| EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210 | CLASSIFICATION Unemployment Insurance |
|---|---|
| | CORRESPONDENCE SYMBOL OUI/DL |
| | DATE May 31, 2024 |

**ADVISORY:** **UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 34-09, Change 1**

**TO:** STATE WORKFORCE AGENCIES

**FROM:** JOSÉ JAVIER RODRÍGUEZ
Assistant Secretary

**SUBJECT:** Regulatory Obligations and Associated Promising Practices for Payment of Unemployment Compensation (UC) by State-administered Debit Cards (including the Department of Labor's Interpretation when Money Leaves a State's Unemployment Fund when Paying UC through these Cards).

1. **Purpose.** To remind states of regulatory obligations and associated promising practices for payment of unemployment compensation and to provide questions and answers on state-administered debit cards.

2. **Action requested.** The Department of Labor's (Department) Employment and Training Administration (ETA) requests that State Workforce Agency (SWA) Administrators provide information contained in this Unemployment Insurance Program Letter (UIPL) to appropriate program staff and other staff as they implement and manage payment of UC using state-administered debit cards.

3. **Summary and background.**

   **a.** Summary – On August 21, 2009, the Department published UIPL No. 34-09, *Best Practices for Payment of Unemployment Compensation (UC) by Debit Cards*. This 2009 guidance remains the position of the Department on state obligations when paying UC benefits by state-administered debit card. This advisory reminds states of those obligations, updates certain promising practices for payment of unemployment benefits by debit card and provides the Department's position on when funds leave a state's unemployment trust fund in the context of a state paying UC through a state-administered debit card.

   **b.** Background – States have many options to pay UC benefits, including direct deposit to an account of the UC recipient's choice, state-administered debit cards, and in some states, paper checks. As explained in UIPL No. 34-09, the Department recommends payment of benefits by direct deposit rather than state-administered debit cards for individuals with bank accounts. Paper checks and debit cards are generally the two options available to individuals who do not have a bank account. The majority of states

| RESCISSIONS | EXPIRATION DATE |
|---|---|
| None | Continuing |

currently offer state-administered debit cards as a UC benefit payment option. In comparison to paper checks, debit cards offer certain benefits to the state and UC recipients, such as quicker access to benefits, greater flexibility to make purchases both in-store and online, and the ability to obtain cash at automatic teller machines (ATMs) and at retailers offering cash back at the point of sale (POS). State-administered debit cards can also be automatically reloaded as UC benefits are paid to UC recipients. Debit cards may offer SWAs a less expensive and more efficient way to pay benefits as compared to paper checks, for example by eliminating printing and mailing costs.

States are reminded that they cannot mandate the use of debit cards, or the use of any specific financial institution, under the Compulsory Use Prohibition of the Electronic Fund Transfer Act (EFTA) of 1978 and its implementing regulation (known as Regulation E). Furthermore, neither states nor their debit card issuers are legally permitted to charge recipients excessive fees for use of a state-administered debit card.

**4. <u>Guidance, Promising Practices and Questions and Answers</u>.**

**a. Access to benefits at no cost.**

As explained in UIPL No. 34-09, the Department interprets Federal law to require that all UC recipients have reasonable access to the entire amount of each UC payment without cost. At a minimum, reasonable access means at least one opportunity for the recipient to withdraw the entirety of each UC payment at no cost. Applied to state-administered debit cards, the state must allow the recipient at least one opportunity to cash-out each UC payment, whether by ATM, an over-the-counter teller transaction, or cash back at a POS purchase, without incurring any fee.

States should review 12 C.F.R. Part 1005 (Regulation E) issued by the Consumer Financial Protection Bureau (CFPB). The regulation establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer (EFT), which includes debit card transactions. Regulation E provides disclosure requirements and procedures for error resolution. The CFPB enforces Regulation E with respect to matters such as the compulsory use prohibition, limited liability for consumers, and investigation timelines for financial institutions in cases of account errors including unauthorized transactions.

States are reminded that debit card issuers must submit prepaid account agreements—a category that includes state-administered debit cards—to the CFPB's public database whenever a new agreement is offered, a previously submitted agreement is amended, or a previously submitted agreement is no longer offered.

