

April 9, 2020

TO: Interested Parties

FROM: Mason M. Bishop 

RE: Analysis of CARES Act Pandemic Unemployment Assistance (PUA)

**Background:** My professional background spans 25 years in workforce development and postsecondary education. During that time, I served as Principal Deputy Assistant Secretary (DAS) for Employment and Training at the U.S. Department of Labor from 2001-2007 during the George W. Bush administration. My responsibilities and portfolio consisted of providing executive-level and policy leadership for many federal employment and training programs, including the Unemployment Insurance (UI) program, the Workforce Investment Act (WIA)<sup>1</sup>, and Trade Adjustment Assistance (TAA), among others. While serving as DAS, I led reform and reauthorization efforts for UI, WIA, and TAA and testified to various congressional committees concerning policy proposals and options for all three programs. Further, I helped lead the Bush administration's response to employment impacts as a result of 9/11 and Hurricane Katrina. This included implementation of federal UI extended benefit programs and overseeing UI policy development and guidance for state implementation.

Prior to my experience at the U.S. Department of Labor, I helped lead workforce reform efforts for Governor Mike Leavitt in the State of Utah, and I worked for the National Association of State Workforce Agencies (NASWA). With each of these experiences, I was exposed to program practices and policy implementation for programs like UI. Therefore, I have the rare experience of engaging broadly and deeply, both at the federal and state levels, in the policy development and program operations of UI. This experience and knowledge is the foundation for the analysis contained in this memorandum.

**Summary:** H.R. 748, The CARES Act, was signed into law by President Trump on March 27, 2020. Section 2100 of the law contains a number of provisions to provide additional unemployment insurance benefits to workers impacted by the COVID-19 pandemic. These include:

Section 2102, the Pandemic Unemployment Assistance (PUA) program, which provides up to 39 weeks of UI to people not otherwise eligible for regular unemployment compensation (including the self-employed);

Section 2104, which provides most individuals an emergency increase in traditional UI benefits of \$600 per week through July 31, 2020; and

Section 2107, which creates the Pandemic Emergency Unemployment Compensation (PEUC) program to provide 13 weeks of emergency UI for people who remain unemployed after they have exhausted their benefits or are not otherwise eligible for benefits.

These federal UI programs and benefits work in concert with the regular UI program. Under Sections 2104 and 2107, an individual eligible for regular UI benefits will receive those benefits from the state's trust fund plus the additional 13 weeks and \$600 per week from federal funding. Under Section 2104, an individual not otherwise eligible for the regular UI program may receive up to 39 weeks of benefits fully-funded by the federal government.

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<sup>1</sup> In 2014 Congress reauthorized WIA, which is now the Workforce Innovation and Opportunity Act (WIOA)

The traditional UI program is a federal-state partnership that maintains dual tax systems. The federal government taxes employers and provides grants to states for program administration, and states tax employers to pay the costs of weekly UI benefits. As part of tax collection efforts, state UI agencies collect quarterly payroll records from employers.

State UI benefit payment systems issue weekly payments to workers who have lost their jobs and are able and available for work with most states paying up to 26 weeks of benefits for laid off workers. These eligibility periods may be longer if the federal government legislates and funds extended unemployment benefits, like it did after 9/11, the 2008 recession, and in the CARES Act.

Importantly, these special, federally-legislated UI programs are different from the regular federal-state arrangement because they are 100 percent federally-funded, including benefits costs; therefore, the U.S. Department of Labor is responsible for administering the program through arrangements with the states. This means that the states act as agents for the federal government in the provision of special federal UI programs, including both CARES Act PUA and PEUC. State trust fund monies are only expended for eligible individuals under the regular UI program, not for PUA or PEUC.

The CARES Act vastly expanded the number of individuals eligible for PUA and PEUC, including those who are self-employed or individual contractors. Under regular federal-state UI programs, self-employed and individual contractors are typically not “covered employees” because they do not pay federal or state unemployment taxes as an employer and do not report quarterly wages to states. However, the federal government does have a program known as Disaster Unemployment Assistance (DUA) that is available to states when a national disaster declaration has been issued, typically due to natural events, but not a pandemic like COVID-19. Under DUA, self-employed and independent contractors, who are not eligible for regular UI benefits, can receive weekly assistance. Under the CARES Act, DUA provides the programmatic framework for administration of PUA.

**Analysis:** The analysis below is not intended to convey legal advice or opinion. It is a policy analysis based on a deep understanding and knowledge of the UI program, how the UI program operates during times of crisis, and the programmatic relationships and roles of the federal government and the states. This analysis relies on the CARES Act statutory language and already-issued U.S. Department of Labor (Department) guidance through Unemployment Insurance Program Letters (UIPL) 14-20 and 16-20. UIPL 16-20 focuses on PUA, so the analysis below uses language from this guidance letter, particularly.

- **Covered Individual.** Under the UI program, “covered individuals” are those people eligible for benefits. Under the Department’s interpretation, for PUA purposes, the definition of covered individuals was clarified to include individuals where the “place of employment” was ambiguous. Specifically, UIPL 16-20 states:

“k) The individual meets any additional criteria established by the Secretary for unemployment assistance under this section.

