

Lost Wages Assistance Overpayment Waiver Authority Fact Sheet

Section 262 of the Continued Assistance for Unemployed Workers Act of 2020 provides that states, territories, and the District of Columbia may waive overpayments under the Lost Wages Assistance (LWA) program when the individual is not at fault for the payment, and repayment would be contrary to equity and good conscience. Such waivers only apply to LWA and apply to both the requirement for repayment by individuals (to the states, territories and the District of Columbia) and states, territories and District of Columbia (to FEMA). This information is for guidance purposes only to aid states in developing criteria to assess individual “fault” and “equity and good conscience,” and is meant to complement established waiver processes where they exist.

The exact language of Section 262 is included at the end of this fact sheet.

Waiver Authority Guidance

Federal law, including the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) and FEMA regulations, requires that FEMA recover disaster assistance funds when funding is provided in error. Pursuant to the Continued Assistance for Unemployed Workers Act of 2020, states, territories and the District of Columbia have been granted authority to waive recoupment of overpayments made to individuals under the LWA program that would otherwise be owed to FEMA. In order to receive a waiver by the applicable state, territory or the District of Columbia, the overpayment must be without fault on the part of the individual, and repayment would be contrary to equity and good conscience. When implementing this waiver authority, states, territories and the District of Columbia are reminded that LWA is not an unemployment benefit program.

Individual Fault

Individual fault exists if the individual knew or suspected there was an error but did not try to correct it. Factors may include:

- a. **Misrepresentation.** Whether the individual made a representation in connection with the claim for LWA that resulted in or contributed to the overpayment, and whether the individual knew or should have known that the representation was inaccurate (i.e., Did the payment(s) come from a misrepresentation or incorrect statement made by the individual?).



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- b. **Failure to Disclose**. Whether the individual failed, or caused another person to fail, to disclose a fact in connection with the individual that resulted in or contributed to the overpayment, and whether the individual knew or should have known that the fact was significant (i.e., Did the individual fail to disclose important information in their application?).
- c. **Knowledge of Error**. Whether the individual accepted the funds and knew, or should have known, that he or she was not entitled to the payment or that the payment amount was incorrect (i.e., Did the individual know or suspect that they should not have received the payment(s)?).
- d. **Other Fault**. Whether, for any other reason, the overpayment resulted directly or indirectly, and partially or totally, from any act or omission of the individual which was erroneous or inaccurate or otherwise wrong (i.e., Did the overpayment(s) result from any other improper act, or failure to act, on the individual's part?).

Whether an individual should have known about an error is determined from the perspective of a reasonable person. Under this standard, the individual would be at fault if an ordinary, reasonable, and prudent person in the same circumstances would have known about the error. The individual's age, physical, and mental condition, or nature of the information supplied to him or her from an official source may mitigate against finding fault if one or more contributed to the submission of an incorrect statement or a statement which did not disclose material facts, or to the acceptance of an erroneous or overpayment.

Equity and Good Conscience

The legal obligation to repay the amounts of such assistance to which an individual who is not at fault, but is otherwise not entitled to, may be waived by the state, territory or the District of Columbia if enforcement of the debt would be contrary to equity and good conscience. In determining whether repayment would be against equity and good conscience, states, territories and the District of Columbia will consider the totality of circumstances to include:

- a. **Detrimental Reliance**. Whether the individual acted in reliance on the overpayment and gave up a benefit because of the overpayment or changed their position for the worse because of the overpayment.
 - i. An individual acts in reliance on the overpayment and gives up a valuable right when they give up a valuable privilege, claim, entitlement, or benefit having monetary worth because of the overpayment.
 - ii. An individual has changed positions for the worse when they, in reasonable reliance on the overpayment, decides to do something that they would not otherwise have done. To establish a change in position or worse, the individual must demonstrate a change in actions or behavior, not simply that the overpayment had been spent. The individual gave up a benefit because of the overpayment, or they changed their position for the worse because of the overpayment.
- b. **Undue Hardship**. Whether circumstances exist, including health problems or disability of the debtor or a family member or other demonstrable factors, in which collection would deprive the individual or household of basic necessities.

Waiver of indebtedness is an equitable remedy and, as such, must be based on an assessment of the facts involved in the individual case under consideration. The burden is on the individual to demonstrate that waiver is appropriate,

and states, territories and the District of Columbia will make waiver determinations based upon the unique circumstances of the individual.

The burden rests on the individual to demonstrate that the collection of the overpayment would be against equity and good conscience.

Reporting Guidance

If a state, territory or the District of Columbia identifies overpayments, that information must be included in the reconciliation information provided to FEMA at closeout. The specific information that must be provided includes the total amount of any overpayments and how much of that total amount was waived. The information should be outlined within the final progress report provided as part of the final closeout package to FEMA.

Also, as part of any monitoring and program evaluation activities conducted by FEMA, states, territories and the District of Columbia must permit FEMA, upon reasonable notice, to review grant-related records to include documentation of waivers approved and justification for the waivers that meet the reasons for a waiver as articulated in the guidance provided.

Should a state, territory or the District of Columbia waive a debt against the individual, the state, territory or District of Columbia's obligation to repay FEMA for the overpayment is also waived. When an overpayment is identified but a waiver is not granted, the obligation of the state, territory or District of Columbia to reimburse FEMA is not waived.

Closeout

As part of the documents provided to FEMA at closeout, states, territories and the District of Columbia should provide an explanation of the process or guidance used to inform any waivers within the final progress report detailing all accomplishments for LWA.

Questions regarding the specifics on how to implement the waiver authority for LWA overpayments, to include the applicability of existing state, territory or the District of Columbia waiver provisions, if any, should be directed to the state, territory or District of Columbia's Office of the Attorney General or equivalent.

Legislative Language

SEC. 262. LOST WAGES ASSISTANCE RECOUPMENT FAIRNESS.

(a) DEFINITIONS.—In this section—

(1) the term “covered assistance” means assistance provided for supplemental lost wages payments under subsections (e)(2) and (f) of section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5174), as authorized under the emergency declaration issued by the President on March 13, 2020, pursuant to section 501(b) of such Act (42 U.S.C. 5191(b)) and under any subsequent major disaster declaration under section 401 of such Act (42 U.S.C. 5170) that supersedes such emergency declaration; and

(2) the term “State” has the meaning given the term in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122).

(b) WAIVER AUTHORITY FOR STATE LIABILITY.—In the case of any individual who has received amounts of covered assistance to which the individual is not entitled, the State shall require the individual to repay the amounts of such assistance to the State agency, except that the State agency may waive such repayment if the State agency determines that—

(1) the payment of such covered assistance was without fault on the part of the individual; and

(2) such repayment would be contrary to equity and good conscience.

(c) WAIVER AUTHORITY FOR FEDERAL LIABILITY.— Any waiver of debt issued by a State under subsection (b) shall also waive the debt owed to the United States.

(d) REPORTING.—

(1) STATE REPORTING.—If a State issues a waiver of debt under subsection (b), the State shall report such waiver to the Administrator of the Federal Emergency Management Agency.

(2) OIG REPORTING.—Not later than 6 months after the date of enactment of this Act, the Inspector General of the Department of Homeland Security shall submit a report that assesses the efforts of the States to waive recoupment related to lost wages assistance under section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5174) to—

(A) the Committee on Homeland Security and Governmental Affairs, the Committee on Finance, and the Subcommittee on Homeland Security of the Committee on Appropriations of the Senate; and

(B) the Committee on Transportation and Infrastructure, Committee on Ways and Means, and the Subcommittee on Homeland Security.