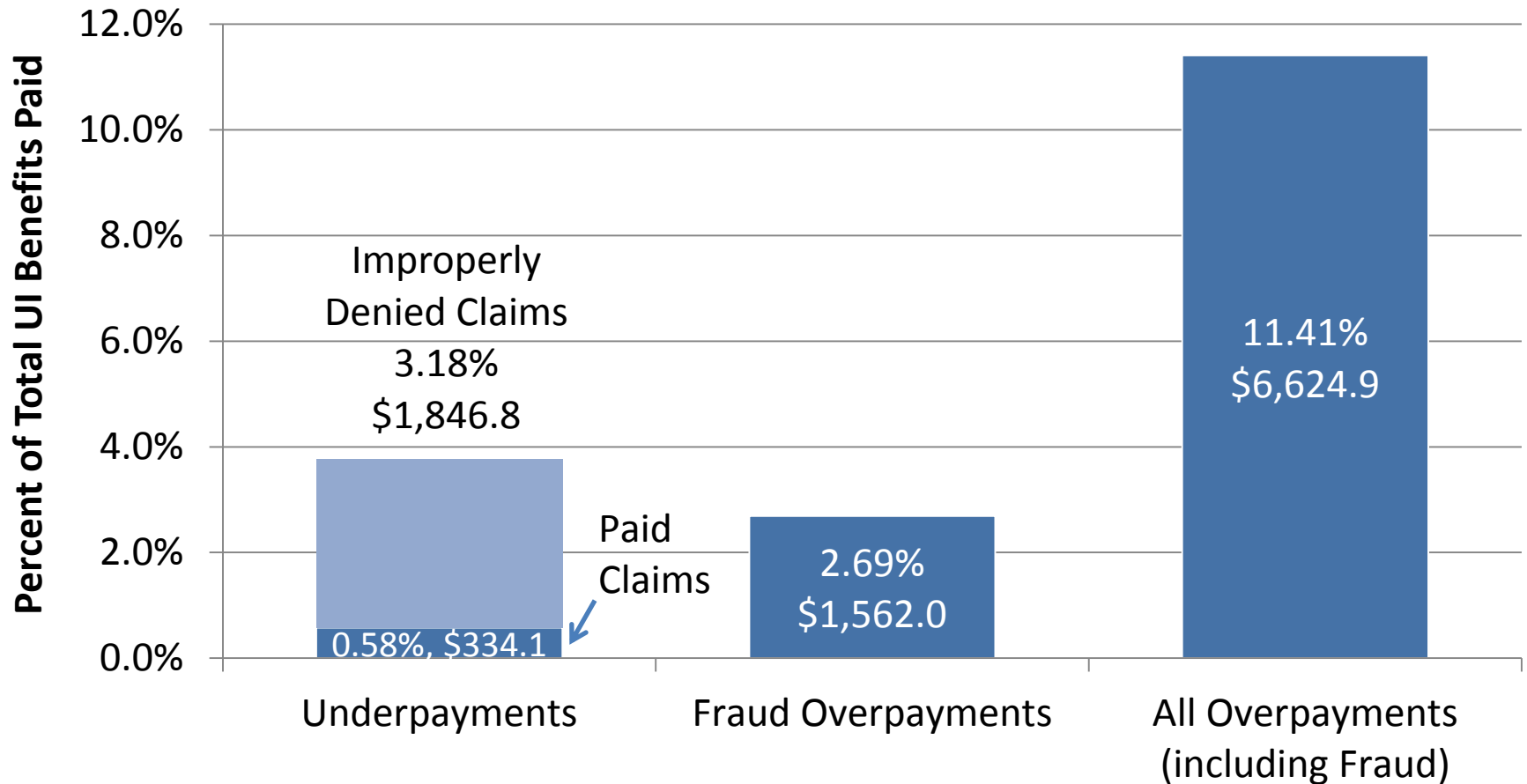
- *The Oregonian* [article](#) (print ed., Oct. 28, 2011): Characterizes state's overpaid benefits (majority non-fraud) as “ill-gotten gains”

