APPENDIX B

In March 2020, due to the COVID-19 pandemic, businesses and schools abruptly closed, and millions of American workers were furloughed or laid off and ordered to stay home indefinitely. Some employers, including the federal government, voluntarily provided their employees with telework options, and others provided employees with paid leave on a temporary basis, as it was then unknown how long the closures would last. Still other employers, such as healthcare providers, first responders, and other essential workers, never stopped reporting to their usual place of work.

Congress quickly enacted a series of pandemic response packages intended to provide stability to employers, employees, and the recently unemployed (and the U.S. economy) during a time of uncertainty. The first relief package[1] allocated federal funds to help stop the spread of the COVID-19 virus. On March 12, 2020, the Department of Labor's Employment and Training Administration (ETA) issued the first Unemployment Insurance Program Letter[2] (UIPL) related to COVID-19. This UIPL provided guidance to states regarding increased UI flexibility due to COVID-19, and clarified that UI was not intended to be used as paid sick leave.

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA)[3] created initial pandemic relief programs including emergency paid sick leave and expanded family and medical leave for eligible employees under covered employers (effective from April 1 through December 30, 2020).[4] Employers could receive refundable tax credits from the Department of the Treasury for the required paid leave and health insurance premiums provided to eligible employees.[5]

FFCRA allocated nearly $1 billion in emergency administrative grants to state workforce agencies through Division D, the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA). On March 22, 2020, ETA issued a UIPL[6] with instructions to states on implementing EUISAA, specifically that states could use flexibility regarding work search, waiting week, and good cause requirements, as well as stating that no interest would accrue on loans to states from the Unemployment Trust Fund from March 18, 2020, through December 31, 2020.

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[1] Coronavirus Preparedness and Response Supplemental Appropriations Act 2020, H.R. 6074, 116th Cong. (2020).

[2] EMP. AND TRAINING ADMIN., UIPL 10-20, UNEMPLOYMENT COMPENSATION (UC) FOR INDIVIDUALS AFFECTED BY THE CORONAVIRUS DISEASE 2019 (COVID-19) (Mar. 12, 2020), *available at* https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2020/UIPL_10-20.pdf.

[3] Families First Coronavirus Response Act, Pub. L. No. 116-127 (2020).

[4] *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, U.S. Department of Labor, *available at* https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave.

[5] *Tax Credits for Paid Leave Under the Families First Coronavirus Response Act for Leave Prior to April 1, 2021*, Internal Revenue Serv. (updated Mar. 14, 2024), *available at* https://www.irs.gov/newsroom/tax-credits-for-paid-leave-under-the-families-first-coronavirus-response-act-for-leave-prior-to-april-1-2021.

[6] EMP. AND TRAINING ADMIN., UIPL 13-20, FAMILIES FIRST CORONAVIRUS RESPONSE ACT, DIVISION D EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT OF 2020 (Mar. 22, 2020), *available at* https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2020/UIPL_13-20.pdf.

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[7] the largest relief package, provided cash stimulus payments to individuals and children and created the Paycheck Protection Program,[8] a program intended to keep small businesses employees tied to their employers and off unemployment benefits by providing forgivable loans to the employers.

The CARES Act also created three new temporary federal unemployment benefit programs—all fully federally funded and able to be claimed retroactively beginning with the week ending January 27, 2020—which augmented existing UI benefits, created additional weeks of temporary benefits, and expanded UI benefits to groups traditionally not eligible to apply. The programs were:

- Federal Pandemic Unemployment Compensation (FPUC): a weekly $600 supplement (or "plus-up") on top of other state and federal UI benefit payments. This benefit terminated the week ending July 25, 2020.

- Pandemic Emergency Unemployment Compensation (PEUC): an emergency program offering 13 additional weeks of extended UI benefits for individuals who exhausted state and federal UI benefits for weeks of unemployment beginning on March 29, 2020, and payable through weeks of unemployment ending on December 26, 2020.

- Pandemic Unemployment Assistance (PUA): a temporary federal UI program for individuals not otherwise eligible for UI benefits including the self-employed, independent contractors, and gig workers, that provided up to 39 weeks of UI benefits beginning on February 2, 2020, and ending on December 26, 2020.

