

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT


U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210



September 24, 2021

MEMORANDUM FOR: CAROLYN R. HANTZ
Assistant Inspector General for Audit

FROM: LENITA JACOBS-SIMMONS 
Acting Assistant Secretary

SUBJECT: Response to the Office of Inspector General Draft Report No.
04-21-001-03-315 – *Unemployment Insurance Overpayments
Related to Work Search Underscore the Need for More Consistent
State Requirements*

Thank you for the opportunity to respond to the above-referenced Office of Inspector General (OIG) draft report. The draft report provides the OIG's conclusions and recommendations with regard to the Employment and Training Administration's (ETA) actions on reporting certain overpayments of Unemployment Insurance (UI) benefits related to work search errors.

While ETA acknowledges that there is always an opportunity to improve its coordination and oversight of states in the context of reducing work search errors, ETA disagrees with the OIG's characterization of ETA's reporting of the UI improper payment (IP) rate as being understated in recent years. Also, ETA believes there is value in providing the readers of this draft report with a greater understanding and context on work search errors. Because work search errors generally cannot be prevented before the UI payment must be made to the claimant in accordance with Federal law, it is not possible for states to proactively reduce this largest root cause of UI IPs. Federal law requires states to make payments "when due," and prevents states from stopping payment of continued weekly UI benefit claims until certain due process requirements are completed, including issuing a notice and providing an opportunity for response. These requirements are important underpinnings of the UI program. In the interest of clarity, there are several audit conclusions and/or findings ETA would like to correct and provide clarification for readers of this report.

ETA provides the following comments regarding the contents of the OIG's draft report:

ETA contends its UI IP estimates have been correctly reported and ETA has been transparent in acknowledging the factors that have not been included in the methodology for reporting its UI IP estimate.

In the draft report, the OIG states that ETA did not include certain overpayments in its estimation of IPs for the UI program, and that the reported UI IP rates are incorrect and were significantly understated for Fiscal Years (FY) 2017 through 2020. ETA disagrees that the IP reporting for

these years were significantly understated. The draft report also asserts, in a number of places that ETA is not in compliance with Office of Management and Budget (OMB) requirements regarding work search. However, ETA reported its overpayment estimates pursuant to the methodology approved by OMB and was transparent by providing calculation information to indicate items that the reported UI IP rate did not include, notably cases where an individual did not conduct the required work search activities and was provided a warning by the state agency.

ETA has not included work search errors that involve the use of warnings in the estimated IP rates because these types of errors have been historically excluded as technically proper payments under the approved OMB methodology. In addition, ETA has not yet provided guidance to states that the use of warnings is prohibited and many states will be required to revise their state laws/policies accordingly. As noted on page 18 of the draft report, ETA has worked with OMB and developed proposed guidance to states on the topic of prohibiting the use of warnings related to work search errors; however, this guidance has yet to be issued. ETA continued to follow up with OMB on this issue, but due to competing priorities, most recently due to the COVID-19 pandemic and subsequent implementation of pandemic-related UI programs, these efforts were placed on hold. ETA intends to resume its efforts to work with OMB to issue this guidance.

Examples of other inaccuracies in the draft report include:

- In the introductory overview (titled “Briefly”) on page 2 and again on page 3, the draft report states that “DOL footnotes in the 2018 and 2019 [Benefit Accuracy Measurement (BAM)] results acknowledged the understatements....” This is not an accurate statement. ETA did not acknowledge the results as being understated, and does not believe that the results are understated. The rates were calculated and reported pursuant to the methodology approved by OMB.
- On page 11 of the draft report, it states that ETA incorrectly excluded certain overpayments from the IP estimate. ETA disagrees with the characterization of this as being “incorrect.” ETA agrees that the reported overpayment estimate did not include these specific type of work search issues in the calculation; however, it does not agree that the IP estimate has been incorrectly reported. The IP estimate is based on the estimation methodology approved by OMB that allowed certain types of work search issues (including those with warnings) to be excluded from the IP estimate.

To help ensure transparency, ETA reports these types of issues in the following places:

- https://oui.doleta.gov/unemploy/bam/2020/BAM_Methodology_IPIA_2020.pdf;
- https://wdr.doleta.gov/directives/attach/ETHandbook_395_Ch5_acc.pdf;
- In the U.S. Department of Labor’s (Department) Agency Financial Report (AFR) – <https://www.dol.gov/sites/dolgov/files/OPA/reports/2020annualreport.pdf>.
- ETA disagrees with OIG’s statement on page 17 that the OMB email approving the UI IP estimation methodology supports the OIG’s finding that ETA is not properly reporting work search errors. ETA’s initial request to OMB asked whether work search could be

removed from the IP calculation. OMB denied that request, but allowed technically proper payments to be excluded from the IP rate estimation—and work search errors involving the use of warnings have always been considered technically proper payments because they were properly made under state law. Since 2014, formal warnings have been openly reported and discussed in the Department's AFR, which OMB reviews. ETA has been consistent in its reporting of IPs since 2014, and OMB has not raised concerns with how the Department has reported work search IPs. Moreover, the OIG's annual Improper Payments Elimination and Recovery Act (IPERA) Compliance Reviews since 2014 reflect that the OIG has not found this reporting to be at issue.¹ This draft report is the first instance of such concern.

