



STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

July 9, 2012

Mr. Peter M. Rivera  
Commissioner  
NYS Department of Labor  
Building 12  
W.A. Harriman Campus  
Albany, NY 12240

Re: Report 2009-0370

Dear Commissioner Rivera:

Our Office examined<sup>1</sup> overpayments the Department of Labor (DOL) classified as non-recoverable during the period August 1, 2010 through January 31, 2011. The objective of our examination was to determine if DOL correctly classified overpayments as non-recoverable in accordance with the New York State Unemployment Insurance Law, the Federal Supplemental Appropriation Act of 2008, and the American Recovery and Reinvestment Act of 2009.

**A. Results of Examination**

We found DOL incorrectly classified between 21 percent and 31 percent of regular Unemployment Insurance Benefit and Extended Benefit overpayments as non-recoverable, totaling between \$3.44 million and \$5.04 million. We also found DOL incorrectly classified \$765,411 in Emergency Unemployment Compensation Benefit and Federal Additional Compensation Benefit overpayments as non-recoverable. Once DOL classifies an overpayment as non-recoverable, no attempt is made to recoup the overpayment.

We shared a draft report with DOL officials. We considered their comments (Appendix A) in preparing this final report. The comments of the State Comptroller on their response are attached as Appendix B. DOL officials agreed with our recommendations and stated that they have taken steps to reduce the number of Emergency Unemployment Compensation Benefit overpayments. They also stated that these steps helped reduce the number of non-recoverable Emergency Unemployment Compensation Benefit overpayments by 89 percent for the period January 1,

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<sup>1</sup> We performed our examination in accordance with the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution, Article II, Section 8 and Article VII, Section 111 of the State Finance Law, and Article 18, Section 550 of the State Labor Law.

2012 through May 31, 2012. DOL will also implement integrity training for all Unemployment Insurance staff by July 2012 that will re-emphasize the proper classification of all overpayments.

## **B. Background and Methodology**

DOL administers the Unemployment Insurance (UI) program, which provides weekly benefits to workers who are out of work through no fault of their own and are ready, willing, and able to work. During the scope of our examination, claimants could receive up to 99 weeks of UI benefits. This includes regular UI benefits, Emergency Unemployment Compensation (EUC) Benefits and Extended Benefits (EB). Claimants could also receive Federal Additional Compensation (FAC) Benefits. FAC benefits are payments added to regular UI, EUC, and EB benefits in accordance with the American Recovery and Reinvestment Act of 2009.

During our examination period, DOL paid over \$4.7 billion in regular UI, EUC, EB, and FAC benefits. Of this, DOL classified \$19,613,896 in overpayments as non-recoverable. Generally, benefit overpayments occur when: (i) employers do not provide information timely, (ii) claimants provide inaccurate or false information, or (iii) staff makes an error.

When DOL identifies an overpayment, it may waive the recovery of the overpayment (i.e., classify the overpayment as non-recoverable) if the claimant meets certain conditions prescribed by the New York State UI Law. Once an overpayment is classified as non-recoverable, DOL does not attempt to recoup the overpayment. However, federal law authorizes DOL to classify an overpayment of EUC benefits as non-recoverable only if the claimant applied for, and DOL approved, a waiver. Federal law also prohibits DOL from classifying FAC payments as non-recoverable if the FAC payments were added to the EUC benefit and a waiver was not obtained.

To accomplish our objective, we analyzed a statistical sample of 212 UI and EB and associated FAC claims where the payments were classified as non-recoverable, reviewed \$814,824 in EUC and associated FAC overpayments classified as non-recoverable, and interviewed DOL officials and staff. We also identified certain matters that we conveyed to DOL in a separate letter and did not include in this report.

### C. Details of Findings

#### **Incorrect Classification of Overpayments for Regular UI and EB and Associated FAC Benefits**

Section 597.4 of the UI Law states DOL may classify an overpayment as non-recoverable if all of the following conditions are met: (i) the claimant did not make a false statement to obtain benefits, (ii) the claimant did not willfully conceal any pertinent information, and (iii) the claimant accepted the benefits in good faith.

During our examination period DOL classified \$19,613,896 in overpayments as non-recoverable. To determine if DOL classified these overpayments correctly, we selected and analyzed a statistical sample from 10,413 claims totaling \$16,072,116.<sup>2</sup> Our statistical sample was selected using a 90 percent confidence level and a precision of plus or minus 5 percent.

We found DOL classified the overpayments from 56 of the 212 claims in our statistical sample, or 26 percent, incorrectly. Although DOL has policies and procedures for classifying overpayments, incorrect classifications occur because staff: (i) does not receive appropriate supervisory oversight to ensure they classify overpayments correctly, and/or (ii) lacks appropriate training for classifying and processing overpayments.