The Secretary has determined that, in addition to individuals who qualify for benefits under the other criteria described above, an individual who works as an independent contractor with reportable income may also qualify for PUA benefits if he or she is unemployed, partially employed, or unable or unavailable to work because the COVID-19 public health emergency has severely limited his or her ability to continue performing his or her customary work activities, and has thereby forced the individual to suspend such activities. For example, a driver for a ridesharing service who receives an IRS Form 1099 from the ride sharing service may not be eligible for PUA benefits under the other criteria outlined above, because such an

individual does not have a “place of employment,” and thus cannot claim that he or she is unable to work because his or her place of employment has closed. However, under the additional eligibility criterion established by the Secretary here, the driver may still qualify for PUA benefits if he or she has been forced to suspend operations as a direct result of the COVID- 19 public health emergency, such as if an emergency state or municipal order restricting movement makes continued operations unsustainable.” [page I-6]

Within the definition, people who were either full-time or part-time self-employed individuals are eligible for PUA. This means that an individual who was both employed as a W2 worker and received a 1099 for contract work, where only the 1099 income was impacted by COVID-19, is eligible to apply for PUA for the loss of 1099 income.

- **Processing PUA Claims.** Department guidance affirms that “applicable state laws” pertain to PUA claims. These include standard procedures under the regular UI program, such as claims filing, notices, due process, and determinations. However, the Department also affirms that self-employed and independent contractors do not have to file and be denied under the regular UI program in order to apply and receive PUA:

“7.b. Claims for PUA. In processing claims for PUA, states must verify that individuals have no regular UI entitlement. If the individual is not eligible for regular UI because there are insufficient covered wages or the individual has an active UI claim with a definite or indefinite disqualification, then a state does not need to require the individual to file a regular UI initial claim. However, the state must have an established process whereby the individual’s ineligibility for regular UI is documented on the application.” [UIPL 16-20, page I-9] [emphasis added]

Two important provisions work in concert with this language. First, the CARES Act provides for a self-certification for self-employed and independent contractors to: (1) establish that they are able and available for work, (2) state they are unable to work due to a COVID-19 reason, including the Department’s interpretation, and (3) demonstrate insufficient work history, if applicable. This provides flexibility for states to allow self-employed and independent contractors to use a variety of documents and the self-certification process as evidence of PUA eligibility. The Department further clarifies that “...“lacking sufficient work history” means an individual (1) with a recent attachment to the labor force (2) who does not have sufficient wages in covered employment during the last 18 months to establish a claim under regular UI, and (3) who became unemployed or partially unemployed because of one of the COVID-19 related reasons identified under Section 2102.” [UIPL 16-20, page I-3].

Second, the Department affirms that “self-employed individuals” “...means individuals whose primary reliance for income is on the performance of services in the individual’s own business, or on the individual’s own farm. These individuals include independent contractors, gig economy workers, and workers for certain religious entities.” [UIPL 16-20, page I-3]

The Department states in UIPL 16-20, Section 7.c.:

“If the individual’s eligibility for regular UI is questionable (for example, there are wages in the base period, but no claim is filed, or a job separation that has not been adjudicated), then the state must first require the individual to file a regular UI initial claim. If the individual is subsequently disqualified, then the state may consider the individual for PUA eligibility.” [page I-9]

Taken together, states have flexibility to streamline their application processes on a statewide, macro-level to accommodate individuals who are self-employed. These self-employed individuals can use the self-certification process and earnings evidence, such as tax

returns, 1099 statements, and bank deposit statements, to self-certify loss of income and inability to work, allowing people to apply directly for PUA. By developing a streamlined statewide process and policy for all self-employed, states can provide better customer service and establish PUA eligibility more quickly, thus promoting faster access to needed benefits. On an individual claims-process level, states can conduct a quick “check” against their quarterly wage data to ensure that the individual is not eligible for regular UI, but states should rely primarily on the self-certification to steer people into the PUA application and claims process.

- **Weekly Benefit Amount (WBA).** Weekly benefit amounts are based upon each states’ WBA calculation; however, all claimants are guaranteed a weekly minimum amount based on UIPL 03-20, which establishes DUA weekly minimums. \$600 is added to the WBA for the total weekly payment.
- **Claims are back dated.** If an individual is otherwise eligible for PUA, the Department has informed states they should back date to February 2, 2020, the first eligible week under the CARES Act. For example, if an individual was impacted in late February, even though he/she is applying now, his/her claim will go back to the week first eligible due to a decline in work, so eligible claimants may receive substantial lump sum payments when their benefits begin. (This includes the additional \$600 per week.)

**Summary:** CARES Act statutory language and Department guidance provide a clear direction for states to implement their assistance efforts to self-employed and independent contractors through PUA. States should act upon this direction by using the self-certification process to develop clear processes for these individuals to apply for PUA, gain a positive PUA claims determination, and help self-employed individuals to access benefits immediately, including benefits for back dated claims. This is an expeditious way to help people severely impacted by COVID-19.