Section 303(a)(1), Social Security Act (SSA), requires that states have "methods of administration . . . reasonably calculated to insure full payment of unemployment compensation when due." The "withdrawal standard" of 3304(a)(4), Federal Unemployment Tax Act (FUTA), requires, in pertinent part, that all money withdrawn from a state's unemployment fund "be used solely in the payment of unemployment compensation, exclusive of expenses of administration." *See also* Section 303(a)(5), SSA. Section 3306(h), FUTA, defines "compensation" as "cash benefits payable to individuals with respect to their unemployment."

**b. States may not mandate use of debit cards.**

Again, the Department recommends payment of benefits by direct deposit rather than state-administered debit cards for individuals with bank accounts. Signing up for direct deposit should not be more burdensome than electing other payment options. States should avoid efforts to dissuade use of direct deposit or to encourage use of a state-administered debit card, for example, by making the debit card the default option unless the UC recipient opts out, imposing undue delays in paying out benefits through direct deposit, or requiring additional burdens for direct deposit enrollment (such as requiring a paper form for an otherwise electronic application). Such efforts could indicate UC recipients were not provided with a meaningful choice. Additionally, UC recipients should be able to change their chosen payment option at any time.

States may offer debit cards to UC recipients as a form of payment, but may not mandate the use of these cards, or the use of any specific financial institution, under the Compulsory Use Prohibition of EFTA of 1978 and its implementing regulation, Regulation E.

Workforce agencies that offer debit cards for UC recipients must give consumers a choice between the government-administered debit card and at least one alternative way to receive payments. This alternative is typically direct deposit into an account specified by the consumer (e.g., a checking or savings account or a personally-owned prepaid card), or in some cases a paper check.

Payment options available to UC recipients must be clearly presented to UC recipients prior to the first UC payment. States violate the compulsory use prohibition of EFTA when consumers are not provided a choice and are required to receive payment of government benefits on a state-administered debit card. Violations include requiring consumers to receive their first payment or an initial set of payments on the debit card, requiring the use of a debit card from which the consumer then has the option of re-directing payments to another account, and failing to provide the statement regarding consumers' payment options required by Regulation E.

States that offer state-administered debit cards as a payment option may automatically mail debit cards to UC recipients as a backup payment method (e.g., where a direct deposit into a consumer's bank account fails due to an incorrect routing number), even if the recipient does not select a debit card as their payment option. The Department neither recommends nor requires this practice. States that send debit cards as a backup payment option must ensure that consumers have received proper disclosures about the card and have elected to use the card prior to paying out any benefits on these backup cards. States may not pay individuals who select direct deposit by automatically making payments onto a debit card and requiring the UC recipient to transfer funds off the debit card to their own bank account.

**c. Promising practices.**

The Department recommends that states maintain the following promising practices related to payment of UC benefits:

i. For UC recipients with bank accounts, states should encourage them to select direct deposit rather than a state-administered debit card as their method of benefit payment, as they will already be aware of the terms, fees, benefits, and limitations of their own bank, including locations of participating branches and ATMs. For UC recipients without bank accounts, states may elect to provide information to UC recipients about local options to open an affordable deposit account at a bank or credit union of their choice in order to enroll in direct deposit for receipt of future benefits into that account.

ii. Some states' debit card issuers currently engage in the practice of revenue sharing, which is when a portion of the provider's revenues from the cards used to deliver UC payments are passed on to the state. SWAs should not enter into debit card arrangements that include a revenue-sharing component for the state. Revenue sharing distorts competition by introducing conflicting financial incentives for states when selecting a debit card provider. States should choose a debit card provider for UC payments based on providing the lowest costs and the highest service quality for UC recipients. States should not seek to obtain revenue from these cards or enter into agreements with any providers that include this form of conflicted compensation.

iii. In making benefits available to UC recipients by debit card, states should communicate the terms and conditions of their use as clearly as possible. As all recipients must have reasonable access to the entire amount of each UC payment without incurring personal cost:

   1. States should negotiate with their debit card providers to allow for as many free in-network ATM withdrawals as possible (in addition to providing for at least one free transaction per UC payment).
   2. States should negotiate with their debit card providers to allow unlimited free POS transactions.
   3. States should negotiate with their debit card providers to expand free access to out-of-network ATM transactions where available, especially if in-network ATM coverage may be limited in certain parts of the state. Many state-administered debit cards already offer some free ATM withdrawals out of network, although the ATM operator may charge its own fees.
   4. States should negotiate with their debit card providers to eliminate overdraft fees and reduce or eliminate denial fees.
   5. For UC recipients who have difficulty resolving debit card issues online, states should provide unlimited free telephone customer assistance.

