

U.S. DEPARTMENT OF LABOR Employment and Training Administration Washington, D.C. 20213	CLASSIFICATION
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DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 10-87
 TO : ALL STATE EMPLOYMENT SECURITY AGENCIES
 FROM : DONALD J. KULICK 
 Administrator
 for Regional Management

SUBJECT : Prosecution of Fraudulent Claims in the
 Unemployment Insurance (UI) Program

1. Purpose. To provide State Employment Security Agencies (SESAs) with interpretive guidance and to furnish procedural instructions on the above subject.

2. References. 18 U.S.C. §641; 18 U.S.C. §1341; 18 U.S.C. 3663(e)(2)(B); and Memorandum of Understanding (MOU) between the Department of Labor's Office of the Inspector General (OIG) and the Employment and Training Administration (ETA) regarding Unemployment Compensation criminal investigations transmitted in UIS Information Bulletin No. 14-85 (copy attached).

3. Background. Over the past several months, some Regional Offices, as well as SESAs, have brought to our attention certain actions taken by the Department of Justice (DOJ) relating to the prosecution of UI fraud cases in Federal courts. Specifically, the issues are:

a. May the DOJ, during plea bargaining with a claimant, reduce the amount of the initial UI benefit overpayment?

b. May the DOJ prosecute fraudulent State UI overpayments under 18 U.S.C. §641, Theft of Government Property?

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c. Does the OIG have the authority pursuant to the MOU to require SESAs to refer fraudulent State UI claims for investigation and prosecution in Federal courts?

Following is a brief discussion of the facts surrounding each issue, our guidance on the issue, and procedural instructions for SESA use:

4. Plea Bargaining

a. Summary of Issue. This issue involved fraudulent UI claims both under the State UI program and Federal programs; i.e., Unemployment Compensation for Former Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX). The initial determination issued by the SESAs in these fraud cases generally pertained to claimants who had been employed while claiming UI benefits for several weeks. Under State UI law, each week was treated as a separate count of fraud. Either because they were Federal program cases that met the prosecution referral criteria or were State UI cases that were prosecuted under a Federal statute such as 18 U.S.C. §1341, for mail fraud, these cases were referred by the SESAs to the OIG for further investigation and prosecution by U.S. Attorneys (DOJ) in Federal courts.

In these cases, the U.S. Attorneys entered into plea bargaining with the claimants involved and accepted a guilty plea to only one count of the alleged multiple violations. As a result of such action, the courts ordered full restitution by the claimant for only the one week in some instances, while in other instances no restitution was ordered. Upon receipt of such court decisions, SESAs only sought repayment for the amount covered in the restitution order. For example, an original overpayment of \$1,500.00 covering 10 weeks of benefits and 10 counts of violations would be reduced to a court-ordered restitution amount of \$150.00 for one count. Upon receipt of this amount of repayment, the SESAs considered the case closed and made no further efforts to recover the balance of overpayment amounting to \$1,350.00.

b. ETA Guidance. The DOJ has complete prosecutorial discretion, subject only to the approval of the court, to determine the number of counts of alleged violations and to reduce the number of counts during plea bargaining. Additionally, DOJ has independent discretionary authority to plea bargain and has no obligation to seek the DOL's approval or input on any decision involving a plea bargain.

However, the fact that the Federal court has not ordered restitution for every violation (or complete restitution for the original amount of the overpayments) in such cases, does not relieve the SESA from the responsibility or obligation to seek full repayment for any and all fraudulent overpayments. Section 3663(e)(2)(B) of 18 U.S.C. provides that any amount repaid to the State under an order of restitution shall be setoff against any amount recovered by the State in any State civil proceeding, to the extent provided by the law of that State. Therefore, the SESA should make all efforts provided by State law to recover any overpayment, even if partial or total restitution is ordered by a court. Federal prosecution is not a substitute for State action to recover overpayments.

c. Procedural Instructions. In cases involving Federal court-ordered restitution of part or all of the original overpayment, SESAs will:

(1) Credit the claimant's overpayment account for the amount of all restitution collected by DOJ or the court and forwarded to the SESA, or paid directly to the SESA or the State.