Based on the parameters of our statistical sample, we estimate DOL incorrectly classified between 21 percent and 31 percent of all non-recoverable overpayments for our examination period. Using the \$1,543 average value of the claims in our sample, we project the total value misclassified is at least \$3.44 million and no more than \$5.04 million. When DOL classifies an overpayment as non-recoverable, no attempt is made to recoup the overpayment.

In response to our draft report, DOL officials stated they have re-classified the overpayments for the 56 claimants identified in our sample and have begun the process of recovering those overpayments.

#### **Incorrect Classification of EUC and Associated FAC Overpayments**

According to the Federal Supplemental Appropriation Act of 2008 and the American Recovery and Reinvestment Act of 2009, overpayments of EUC and associated FAC benefits cannot be classified as non-recoverable unless the claimant applies for, and DOL approves, a waiver.

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<sup>2</sup> We excluded the \$814,824 in EUC and associated FAC benefit payments that we reviewed separately from the statistical sample. We also excluded \$2,726,956 in overpayments involving an Administrative Law Judge decision because their characteristics indicated they could unduly affect our analysis.

During our examination period, DOL classified \$814,824 in EUC and associated FAC benefits as non-recoverable. We found DOL did not have an edit in the UI System to prevent DOL staff from classifying EUC and associated FAC overpayments as non-recoverable. We also found DOL does not have an exception report identifying EUC and FAC overpayments classified as non-recoverable for supervisory review. As a result, DOL incorrectly classified 399 EUC and FAC overpayments, totaling \$765,411, as non-recoverable, despite the absence of an approved waiver.

In response to our draft report, DOL officials stated they have begun to re-examine the \$765,411 in EUC and FAC overpayments and will make new determinations, if allowable, under state law. DOL will recover the overpayments reclassified as recoverable, if allowable, under Federal law. In addition, DOL has created an exception report to identify all EUC overpayments classified as non-recoverable. These overpayments will be reviewed by the UI Integrity and Quality Control Bureau and incorrect determinations will be addressed promptly.

### **Recommendations**

- 1) *Recover the overpayments for the 56 claims in our sample that were incorrectly classified as non-recoverable.*
- 2) *Recover the \$765,411 in EUC and FAC overpayments incorrectly classified as non-recoverable. Identify and recover all EUC and FAC overpayments incorrectly classified as non-recoverable since the inception of those programs.*
- 3) *Provide appropriate supervisory oversight and review to ensure staff classifies overpayments correctly.*
- 4) *Train staff to properly classify and process overpayments.*

We thank the management and staff of the Department of Labor for the courtesies and cooperation extended to our auditors. Since your response to the draft report is in agreement with this report, there is no need for further response unless you feel otherwise. If you choose to provide a response, we would appreciate receiving it by August 9, 2012.

Sincerely,

Bernard J. McHugh  
Director of State Expenditures

Enclosures: Appendix A  
Appendix B

cc: Carl Boorn  
Timothy Burleski



**New York State Department of Labor**  
Andrew M. Cuomo, *Governor*  
Colleen C. Gardner, *Commissioner*

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June 18, 2012

Bernard J. McHugh  
Director of State Expenditures  
110 State Street  
Albany, NY 12236

Dear Mr. McHugh:

This is in response to your letter dated May 1, 2012, regarding Draft Report 2009-0370 containing OSC's examination of Unemployment Insurance overpayments classified as non-recoverable during the period August 1, 2010 through January 31, 2011. (Draft Report 2009-0370)

During the period audited, August 1, 2010 through January 31, 2011, the Department of Labor ("the Department") made more than 24 million payment transactions, totaling more than \$4.7 billion.

Since the audit, the Department has taken steps to reduce non-recoverable EUC overpayments determinations. These steps helped reduce overpayments by 89% over last year for the period of January – May 2012. Steps completed or underway include:

1. The Department created an exception report that identifies all non-recoverable Emergency Unemployment Compensation (EUC) payments. This report allows a review of these payments by the UI Integrity and Quality Control Bureau.
  - a. Cases are returned to staff for possible re-determination
  - b. Additional training opportunities identified
2. The Department will implement Integrity Training for all UI staff by July 2012. The training re-emphasizes how to classify overpayments properly and prevent overpayments.
3. The Department of Labor has received a \$2.1 million Integrity Grant from the United States Department of Labor. These funds will help prevent improper payment of UI benefits through:
  - a. Technology improvements
  - b. Staff training
  - c. Integrity focused messaging to claimants, employers and the public
4. The Department began a State Information Data Exchange System (SIDES) program pilot on March 31, 2012. SIDES allows automated communication with employers about separation issues.
5. The Department began using the State Identification Inquiry (SID) system in the Interstate Connection Network (ICON) application on March 31, 2012. This allows staff to identify claimants who are working in other states while they collect benefits in New York.
6. In early fall 2012 the DOL will change how we handle new hire data. If new hire data indicates the claimant is re-employed, they will not be able to certify on-line or via phone. States with a similar process saw a 60% drop in certifications by those who are re-employed.