6. States should negotiate with their debit card providers to eliminate fees for balance inquiries at ATMs, including at out-of-network ATMs where possible, while recognizing the ATM operator may charge its own fees. UC recipients should be able to monitor balances frequently in order to track receipt of their benefits, plan for their finances, and identify potential fraud on their accounts.
7. States should negotiate with their debit card providers to eliminate fees for one-time bill payments or for other transfers to an external account. These fees for basic transactional services are not frequently charged on other types of accounts.

**d. Questions and Answers.**

1. **Question**: When do funds leave a state's unemployment fund when paying UC through a state-administered debit card?

   **Answer**: A UC recipient's mere receipt of a debit card, like the receipt of a paper check, does not necessarily transfer unemployment funds to the recipient. Just as a recipient must cash, deposit, or transfer the check to another person to obtain the funds represented by the check, a recipient must activate the debit card to obtain funds from the card. The Department interprets Section 303(a)(5), SSA and 3304(a)(4), FUTA, to mean that money leaves a state's unemployment fund upon 1) the transfer of funds to the UC recipient's debit card account for the first initial payment of benefits *and* 2) activation of the debit card. Thus, for purposes of the withdrawal standard[1], an amount is not considered paid to the UC recipient until the later of when the UC recipient activates their card and when the state transfers funds to the UC recipient's account for the first initial payment. For continuing payments, an amount is not considered paid to the UC recipient until the state transfers funds to the UC recipient's account for the continuing payment, assuming that the debit card is not deactivated. If a state transfers funds to a debit card, but a recipient does not activate the debit card within a reasonable period of time, those funds must be returned to the UI trust fund. The Department interprets "reasonable time" as one year after the state's most recent transfer of funds from the state's benefit payment account to the UC recipient.

2. **Question**: Is a state permitted to enter into a contract with a vendor under which the vendor bank would be permitted to charge inactivity fees on debit card accounts that have not been activated by the UC recipient?

   **Answer**: No. If the UC recipient has not activated the debit card, such funds remain in the UC fund. Therefore, a contract with a vendor authorizing the charging of an inactivity fee on a debit card that has not been activated would violate the withdrawal standard.

[1] This guidance is specific to the Department's interpretation of when a withdrawal occurs when paying UC through a state-administered debit card for purposes of the withdrawal standard found in Section 3304(a)(4), FUTA and Section 303(a)(5), SSA. States should continue to follow the guidance contained in Handbook 401 for all other purposes, including the date a payment is considered to have been made for purposes of first payment timelapse.

3. **Question**: Is it permissible for a state to remove funds from a debit card that has been activated but a balance remains on the card?

   **Answer**: Once a debit card is activated, the funds on the debit card become the property of the UC recipient, even if the recipient fails to withdraw all of the funds on the card. Whether the state is permitted to remove benefits from an activated debit card and the conditions under which such seizures are permitted (e.g., fraud vs. non-fraud), are matters deferred to state law. Generally, federal UC law does not speak to when benefits may be removed from a debit card, which means state law applies. Depending on the state, this could include a state's UI law or other provisions in a state's law.

   Although federal UC law generally does not determine whether a state may seize UC benefits that have become the property of the recipient, when a state seizes or otherwise recovers an overpayment, those funds must be returned to the fund from which they were withdrawn. Amounts originating from the state's UI trust fund must then be returned to the trust fund and amounts originating from other sources, such as the federal accounts for temporary emergency programs, must be returned to the originating account.

4. **Question**: Is a determination required before the state can remove funds from a debit card that has been activated but a balance remains on the card?

