



STATE OF VERMONT
OFFICE OF THE STATE AUDITOR

To: House Commerce and Economic Development Committee
Senate Economic Development, Housing, and General Affairs
From: Doug Hoffer, State Auditor
Re: Overpayments of Federal CARES Act Unemployment Compensation Programs
Date: 18 August 2023
Cc: Michael Harrington, Commissioner, Department of Labor

My office has reviewed the Vermont Department of Labor's (VDOL) efforts to inform thousands of Vermonters that they may request a waiver of financial penalties associated with accidental overpayments of COVID-era unemployment compensation benefits. Since the onset of the COVID pandemic, Vermonters have been overpaid at least \$16 million in federal unemployment insurance (UI) payments. **Some of these UI overpayments occurred through no fault of the claimant and are eligible to be waived yet VDOL has been extremely slow¹ and in some cases has completely failed to inform Vermonters that they can request to have their overpayments forgiven.** Months or even years later, Vermonters are receiving notices telling them they owe this money back to the State. I asked my staff to look into this issue after learning from Legislative committee hearings that VDOL was *not* informing Vermonters of their right to request waivers of these overpayments. Unless something changes, many Vermonters will struggle to repay overpayment amounts that were the State's fault, unaware of their rights to request relief. Some have already had their tax refunds reduced. With so many cost of living pressures to contend with, the unemployment "debts" are just one more thing to stress affected households.

This memo summarizes our findings. I have decided not to conduct a formal audit at this time because VDOL is currently working to correct some of the issues described in this memo. My office will continue to monitor the situation going forward.

Background

In response to the COVID-19 pandemic, Congress created multiple new unemployment insurance (UI) programs as part of the CARES Act, including the Pandemic Unemployment Assistance Program (PUA), Federal Pandemic Unemployment Compensation program (FPUC), and the Pandemic Emergency Unemployment Compensation program (PEUC). Collectively, these programs expanded the pool of Vermonters eligible for unemployment, provided additional money each week to unemployment recipients, and extended the number of weeks an individual could receive unemployment money.

Congress recognized States would struggle to implement the new CARES Act UI programs and gave States the ability to waive overpayments under certain circumstances: (1) the overpayment must have occurred through no fault of the individual, and (2) forcing the individual to repay the overpayment would be "against equity and good conscience." An overpayment waiver request is not a dispute that the

¹ Because VDOL was so slow with their appeals process Vermont Legal Aid (VLA) filed a [class-action lawsuit](#) against VDOL on behalf of VLA's clients. As a result of this lawsuit, VDOL hired additional Administrative Law Judges to hear appeals and entered into an [interim agreement](#) with VLA to comply with federal guidelines requiring that 80 percent of all first level appeals be decided within 45 days.

overpayment is incorrect. Rather, it is a request by the claimant not to have to repay the overpayment. Any State that chooses to allow overpayment waivers must follow [U.S. Department of Labor guidance](#) which requires *all claimants who received an overpayment* from that CARES Act UI program to be notified of their right to request a waiver. Vermont allows overpayment waivers **but has not complied with the federal guidance.**²

Matters of Concern

Claimants Not Informed About Their Right to Request an Overpayment Waiver³

In June 2023, VDOL informed my office that at the time almost **7,400 claimants owed roughly \$14.2 million in overpayments from the FPUC and PEUC**, as shown in Exhibit 1 below. VDOL allows claimants to request overpayment waivers from these programs. While VDOL may not approve all waiver requests, that does not change the fact that all claimants **must** be informed of their right to request an overpayment waiver. **VDOL has not notified all claimants of their right to request an overpayment waiver. According to VDOL officials, 1,351 Vermonters were not initially informed of their right to request a waiver at the time they were notified that they had received an overpayment.** The Department claims they are now in the process of notifying these individuals of their right to request a waiver and that since the summer of 2022 all new overpayment determination notifications now inform claimants of their right to request a waiver.

Exhibit 1: FPUC and PEUC Overpayments^a

Federal UI Program	Brief Description	Claimants with Unpaid Overpayments	Dollar Amount of Unpaid Overpayments
FPUC	Additional benefits to claimants in all unemployment programs.	3,486	\$8,741,522
PEUC	Extended regular UI.	3,886	\$5,461,132
Totals		7,372	\$14,202,654

^a This information was provided by VDOL in June 2023 but without a specific “as of” date for each program. These numbers are subject to change as VDOL continues to review for possible overpayments.