Reframing the Narrative

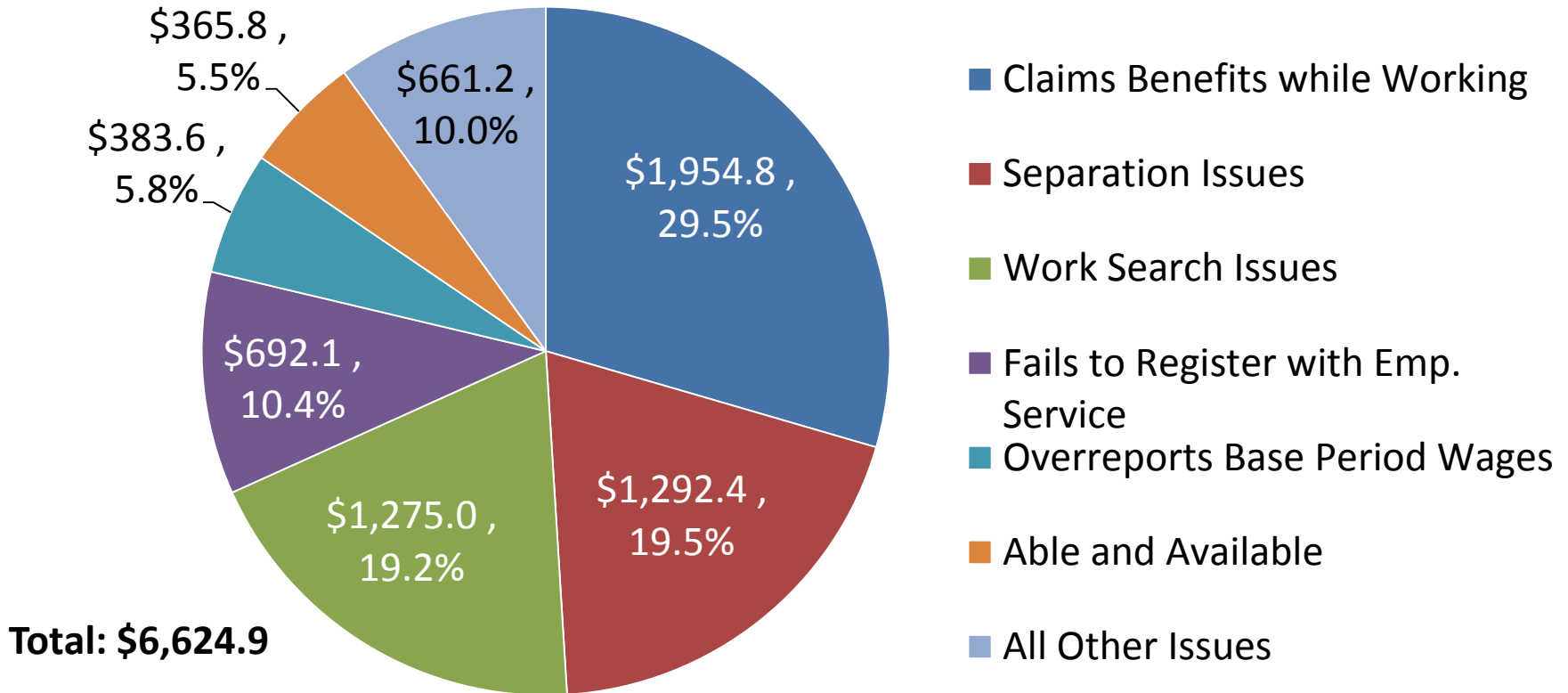
“Whole Truth” About Fraud and Error in UI Program:

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)
3. Employer fraud and abuse contribute significantly to overpayments and taxes withheld from UI program. In 2010, employers failed to report \$4.4 billion in wages when they misclassified employees as independent contractors (Source: Audit Data, ETA 581 Contributions Operations Report).