7. Lastly, the Department of Labor will implement a secure communication portal by September 30, 2012. This will give staff and employers the ability to communicate in a private, secure manner. This two way messaging will reduce mailing cost and speed up responses from employers. This will help stop overpayments because of the delays that mail and processing time cause.

Section 597.3 of the UI law sets the standard for re-determining cases. Under this section, the Department is constrained with respect to the collection of some overpayments. The statute specifies:

*Any determination regarding a benefit claim may, in the absence of fraud or willful misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information, or, if the review is based thereon, within six months from a retroactive payment of remuneration, provided that no decision on the merits of the case has been made upon hearing or appeal. Such review shall be conducted and a new determination issued in accordance with the provisions of this article and regulations and procedure prescribed there under with respect to the adjudication and payment of claims, including the right of appeal.*

#### **Willful Overpayments**

Improper payments occur through the willful actions of the claimant or through error of the claimant, the employer or the agency (also commonly referred to as "non-willfully"). Willful overpayments are the result of a fraud the UI claimant commits. Examples of willful overpayments include claimants that:

- Made a false statement
- Accepted benefits in bad faith
- Withheld a pertinent fact

Willful overpayments are generally recoverable.

#### **Non-willful overpayments**

Non-willful overpayments occur when the overpayment is a result of an error, by the UI claimant, an employer, or the Department. Some of these are recoverable others are not.

The Department can only re-determine cases that are non-willful, (non-fraudulent) within one year from its initial determination for regular UI benefits or extended UI benefits (EB). The one-year statute of limitations does not apply to willful overpayments.

#### **Federal emergency unemployment compensation (EUC) benefits**

Unemployment Insurance Appeal Board case law only allows the Department to re-determine and recover any overpayment of improperly paid EUC benefits consistent with state law. Federal law requires the Department to recover all EUC overpayments, but it also requires states to follow their laws for review and determination procedures.

The Department may not review, re-determine, or issue any kind of overpayment on **non-willful** EUC payments made more than a year ago.

The Department can review and re-determine **willful** overpayments without any bar to action. Federal law allows recovery of EUC overpayments for three years.

The OSC's recommendations and our response follow:

**OSC Recommendation**

1. *Recover overpayments for 56 claims that we incorrectly classified as non-recoverable.*

**DOL Response**

The Department has begun the process to recover these payments. The Department re-classified the overpayments and will send letters to the claimants by June 22, 2012.

**OSC Recommendation**

2. *Recover the \$765,411 in EUC and FAC overpayments incorrectly classified as non-recoverable. Identify and recover all EUC and FAC overpayments incorrectly classified as non-recoverable since the inception of those programs.*

**DOL Response**

The Department has begun to re-exam the \$765,411 in EUC and Federal Additional Compensation (FAC) payments. A new determination will be made if allowable under state law by September 28, 2012. The Department has the ability to identify all non-recoverable FAC or EUC payments. These exceptions will be reviewed to make sure that determinations are correct under state law and that they are collectable based on the allowable period for recovery under Federal law. This review will be completed by September 28, 2012.

**OSC Recommendation**

3. *Provide appropriate supervisory oversight and review to make sure staff classifies overpayments correctly.*

**DOL Response**

The Department has and continues to review its procedures and notices in relation to the recoverability of EUC overpayments to achieve the greatest consistency and efficiency.

For example, in September of 2011, the Department implemented additional controls and supervisory checks on its EUC overpayment determination system in the following ways:

- Limit the number of staff to determine EUC overpayments as non-recoverable
- Audit determinations through specific reports
- Return all cases to staff that are determined non-recoverable outside of allowable exceptions (determination of non-recoverability in a hearing or a properly granted waiver) for re-determination

As a result of these revised policies and procedures, the Department has achieved a significant decrease in non-recoverable EUC overpayment determinations by 89% for the January to May period compared to last year.

**OSC Recommendation**

4. *Train staff to properly classify and process overpayments.*

**DOL Response**

In addition to overpayment training as a component of Labor Service Representative's training, the Department will implement integrity training for all UI staff by July 2012. This training will re-emphasize the proper classification of overpayments.

**OSC Recommendation**

5. *Develop an exception report identifying EUC and associated FAC overpayments classified as non-recoverable for supervisory review.*

Comment 1
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**DOL Response**

The Department already maintains an exception report for Federal Emergency Unemployment Compensation determinations. This report is generated on a monthly basis. The Department's Benefit Quality Control Section reviews and refers incorrect determinations to staff to address promptly.

If you have any comments please contact Carl Boorn, Director Unemployment Insurance Division at (518) 457-2177.

Sincerely,

  
Colleen C. Gardner

### **State Comptroller Comments on Auditee Response**

1. DOL created an exception report that identifies all non-recoverable Emergency Unemployment Compensation Benefit overpayments. We verified the exception report has been developed. Therefore, we removed this recommendation from the final report.