- On page 18, the draft report states that “ETA could not provide any record of a response from OMB or any further correspondence to or from OMB since [September 6, 2017].” The OIG auditors did not make any such request of ETA. The OIG auditors had requested evidence that ETA's draft guidance had been submitted to OMB for review. ETA had ongoing communications with OMB on this topic at least up to June of 2019 and prior to the start of the COVID-19 pandemic.
- ETA also notes that the draft report makes very liberal use of rounding of key numbers that serves to inaccurately inflate the statistics used in the draft report. For example, see footnote 7 in the draft report.

ETA encourages states to integrate flexibility into their work search policies and supports state efforts to allow valid work search strategies that are in line with current labor market standards.

In Training and Employment Notice (TEN) No. 17-19,² issued in February 2020, ETA encouraged states to have a fully integrated workforce system that focuses its collective efforts on assisting claimants in getting back to work as quickly as possible and to expand their acceptable work search activities beyond employer contacts to modernize work search policies with practices used to search for work in today's labor market. ETA provided examples of appropriate work search activities that states may implement, including various online search activities, which are effective in assisting individuals to find jobs. The issue of what constitutes an acceptable work search activity is, ultimately, a matter of state laws and policies.

Further, ETA asserts that there are valid work search situations when a state may find a contact to be “unverifiable.” Unverifiable work searches involve scenarios where activities cannot be

¹ The OIG's past reports on reviews of ETA compliance with IPERA and improper rate reporting can be found at: <https://www.oig.dol.gov/public/reports/oa/2014/03-14-004-13-001.pdf>
<https://www.oig.dol.gov/public/reports/oa/2015/03-15-001-13-001.pdf>
<https://www.oig.dol.gov/public/reports/oa/2016/03-16-002-13-001.pdf>
<https://www.oig.dol.gov/public/reports/oa/2017/03-17-002-13-001.pdf>
<https://www.oig.dol.gov/public/reports/oa/2018/03-18-002-13-001.pdf>
<https://www.oig.dol.gov/public/reports/oa/2019/22-19-007-13-001.pdf>
<https://www.oig.dol.gov/public/reports/oa/2020/22-20-008-13-001.pdf>
² https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4227

independently verified, such as networking, applying for a job through online platforms, e.g., Craigslist, updating a LinkedIn profile, as well as where an employer is unable to provide a definitive answer on a claimant's work search attempt.³ As states continue to modernize their work search policies, a growing number of work search activities will not allow verification (i.e., unverifiable activities) but would be considered suitable if permitted under a state's work search law or policy. While an individual may not be able to provide a verifiable record of how they completed a networking activity, proper reporting of the activity upon request (i.e., via phone to the BAM investigator, on a work search log, during the weekly certification, etc.) and the BAM investigator's record of the activity, may meet the work search requirement under that specific state policy.

Further, on pages 15 and 16 of the draft report, the OIG raises concerns about the practice of BAM investigators seeking verification of work search activities by phone. ETA has always provided that BAM investigators may conduct interviews via email, phone, and mail (depending on state policies). For verification purposes, a verbal testimony is no different than an individual mailing in their work search activities on a log, with all pertinent information captured over the phone. States are encouraged to conduct BAM interviews by telephone to expedite the process and provide interviewees the opportunity for clarification to ensure that the responses are properly understood. However, ETA has also provided that the BAM investigator has the responsibility to attempt to verify all work search contacts/activities as part of their investigation. If the BAM investigator was not attempting to verify the verbally provided work search information, then there would be a legitimate concern, but that is not the situation described in the draft report.

Further, the OIG does not state the basis for their conclusion that the level of unverifiable work search activities is not acceptable (page 16) – it appears to be more speculation. However, on pages 15 – 16 of the draft report, the OIG reiterates all of the reasons why a work search activity could be considered unverifiable; therefore, in states where these conditions exist, unverifiable rates could be higher. In that paragraph, the OIG acknowledges that verifying certain acceptable types of work search activities may not be possible.

A common situation where work search activities are investigated and deemed unverifiable but acceptable occurs when the claimant provides information that they conducted a work search with a specific employer, but the employer does not have a record of applicants and cannot confirm or deny the individual's activities. Another similar situation occurs when an individual applies for a job online, and the employer uses a service that keeps their identity anonymous or confidential, making verification with employers impossible. In both these situations, the BAM investigator can conclude that the work search contact is unverifiable.

If ETA were to restrict states to only recognize work search activities for which documentation may be created by a source other than the claimant, states' abilities to align their work search policies with current labor market work search trends would be significantly impeded. This would result in maintaining outdated work search policies that do not align with effective

³ On page 5, the draft report raises concerns about one state's allowance of online work search activities. However, the fact is that individuals regularly search for jobs using online resources and ETA considers online job searches an effective strategy for individuals to find jobs in the current labor market.

methods used by job seekers to successfully secure employment and would undermine the purpose of the work search requirement itself.