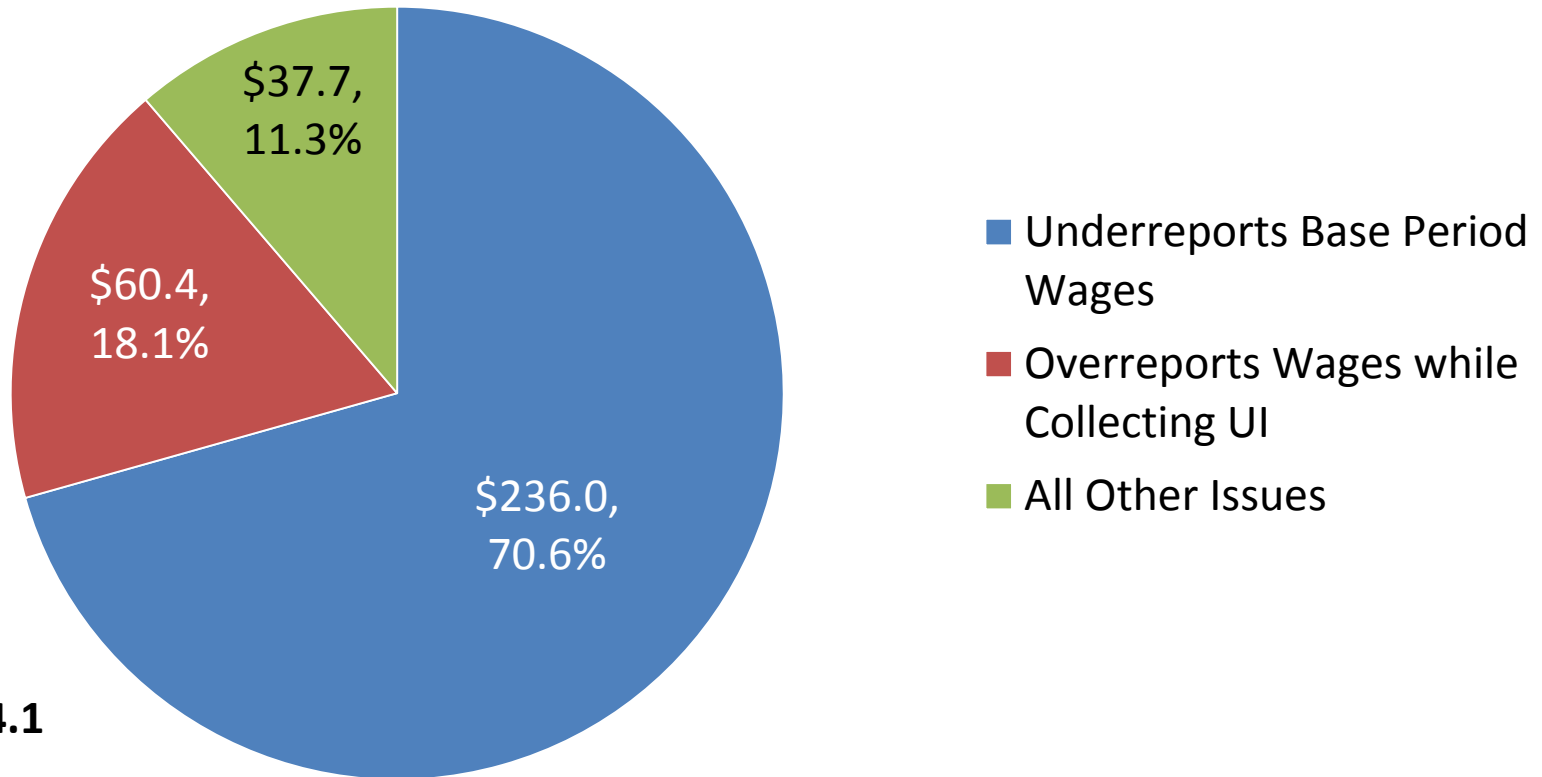
Under- vs. Overpayments, 2010 (\$ mil.)



Causes of Overpayments (Fraud and Non-Fraud), 2010 (\$ mil.)



Causes of Underpayments (on Paid Claims), 2010 (\$ mil.)



Total: \$334.1

States with Highest Overpayment Rates, 2010 (\$ mil.)

State	Benefits Paid	Overpayment Rate	Fraud Rate	Underpayment Rate
Indiana	\$1,093.5	55.50%	3.23%	0.12%
Louisiana	\$431.9	51.40%	9.74%	1.85%
New Mexico	\$309.7	27.35%	5.08%	0.82%
Alabama	\$488.1	20.84%	1.79%	0.19%
Virginia	\$826.5	20.39%	1.92%	0.18%
Arizona	\$726.8	20.18%	5.13%	0.09%
Tennessee	\$622.1	18.99%	2.68%	0.26%
Colorado	\$907.3	18.65%	0.78%	0.69%
Maine	\$216.6	17.04%	0.54%	0.36%
Nebraska	\$184.1	16.77%	1.72%	0.45%
United States	\$58,040.9	11.41%	2.69%	0.58%

*Note: Overpayment rate excludes agency errors by states other than sampling state
Sources: U.S. DOL Calendar Year 2010 Benefit Accuracy Measurement Data Summary*



