

# *Failure to respond to state UI notices could result in relief denial, higher rates, and penalties*

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## ***In brief***

A federal mandate directs states to adopt laws requiring employers and their agents to timely and accurately respond to state Unemployment Insurance (UI) notices. An employer's failure to comply could result in substantial penalties, a preclusion from recovering erroneous UI account charges, and an increased UI rate. States are required to adopt such laws on or before October 21, 2013. Accordingly, employers should have a process in place to respond to such notices.

We discuss below some of the specific guidance provided in state and federal law, potential consequences for failure to conform with state mandates, and best practices with regard to unemployment claims management processes in order to comply with state mandates and mitigate potential consequences.

## ***In detail***

### ***Background***

For fiscal year 2011, a US Department of Labor study indicated that erroneous federal and state UI overpayments were equivalent to 11% of the total unemployment benefits paid out during that time. Certain states actually paid more improper UI benefits than proper ones. Such overpayments put a strain on both state and federal unemployment funds, diluting state UI trust funds and forcing the federal government to provide additional funding to make up for the erroneously paid benefits. As a result, Congress responded by increasing employer

accountability in administration of UI trust funds.

### ***Federal mandate for state accountability***

Under the Trade Adjustment Assistance Extension Act (TAAEA) of 2011, Congress mandates that states add additional accountability for claimants and employers regarding state UI claims.

In addition, the TAAEA mandates that states prohibit the reimbursement of benefits erroneously charged to an employer's account when (1) the erroneous payment results from the failure of the employer (or employer's agent) to 'timely or adequately' respond to the state's request for information

related to the claim; and (2) the employer has established a pattern of failing to respond to such requests. US Department of Labor guidance provides that 'pattern of failure' means, at a minimum, two or more instances of such behavior by the employer. *See* US Department of Labor, *Unemployment Insurance Program Letter No. 02-12*, December 20, 2011. However, the TAAEA specifically provides that states may provide for stricter standards than the 'pattern of failure' provided for in the TAAEA. The TAAEA provides that states may prohibit the relief of charges

after the first instance of failure to respond 'timely and adequately' to the state's request for information related to benefit charges.

States are required to be in compliance with the TAAEA mandates on or before October 21, 2013. A state's failure to comply with the TAAEA mandates by October 21, 2013, will result in employers losing federal unemployment tax (FUTA) credit amounts received for compliance with state unemployment tax (SUT) payments.

In addition, nothing in the TAAEA precludes states from imposing additional penalties. The TAAEA also allows states freedom to define whether an employer's response to information requests is considered timely or adequate.

When benefits are erroneously paid to a former employee as a result of an employer's failure to respond to requests for information, the TAAEA mandate imposes both a current and future cost to the employer. When an erroneous benefit payment is made, the cost of the benefit is deducted from the employer's UI account, representing a current cost (loss of money paid into its UI account) to the employer. In addition, because UI tax rates are directly linked to the benefits charged to an employer's account, the more benefit charges that an employer has leads to an increase in the employer's UI tax rate. This leads to higher UI taxes in the future.

Prior to the TAAEA, employers could obtain reimbursement for erroneous charges (i.e., charges made relating to a former employee later determined to be ineligible for benefits) and avoid such direct and indirect costs regardless of whether they responded to state inquiries for information. As a result, many employers chose not to respond to such inquiries. However,

the TAAEA imposes accountability on employers by eliminating the potential for reimbursement if an employer fails to respond to state information requests.

In addition, the TAAEA mandate to respond to information requests is not limited to employers; the requirement specifically includes 'employer agents' within the mandate. Employers that outsource their unemployment claims management (UCM) compliance to third party payroll providers may still incur penalties and account relief denial due to a provider's failure to timely or adequately respond to a state's request for information.

#### **State accountability laws**

Prior to the TAAEA mandate, certain states, including Massachusetts and Wisconsin, had laws prohibiting the reimbursement of erroneously charged benefits. Many of these states prevent such reimbursement when the employer fails to respond to the state's request for information, regardless of whether a pattern of failure has been established.

As of October 1, 2013, all states have either passed or proposed authority designed to come into compliance with the federal mandate. While certain states have, as discussed above, imposed accountability on employers that fail to timely and adequately respond to state requests for information in any instance, the majority of states adhere to the 'pattern of failure' mandate in the federal statute and only prevent benefit relief after multiple instances of failing to respond to state information requests related to UI benefit claims.

Many states define 'pattern of failure' to equal a certain percentage of claims in a prior year. For example, Kansas defines 'pattern of failure' to be the greater of two instances or 2% of

claims in the prior year, while Kentucky defines 'pattern of failure' to be the greater of six offenses in a calendar year or 2% of claims in the prior year. *See* Kansas (L. 2013, HB 2105); Kentucky (L. 2013, HB 102).

States also vary with respect to whether a response is timely made. For example, Florida provides employers with 20 days to respond to requests for information; while Oklahoma and Virginia provide a 10 day window from the date of mailing of the information request in which to respond. *See* Florida (L. 2013, HB 7707); Virginia (L. 2013, HB 771); Oklahoma (L. 2012, HB 2204).

Adequate responses to state requests are also mandated by the TAAEA. While states are free to determine what is considered an 'adequate' response, in general, states consider a response to be 'adequate' when the response provides sufficient material facts to enable the state to make a correct determination regarding a claim for benefits.

#### **Additional penalties**

Certain states have imposed consequences in addition to those mandated under the TAAEA resulting from a pattern of failure to timely and adequately respond to state information requests. For example, Virginia imposes a \$75 penalty after the third offense of failure to timely and adequately respond to a state's request for information, while Massachusetts imposes a \$25 fine for each failure to respond to a request for information. Monetary penalties can also be imposed as a result of a 'pattern of failure' to respond to state information requests in New Hampshire, among others. *See* Virginia HB 771, *supra*; Mass. Gen. Laws Ch. 151A, § 38(a); N.H. Rev. Stat. § 282-A:166-a.

Both Virginia and Massachusetts provide that penalties can be waived if the employer can demonstrate good cause for failure to respond to the state's information request. However, the standard for good cause in each state is very high. Virginia law provides that 'good cause' for failing to respond to an information request can only be as the result of 'compelling and necessitous circumstances beyond the employer's control.' Discussions with the Massachusetts Department of Labor indicate that good cause exceptions are only granted as a result of significant impairment to the employer's operations.

### ***The takeaway***

While failure to comply with TAAEA mandates may lead to higher employer UI benefit costs, increased

tax rates, and monetary penalties, such consequences are preventable by maintaining unemployment claims management best practices. Even employers that outsource their UCM to a third party should incorporate certain practices to facilitate that they are providing their third party provider with complete data to timely and adequately respond to state information requests.

First, key personnel should understand each state's requirements to facilitate that adequate documentation is incorporated and timely sent to states. These personnel are not limited to the HR department, but may include personnel from the finance, payroll, and legal departments. Second, companies should review internal policies and documentation procedures to

determine whether such policies allow for adequate information to be disclosed to states. Such information may include documentation related to the separated employee's acknowledgement of company policies as well as documented instances in which such policies were violated. Employers should also set up an internal tracking mechanism in order to identify potential flaws and improve their UCM process.

When selecting a third party UCM provider, employers should select a provider with whom they maintain a good relationship. Strong communication with a third party UCM provider is necessary in order to facilitate that the third party provider is able to comply with state UI Integrity requirements.

### ***Let's talk***

If you have any questions or would like to discuss PwC's UCM service offerings, please contact one of the following individuals.

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