While FPUC and PEUC claimants are now notified about their right to request waivers in the *initial* overpayment notification letter, **claimants are not continually reminded of this right in their monthly overpayment bills they receive from VDOL.** This is not a small concern. Most Vermonters have no experience navigating the technical fine points of the UI system and can easily confuse or miss elements of what could be a very unsettling formal letter telling someone they owe thousands of dollars they may not have.

VDOL told my staff that they are not providing monthly waiver request reminders to Vermonters because they do not have an automated process to do so. An automated process would, in effect, allow VDOL to produce and mail a particular message to a selected group of UI claimants with the click of a button.

VDOL reports that FPUC and PEUC overpayments are recorded in VDOL’s mainframe system that is used to manage traditional UI programs. The automated billing process in this system does not distinguish FPUC and PEUC overpayments from other UI overpayments. Because waiver requests apply only to

² Exhibit 4 in Attachment I contains a flowchart of VDOL’s waiver determination process when assessing against these two criteria and Exhibits 5 and 6 document VDOL’s interpretation of fault and test for determining equity and good conscience, respectively.

³ Another way VDOL reminds claimants is through VDOL’s website. When I instructed my staff to begin looking at this issue, VDOL had text on their website that looked to be a link to a CARES Act overpayment waiver, but the link was broken. Nor did the website provide a form to request a waiver. After my staff pointed this out, VDOL updated the text to become a clickable link which now takes Vermonters to a webpage that explains their right to request a waiver and contains a waiver request form.

FPUC and PEUC overpayments and not the other overpayments recorded in the system VDOL is unable to send automated reminders alerting *only* FPUC and PEUC claimants with an overpayment determination of their right to request a waiver.

Recognizing this limitation, my staff asked why VDOL could not institute a manual process to send these reminders to Vermonters with known overpayments. Exhibit 1 above shows that VDOL has already identified 7,372 claimants with overpayments in the two programs. **VDOL responded that they simply have not considered manual processes or any alternative options, which could be deployed now.**

Overpayment Waiver Requests Do Not Stop Overpayments from Going to Tax Department for Collection

VDOL can request that the Department of Taxes withhold tax refunds to offset unpaid UI overpayments. According to VDOL officials, the overpayment waiver process does not stop VDOL from continuing their collection actions, including garnishing tax refunds. **However, this is inconsistent with State law and United States Department of Labor (U.S. DOL) policy.** [32 V.S.A. §5932 states](#), “‘debt’ means any obligation to pay a sum of money to a claimant agency, the amount of which is fixed...” Not pausing the collection process when a waiver has been requested appears to violate State law because the requirement to repay the overpayment is not “fixed” until the waiver process is complete. In addition to State law, [U.S. DOL Unemployment Insurance Program Letter 1-16](#) states: “Until the period for a waiver request has elapsed, or, if an individual applies for a waiver, the waiver determination is made, [S]tates *may not commence recovery of overpayments.*”[our emphasis]

When my staff pointed out these requirements, VDOL was unsure whether their current process was inconsistent with state law but acknowledged it was inconsistent with federal policy. VDOL’s explanation of why this occurred was the same as the reasoning for why monthly billing statements cannot have automated reminders of a claimant’s right to request a waiver, namely that the IT system was unable to treat the PEUC and FPUC claims and their waiver process in a unique manner different from the traditional UI claims that do not have a waiver process. Therefore, since VDOL continues to send regular UI tax offset notices to Tax, FPUC and PEUC overpayment cases are being sent to Tax as well. As stated earlier, VDOL has not contemplated alternative ways process to address this technological hurdle.

It is not clear to me why VDOL does not simply stop sending UI offset notices to Tax until they have found a method to distinguish between FPUC/PEUC cases and regular UI cases. **The consequence of VDOL’s actions is to create unnecessary anxiety and financial pain for many Vermonters who have done nothing wrong.**

After Collecting \$13 From Vermonters as a Fee For Having their Tax Refund Garnished, VDOL Does Not Have a Plan to Reimburse Those Who Receive an Overpayment Waiver

If FPUC and PEUC overpayments are eventually waived, VDOL is required to reimburse monies taken to repay the overpayment. However, VDOL has not addressed how they will reimburse claimants, including the \$13 recoupment fee the claimants had to pay the Department of Taxes (Tax) when their overpayment was originally recouped through garnishment. The \$13 fee is used to fund the administrative costs Tax incurs during the recoupment process. **While VDOL claims they currently have neither a mechanism nor the funds to repay any collection fee Tax assessed, nothing prohibits them from seeking the funds in the State budgeting process to do so.**

Here again, I do not understand why VDOL does not simply stop sending UI offset notices to Tax for the time being. It is unfair to Vermonters who have done nothing wrong, and who may already be struggling financially. Moreover, while a \$13 fee is not a terrible burden for some, it is unfair to ask Vermonters to absorb the cost of the State’s mistake.