Unemployment Insurance Improper Payments

Root Causes and Solutions

National Employment Law Project Presentation

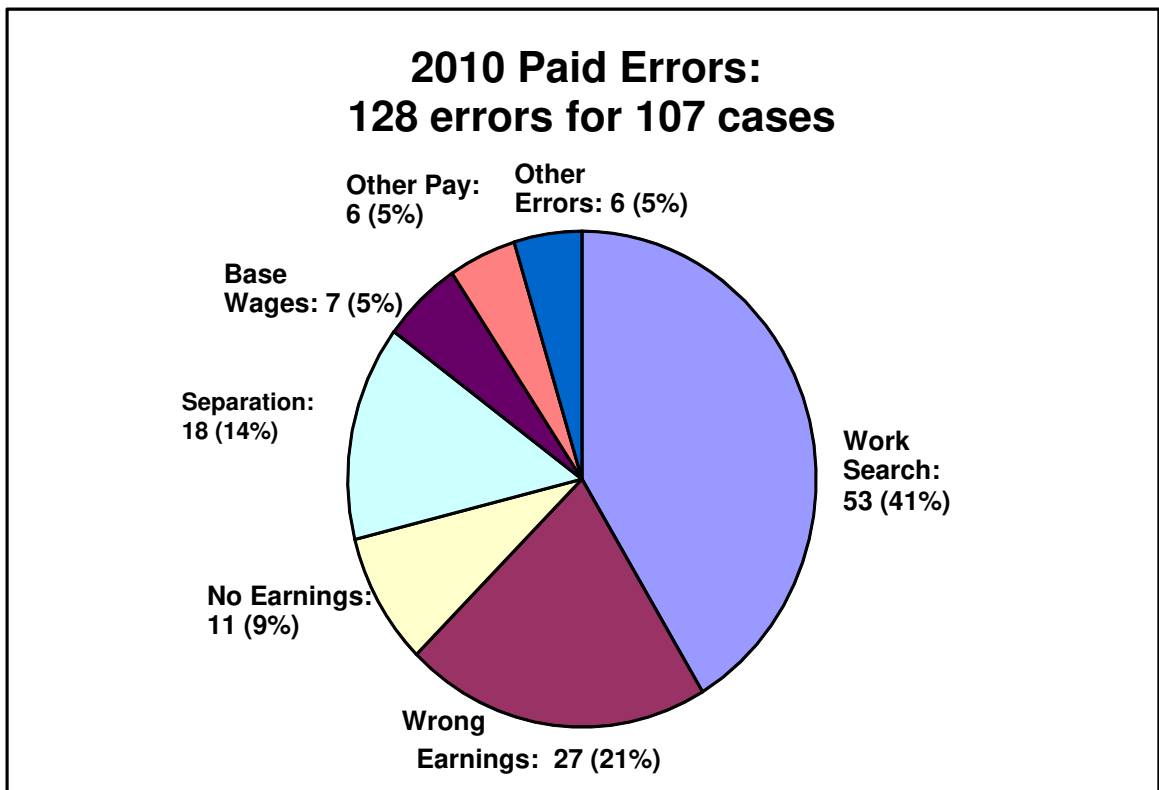
November 17, 2011

Introduction



Colorado's improper payments fall into the following general categories:

- Claimants are paid despite failure to perform or properly report required work search activities
- Claimants are collecting UI benefits while working
 - Misunderstanding
 - Misrepresentation (Smaller percent claimant fraud)
- Improper adjudication of separation issues
- 85% in targeted areas



Actions to Address Improper Payments



- CDLE-UI established a cross-functional Task Force to explore and address improper payments, the mission of which is to:
 - Identify root causes and develop and implement an action plan to address problems related to improper payments
 - Reduce Colorado's overall improper payment rate by increasing activities focused on prevention, early detection, and collection
- The Task Force has identified the following root causes of improper payments:
 - Current regulations lack specificity concerning work search and recordkeeping requirements
 - Claimants don't fully understand the requirements relating to work search and for reporting hours worked and earnings
 - Not enough UI staff are focused on issues related to improper payments (detection and collection)
 - Staff require training on activities that result in improper payments
 - Current BAM processes artificially inflate improper payment numbers

Key Strategy	Action Items
Provide specificity in regulations relating to work search requirements	<ul style="list-style-type: none"> • New regulations to set out more stringent, specific work search and recordkeeping requirements • Goal is to have new regulations in place January 2012
Communicate with claimants on requirements concerning work search and reporting of hours and earnings	<ul style="list-style-type: none"> • Revision of UI handbook, web site, phone scripts, and hold messages to reflect new regulatory requirements and provide clear and concise information, directions, and tools for compliance • Targeted outbound calls and email blasts to new claimants on work search requirements and to those reporting some earnings while receiving benefits on requirements on reporting wages and separations
Communicate with employers on the role they can play in reducing overpayments	<ul style="list-style-type: none"> • Work to ensure employer separation documents are submitted timely • Communicate the need for employers to timely report new hires to the National Database of New Hires • Use existing communication tools (Quarterly Tax Newsletter and others) as an employer education tool
Increase UI staff focused on issues related to improper payments	<ul style="list-style-type: none"> • Increased staffing of business units addressing improper payments to tackle backlog and be more proactive moving forward • Resume weekly “cross match” of claimants to federal and state databases of new hires • Increase number of random audits of claims
Provide UI staff training on activities that result in improper payments	<ul style="list-style-type: none"> • Emphasize that “Everyone Owns Integrity” • Improve “initial fact finding” skills to eliminate adjudication-related improper payments • Share information across the business units so errors are not repeated • UI-wide training initiative related to a reorganization
Revise BAM coding and related processes, particularly for work search related issues	<ul style="list-style-type: none"> • Bring Colorado policies in line with other states • Send non-responders to BAM questionnaire a formal warning letter informing them of potential consequences of failing to respond • No longer classify failure to respond to questionnaire as an “improper payment”