(2) Pursue routine collection actions, including utilization of any restitution schedule ordered by the court, to recover the balance of the overpayment until further repayment of the overpayment has been completed or has otherwise been disposed of in accordance with State law and procedures, since an order of restitution is not a final disposition of the entire fraudulent overpayment amount.

While this guidance and procedural instruction relate specifically to Federal court actions, the same is also applicable to decisions rendered by State or local courts operating under similar conditions.

5. Prosecution of Fraudulent State UI Claims by the DOJ Under 18 U.S.C. §641, Theft of Government Property

a. Summary of Issue. This issue involved fraudulent UI claims under the State UI program that were requested from a SESA by the OIG for investigation and referral for prosecution by U.S. Attorneys (DOJ) in Federal Courts under 18 U.S.C. §641. This section of the Federal criminal code provides for the prosecution of anyone who steals money, or thing of value, of the United States. The legal justification for such prosecutive action was that since a State UI Trust Fund is commingled with Federal money and because of Federal supervision and control, this would allow for the Federal prosecution of a State UI claim as a theft of government property. In the cases referred, prosecution was obtained in the Federal court under 18 U.S.C. §641.

b. ETA Guidance. The DOJ and U.S. Attorneys have complete discretion in determining what statutory provision has been violated in order to bring Federal prosecution. Any agreements reached with DOJ to change the use of 18 U.S.C. §641 as the appropriate criminal provision upon which a Federal prosecution of a fraudulent State UI payment should rest will be the subject of further guidance in the future.

c. Procedural Instructions. It should be noted that our guidance/procedural instructions pertain only to State UI fraudulent claims and 18 U.S.C. §641. It does not pertain to Federal program fraudulent claims that may be prosecuted in Federal courts under this Federal criminal statute. Additionally, both State UI fraudulent claims as well as Federal program fraudulent claims may continue to be referred to the OIG for investigation and their referral to the DOJ for prosecution in Federal courts under 18 U.S.C. §1341 relating to mail fraud, or other Federal statutes as may be decided by the DOJ.

6. Prosecutive Authority of the United States

a. Summary of Issue. The foregoing issues caused some SESAs to question whether the OIG has the authority to require them to refer State UI fraudulent claims for investigation and prosecution in Federal Courts pursuant to the MOU between OIG and ETA.

b. ETA Guidance. Paragraph 2 of the MOU requires SESA notification to OIG of fictitious employer schemes and theft/embezzlement/fraud by SESA employees. Paragraph 3 requires routine referral to the OIG of fraud cases (that meet the referral criteria) involving UCFE, UCX, TAA, DUA, Redwood Employee Protection Program, and FSC. Paragraph 4 of the MOU provides that OIG will assist SESAs on other types of claimant fraud cases at the request of the SESA. From the cases at issue, it would appear that they would fall under Paragraph 4 of the MOU, which pertains to assistance to SESAs on request of the SESAs - a cooperative effort rather than a directory one, and one which it is the State's option to initiate.

c. Procedural Instructions. Except for fictitious employer schemes, SESAs are not required to refer State UI fraudulent claims to the OIG for investigation. Such action would fall under Paragraph 4 of the MOU and is a result of a cooperative arrangement whereby the SESA, at its option, requests OIG assistance in such matters. Generally, these kinds of fraudulent claims should be prosecuted under applicable provisions of the State UI law.

6. Action Required. SESA Administrators are requested to furnish appropriate staff with a copy of this UIPL for their future guidance on such matters.

7. Inquiries. Direct inquiries to appropriate Regional Office staff.

8. Attachment. Copy of UIS Information Bulletin No. 14-85.