PUA Specific Issues

VDOL had more than 17,000 claimants in the PUA program during 2021. VDOL did not initially review the documentation supporting those claimants' eligibility because the Department was overwhelmed by the volume of claims and must now do so. As of June 2023, VDOL had reviewed about one third of the 17,000 claimant files and has so far informally identified more than 3,000 claimants with overpayments as shown in Exhibit 2 below.

Exhibit 2: PUA Overpayments

Federal UI Program	Brief Description	Claimants with Unpaid Overpayments	Dollar Amount of Unpaid Overpayments
PUA	Includes self-employed individuals lacking sufficient work history, those who have exhausted regular UI, and those who do not otherwise qualify for UI.	3,041	\$1,736,909

The PUA claims are in a separate system from other UI claims. The PUA system currently does not have functionality to send overpayment determinations, bill claimants, receive and process payments received from claimants, nor recover monies from other sources. **According to VDOL officials, they are unable to formally notify claimants that they have an overpayment determination until they add overpayment and collection functionality to the PUA system. That is only the case because VDOL refuses to consider other means of notifying claimants, which could be done manually or by a contractor.** The Department's insistence on waiting for an IT system solution means that the 3,041 claimants in Exhibit 2 have not been formally notified that they have an overpayment and their right to appeal or request an overpayment waiver. This means the overpayment determination process is not complete for these claimants.

VDOL has a contract to add overpayment and collection functionality to the PUA system which is expected to cost just over \$900,000 (\$530,572 for development and implementation and \$372,482 for five years of support). This functionality is supposed to be implemented by the fall of this year but there are risks to meeting that timeline. First, there is staff turnover. The Agency of Digital Services (ADS) project manager for this project left his job in June 2023. Our recent [audit of IT projects](#) found that the departure of project managers was a primary reason projects experience delays. Second, according to an ADS official, the project has experienced a multi-week delay as resources from VDOL and ADS needed to stand up a new Disaster Unemployment Assistance program because of the July flooding. **These delays will only increase the lag in notifying claimants that they have a PUA overpayment and their right to appeal and/or request an overpayment waiver.**⁴

It is noteworthy that there is no evidence that VDOL considered simpler and more affordable solutions. For example, DOL staff could manually stuff the 3,041 envelopes or hire a local printing firm to do so mechanically. **Indeed, we obtained multiple quotes for less than \$4,000.** Finally, given the delays and the failure to communicate with the affected Vermonters, there is no reason not to act now rather than wait for the completion of the master IT project.

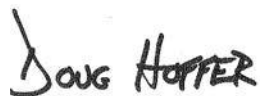
VDOL's Delay in Making Overpayment Determinations Risks Letting Fraudsters Off the Hook if State Law is Found to Apply

⁴ VDOL expects the new functionality of the PUA system to resolve one additional issue by allowing VDOL to issue a blanket waiver for all claimants impacted by VDOL misunderstanding federal guidance that resulted in the Department overpaying PUA claimants by one dollar weekly for three months. Once the PUA system gains additional functionality, VDOL officials stated they will identify all individuals who were overpaid with this specific issue and then waive the overpayments all at once.

[21 V.S.A. §1347\(a\)](#) states: “The [overpayment] determination shall be made within three years from the date of such overpayment”. According to VDOL officials, U.S. DOL has not decided if State law applies to the CARES Act programs. However, if State law applies, **VDOL may be unable to make overpayment determinations on CARES Act claims older than three years, even if these overpayments were made with the intent of defrauding these programs.** While I support waiving overpayments for those that qualify, I am concerned that if U.S. DOL determines that State law applies, fraudsters will not be required to repay their overpayments due to VDOL’s inability to make overpayment determinations in a timely manner.

My staff and I will continue to monitor these issues and provide updates if concerns go uncorrected or new concerns arise.