Finally, Table 1, on page 5, refers to certain waivers as common state strategies or policies used to reduce work search overpayments. However, certain identified activities are explicitly required under Federal law (e.g., training under Sec 3304(a)(8), Federal Unemployment Tax Act [FUTA], and short-time compensation under Sec 3306(v)(5), FUTA).

ETA engaged the UI Integrity Center in providing intense targeted technical assistance to address the top root causes of IPs, resulting in nine of the 11 states receiving such targeted technical assistance experiencing substantial reductions in their IP rate and the national UI IP rate decreasing from 10.67 percent to 9.55 percent.

The draft report states that strategies employed by ETA and the states did not consistently reduce UI overpayments related to work search.

ETA disagrees with this statement and requests that the OIG acknowledge the significant steps taken by ETA and the states to reduce work search errors and the resultant positive effects of that effort in the final report. In FY 2019, ETA, in partnership with the UI Integrity Center, made reducing the national IP rate a top priority. As part of this effort, 11 states with high IP rates were provided intense targeted technical assistance (i.e., state intensive services) to address the top root causes of their IPs. As part of the offered state intensive services, states developed an IP Reduction Plan and executed strategies to reduce their IPs. From the period of July 1, 2018, through June 30, 2019, the national UI IP rate was 10.67 percent. For the most recent data prior to the onset of the COVID-19 pandemic (April 1, 2019 through March 31, 2020), the national UI IP rate decreased to 9.55 percent. The decrease in work search errors contributed to this reduction in the IP rate and correlated with the delivered state intensive services and the other steps taken with high rate states to reduce their IP rates. Of the 11 states receiving state intensive services, nine of the states substantially reduced their IP rates during the time periods referenced above.

Summary of Comments

In closing, while ETA acknowledges that it has not issued the planned guidance to states addressing the use of warnings in reporting work search errors, ETA is concerned that the draft report is neither a full nor accurate representation of ETA's efforts, that it misinterprets the approved IP methodology for calculating IP estimates, and that said draft report arrives at a conclusion ETA disagrees with, which is that UI IP rates have been understated. Moreover, the draft report does not address the recent success of the state intensive services strategy, which did not rely on the use of warnings and demonstrated quantifiable improvements in reducing IP rates in nine states.

Response to the OIG Recommendations

Please find below the OIG recommendations contained in the draft report, followed by ETA's response to each of the OIG's recommendations.

Recommendation 1: Develop and implement cause-level reduction targets to gauge and monitor the effectiveness of strategies implemented by states to reduce work search overpayments.

ETA Response: ETA has already implemented appropriate actions to address this recommendation. As part of the annual State Quality Service Plan (SQSP) submission, states are required to provide a state-specific Integrity Action Plan (IAP) that lists their top root causes of IPs, specific strategies to address those top root causes, and appropriate targets and milestones for these specific strategies. ETA will continue to provide technical guidance to states and to monitor the effectiveness of the strategies implemented by states to reduce IPs, including work search-related overpayments. Additionally, ETA notes that the FY 2022 SQSP guidance (UI Program Letter No. 24-21⁴) specifically requires states to include strategies in their IAP that are designed to facilitate claimants' compliance with state work search requirements while also supporting their reemployment and encourages the adoption of the work search requirements in the Model UI State Work Search Legislation (see TEN No. 17-19⁵).

While ETA will examine the implementation of cause-level reduction targets at the federal level, ETA does not believe this will be practical since the UI program is administered by 53 states under different state laws; therefore, root causes of IPs will vary from state to state. Additionally, there are many factors that may impact the IP rate at the cause-level, and changes of cause-level rates may not reflect the effectiveness of one particular strategy at the state or federal levels.

Recommendation 2: Examine the effectiveness of BAM's contact verification process to ensure it reflects the current methods claimants use to seek work.

ETA Response: ETA agrees with this recommendation and will continue to explore opportunities to examine and improve the employer contact verification process used by state BAM investigators to ensure the process supports current labor market practices.

Recommendation 3: Inform states that formal and informal warnings are not permissible.

ETA Response: ETA agrees with this recommendation and will continue to work on getting appropriate guidance to states published on this topic

Recommendation 4: Include in the UI improper payment estimate: (1) overpayments related to work search formal and informal warnings; and (2) payments to claimants who provide no or insufficient documentation to support eligibility with respect to work search, consistent with the Middle Class Tax Relief and Job Creation Act and OMB guidance that defines improper payments.

ETA Response: ETA concurs with this recommendation. Regarding work search errors involving the use of warnings for issues such as payments to claimants who provide no or insufficient documentation to support eligibility under state law and policy, ETA will begin

⁴https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=5733

⁵https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=4227

including these payments in its reported overpayment estimations after states have been provided guidance that the use of such warnings is not permissible and have had the necessary time to change their relevant state laws, policies, and procedures. Following the issuance of this work search-related guidance, ETA will also need to provide guidance to states regarding the changes to the IP estimation methodology and requirements for reporting the IP estimate for future years. In addition, ETA is committed to continuing its work with states and OMB to ensure its IP estimation methodology and reporting is transparent and meets OMB's requirements.