Key Features of Rational Strategy to Improve UI Program Integrity

- Prevent overpayments through better processes and clearer guidance to claimants
- Give claimants with potential overpayments fair notice and hearing rights
- Waive overpayments where requiring repayment would be inequitable
- Charge overpaid benefits to employers that fail to respond timely to agency requests, regulate third-party agents, and penalize employer fraud
- Integrity initiatives should be fair, balanced, and should not threaten access to system or impose unreasonable new administrative requirements

Prevent Overpayments through Better Processes and Guidance to Claimants

- Many claimants are overpaid because they do not report some form of income for week of unemployment (e.g., part-time or contract work)
- Errors frequently due to confusing instructions about when and how to report such data and limited in-person support
- Advocates should evaluate claims instructions (handbooks, on-line systems, etc.) and engage UI agencies where there's common confusion, particularly now when USDOL is tasking states to find ways to prevent overpayments
- Many eligibility review and on-line filing systems are difficult to navigate; advocates should play vital role in needed process re-engineering (currently ongoing in many states)

Provide Workers Strong 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)) SSA)
- 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 considering terminating, suspending, or reducing UI benefits should have standards for notice to claimant that include 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

Provide Workers Strong Notice and Hearing Rights (2)

- In cases of alleged fraud, states should require notice and hearing before benefits are suspended or terminated
- In all cases, states should adopt clear standards for scheduling and notice of hearing, for agency conduct of hearing, for written determinations, and notice of appeal rights
- Appeal or redetermination decisions overturning prior award of benefits should include clear statement that failure to appeal can result in overpayment of benefits previously paid

Waive Overpayments Where Requiring Repayment Would Be Inequitable

- 36 states and DC allow for waiver of non-fraud overpayments (or where claimant is “without fault”) under certain circumstances
- Most common standard is where requiring repayment would be “against equity and good conscience”
- States should adopt clear waiver standards that specify equitable conditions for waiver, including financial hardship or extraordinary hardship (defined)

Hold Employers and their Agents Accountable for Fraud and Abuse

- States have two years to enact legislation to conform with recent federal UI program integrity 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
 - Note: Law also clarifies that nothing prohibits states from eliminating more onerous “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
 - State legislatures could clarify that benefits paid in these cases should not be categorized as overpayments

Hold Employers and their Agents Accountable for Fraud and Abuse (2)

- Hold employer third-party representatives accountable for failing to respond timely and adequately to state agency requests for information, not just the employer
- Create registration requirement for third-party agents, standards for rules of conduct before the agency, standards for timely withdrawal of appeals, and penalties that include fines, equitable remedies, and deregistration
- Conduct more targeted UI audits to detect employer misclassification of independent contractors, increase reporting requirements, and create stronger sanctions to enforce the law

Integrity Initiatives: Fair, Balanced, and No New Obstacles to Accessing UI Benefits

- State UI agencies responding to USDOL's call to remedy overpayment problem with internal taskforces
- While state legislatures will be enacting tougher fraud penalties, advocates should reinforce that *most overpayments are not due to fraud* and claimants paid in error should not be misidentified and subject to fraud penalties
- State UI laws increasing worker penalties should be balanced to also include tough sanctions for employers who fail to pay fair share of UI taxes
- Safeguards against overpayment should be proportionate to threat; states should not be implementing new requirements that make it more difficult to access benefits (e.g., complex work-search documentation procedures, new continuing eligibility conditions)



Q&A



Resources:

NELP:

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Maurice Emsellem (emsellem@nelp.org)

USDOL:

UI PL No. [19-11](#)

Comparison of State UI Laws 2011, Chapter 6, [Overpayments](#)

UI Payment Integrity Information [Home Page](#)



For more information:

nelp.org / unemployedworkers.org

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