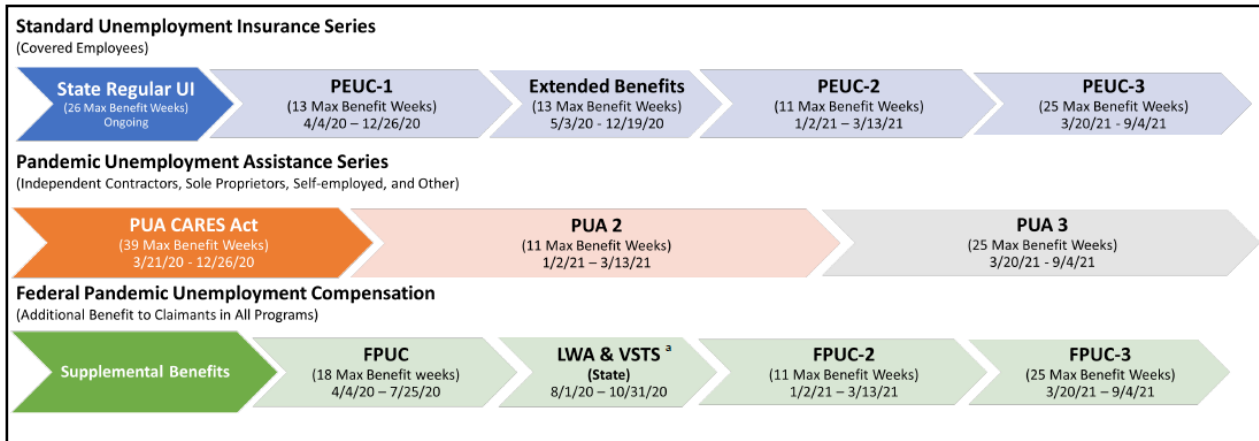
Sincerely,

A handwritten signature in black ink that reads "DOUG HOFFER". The signature is written in a cursive, slightly stylized font.

DOUGLAS R. HOFFER
State Auditor

Attachment I: Additional Background Exhibits

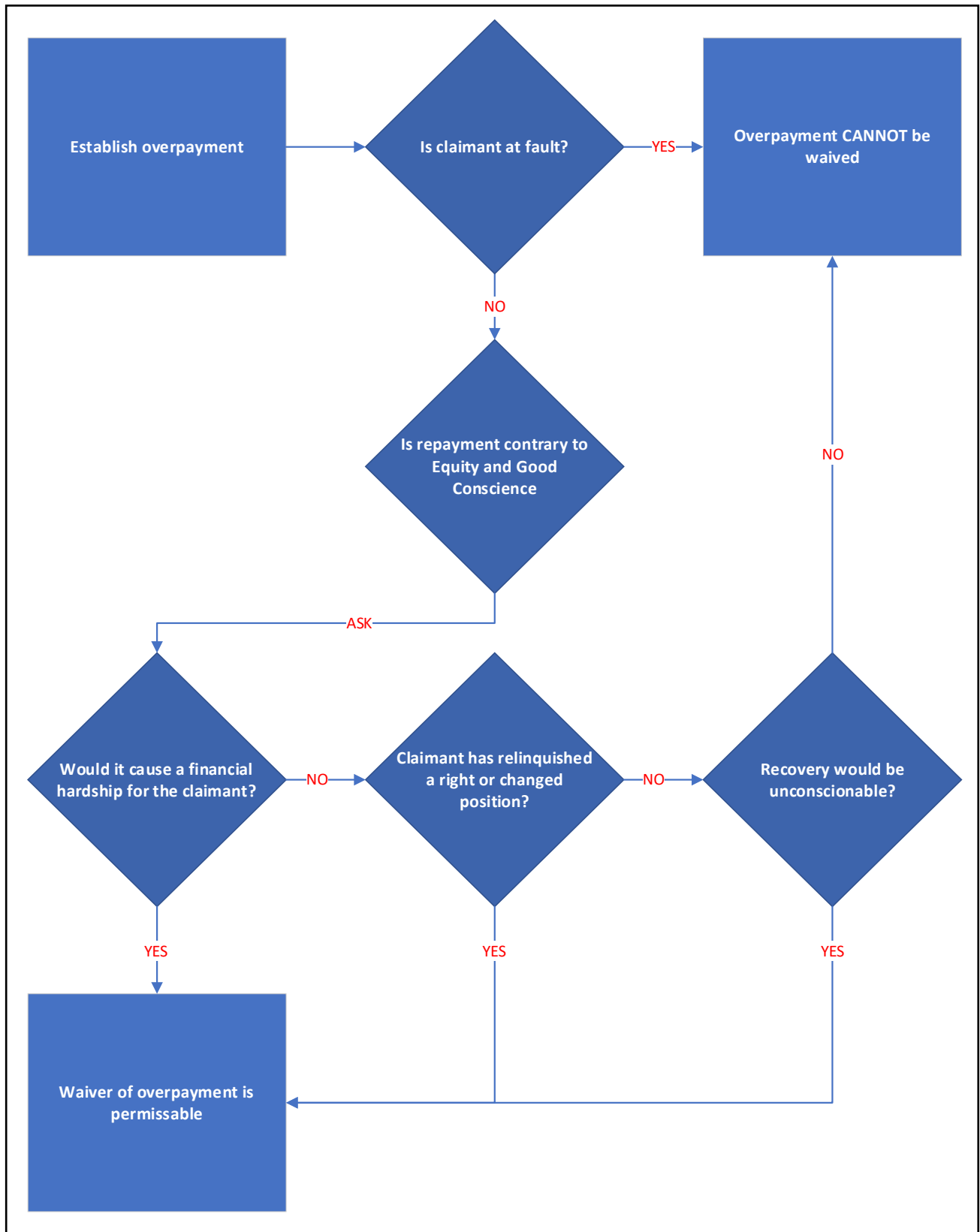
Exhibit 3: Unemployment Programs During the Pandemic and Their Timelines