   **Answer**: Yes. See, UIPL Nos. 19-21, 01-16, and 16-21. A state cannot attempt to remove funds from a debit card until a determination establishing an overpayment has been made. The "when due" standard requires that when a state identifies a potential overpayment, it must "provide the individual an opportunity to be heard," "timely notice of [an] interview [date]," and an opportunity to present evidence" before making an "official" overpayment determination. See, Section 4.a., 4.b., and 4.d. of UIPL No. 01-16. Once a determination is made, as explained in UIPL No. 01-16, Change 1, the state is not required to wait until the notice of determination of overpayment has been received by the UC recipient, or wait until the determination is final, before initiating recovery efforts. Unless prohibited by state law, the state may take action(s) to recover the overpayment once the determination has been issued to the UC recipient. States are permitted, but not required, to wait until the determination is final (*i.e.*, all appeals have been exhausted or time to file an appeal has run out) before initiating recovery.

5. **Question**: Can the state stop payment to the UC recipient if the financial institution returns funds on a debit card due to suspicious activity?

   **Answer**: A financial institution's decision to return UI benefit payments to the state is not sufficient, on its own, to determine that benefits have been overpaid or that fraudulent activity occurred. If the state has not already done so, it must verify the recipient's identity and take any other appropriate steps to determine whether an overpayment or fraudulent activity occurred. If the financial institution does not provide any details on why the payments were returned and the state has no other information to indicate that suspicious activity occurred, the state may not stop payments to the recipient while conducting the ID verification process. The state must have a process to reissue any benefits as soon as administratively feasible and through an alternative method (e.g., new direct deposit account, debit card, paper check) when there is not sufficient information to withhold payments. This process must include contacting the recipient to update the payment method. (See UIPL No. 02-16, Section 4A).

5. **Inquiries.** Questions should be directed to the appropriate ETA Regional Office.

6. **References.**

- Social Security Act Sections 303(a)(1) and (5) (42 U.S.C. §503(a)(1) and (5));
- Federal Unemployment Tax Act Sections 3304(a)(4) and 3306(h) (26 U.S.C. §3304(a)(4) and 3306(h));
- Electronic Fund Transfer Act Sections 1693c and 1693k (15 U.S.C. §1693c and 1693k);
- Consumer Financial Protection Bureau, *CFPB Bulletin 2022-02: Compliance Bulletin on the Electronic Fund Transfer Act's Compulsory Use Prohibition and Government Benefit Accounts* (February 15, 2022), https://www.consumerfinance.gov/compliance/supervisory-guidance/cfpb-bulletin-2022-02-compliance-bulletin-electronic-fund-transfer-acts-compulsory-use-prohibition-and-government-benefit-accounts/;
- Consumer Financial Protection Bureau, *Public Benefits Delivery & Consumer Protection* (March 1, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-public-benefits-delivery-consumer-protection/full-report/;
- Consumer Financial Protection Bureau, *12 CFR Part 1005 - Electronic Fund Transfers (Regulation E)* (Most recently amended April 19, 2023), https://www.consumerfinance.gov/rules-policy/regulations/1005/;
- UIPL No. 34-09, *Best Practices for Payment of Unemployment Compensation (UC) by Debit Cards*, issued August 21, 2009, https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-34-09;
- UIPL No. 01-16, *Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures*, issued October 1, 2015, https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-01-16;
- UIPL No. 01-16, Change 1, *Federal Requirements to Protect Claimant Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures - Questions and Answers*, issued January 13, 2017, https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-01-16-change-1;

- UIPL No. 16-21, *Identity Verification for Unemployment Insurance (UI) Claims*, issued April 13, 2021, https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-16-21;
- UIPL No. 19-21, *Benefits Held by Banks and Financial Institutions as a Result of Suspicious and/or Potentially Fraudulent Activity and the Proportional Distribution Methodology Required for Recovering/Returning Federally Funded Unemployment Compensation (UC) Program Funds*, issued May 4, 2021, https://www.dol.gov/agencies/eta/advisories/unemployment-insurance-program-letter-no-19-21;
- TEN No. 09-18, *Regulation E Requirements for Prepaid Accounts (or Debit Cards)*, issued November 19, 2018, https://www.dol.gov/agencies/eta/advisories/training-and-employment-notice-no-09-18; and
- ET Handbook No. 401, Fifth Edition, *Unemployment Insurance Reports Handbook*, issued August 16, 2017, https://www.dol.gov/agencies/eta/advisories/handbooks/et-handbook-no-401-5th-edition.

**7. Attachment(s).** None.