Source: VDOL

^a The Lost Wage Assistance Program (LWA) provided recipients an extra \$300 a week from FEMA assistance funds and the Vermont Short-Term Supplements program (VSTS) provided an additional \$100 a week and was a State program.

Exhibit 4: VDOL's Overpayment Waiver Determination Process



Source: [VDOL U.I. Bulletin 552, June 24, 2022.](#)

Exhibit 5: VDOL's Definition of Fault

What is Fault?

For starters, there must be a finding that the claimant is without fault for the underlying overpayment. A claimant is at fault when the claimant made false or misleading statements, failed to be able and available without compelling reasons beyond the claimant's control, failed to report hours worked or earnings received, failed to fulfil the work search requirement, failed to attend RESEA or other reemployment services, refused an offer of suitable work without reasonable basis.

A primary reason a claimant may be without fault is when the claimant timely notified the Department of an issue that was subsequently ignored in order to process and pay the claim, when a programming error cause an incorrect or duplicate payment to issue to the claimant, the claimant took an action at the direction of Department staff, including contracted staff, or when there was an unreasonable Department delay in adjudicating or determining an issue. In addition, a claimant may be without fault if there was a reasonable misunderstanding of the program requirements coupled with an attempt to outreach to the Department for clarification.

The fact that incorrect information was provided does not automatically mean the claimant committed fraud. In the event a claimant provided incorrect information, staff should review with the claimant the reasoning for failing to provide the correct information to help determine whether the failure was an intentional act. An intentional failure to provide information to the Department as requested, such as wages earned or hours worked, should be treated as an intentional misrepresentation and result in a fraud determination.

Source: [VDOL U.I. Bulletin 552, June 24, 2022.](#)

Exhibit 6: VDOL's Description of Equity and Good Conscience

What is Contrary to Equity and Good Conscience

If the staff member has found that the overpayment was without fault on the part of the claimant, staff **may** waive the overpayment if there is a further finding that repayment would be contrary to equity and good conscience.

Because Vermont law does not define the term "equity and good conscience" in relation to the UI program, USDOL guidance requires the state to utilize the following provisions in determining what circumstances would qualify as contrary to equity and good conscience:

- 1) The overpayment would cause financial hardship to the person for whom it is sought; OR
- 2) The recipient of the overpayment can show (regardless of their financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment either they have relinquished a valuable right or changed positions for the worse; OR
- 3) Recovery would be unconscionable under the circumstances.

As one can see above, the circumstances that meet the definition of contrary to equity and good conscience need further definition. Therefore, examples are provided within this UI Bulletin (below) to identify when repayment of a CARES Act related overpayment may be waived.

Source: [VDOL U.I. Bulletin 552, June 24, 2022.](#)