Congress, Governors, and state legislators wanted state workforce agencies to distribute the benefits quickly, so the legislation allowed state workforce agencies flexibility with many aspects of processing claims. From April 2 through August 3, 2020, the Department of Labor's ETA issued 20 UIPLs relating to implementing the CARES Act. These expanded on the earlier guidance of allowing state workforce agencies to process claims with flexibility not normally allowed in regular UI, including suspending work search requirements and other verifications that normally create a delay between when an individual first files a claim for benefits and receives an initial payment. Most importantly, the PUA program allowed claimants to self-certify that they were eligible to claim benefits. This, combined with the "plus-up" payments, made the benefits both attractive to fraudsters and organized crime, and easy to claim.

As early as April 21, 2020, OIG issued an advisory to ETA that the design of these programs as well as existing vulnerabilities with state IT systems and staffing made the pandemic UI programs at increased risk for improper payments.[9] On May 26, 2020, OIG urged

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[7] CARES Act, H.R. 748, 116th Cong. (2020).
[8] *Paycheck Protection Program (PPP) Information Sheet: Borrowers, U.S. Dep't of the Treasury. https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf.*
[9] U.S. Dep't of Lab. Off. of Inspector Gen., *CARES Act: Initial Areas of Concern Regarding Implementation of Unemployment Insurance Provisions* (Apr. 21, 2020), *available at* https://www.oig.dol.gov/public/reports/oa/2020/19-20-001-03-315.pdf.

ETA to require states to implement measures to require PUA claimants to substantiate their weekly benefit amounts (WBA) by providing documentation such as pay stubs or tax returns.[10] On June 5, 2020, the DOL Solicitor issued a legal opinion that, while the Department shared OIG's concern about increased fraud and abuse in the PUA program resulting from the self-verification process set forth in the CARES Act, ETA was unable to implement OIG's recommendation to require documentation of employment as a requirement for eligibility in the PUA program.[11] The Solicitor's legal analysis was that Congress must amend the law to require this documentation for PUA eligibility. OIG urged ETA to seek additional guidance or clarification from Congress or to request legislative action to curtail improper or fraudulent PUA payments.[12]

Throughout the pandemic, ETA would issue more than 50 UIPLs[13] to states with guidance regarding implementing the four new pandemic UI programs authorized by Congress, and the Lost Wages Assistance (LWA) program including eligibility, flexibility, and funding. The UIPLs also covered program integrity issues such as reporting of improper payments, identity verification, efforts to prevent and detect fraud and imposter claims, recovery of fraud overpayments, and the obligation to refer allegations of fraud, waste, abuse, mismanagement, or misconduct relating to unemployment compensation to DOL OIG.

As new issues and questions arose, ETA even issued multiple "change" UIPLs, which supplemented, but did not replace previously issued UIPLs. States, already struggling to deal with an unprecedented number of new claims, were frustrated with the rapidly changing guidance they were receiving nearly daily from ETA, particularly as it related to PUA eligibility.

U.S. Secretary of Labor Eugene Scalia, testifying before the Senate Committee on Finance on June 9, 2020, urged Congress to allow the CARES Act authorization for the $600 weekly supplement to expire, citing falling unemployment numbers.[14] Additionally, National Bureau of Economic Research (NBER) data showed that with UI benefits combined with FPUC, 69 percent of unemployed workers would receive unemployment benefits exceeding 100 percent of their wages and non-wage compensation.[15] Scalia argued that this could be a deterrent to those individuals resuming work and could prevent health care systems finding the workers needed to continue to combat COVID-19. In Summer 2020, with many states and businesses now reopening, Congress considered several legislative proposals related to UI benefits,

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[10] Alert Memorandum from Elliot P. Lewis, Assistant Inspector Gen. Off. of Audit, U.S. Dep't of Lab., to John P. Pallasch, Assistant Sec'y, Emp'l Training Admin. (May 26, 2020), *available at* https://www.oig.dol.gov/public/reports/oa/2020/19-20-003-03-001.pdf.

[11] Memorandum from Kate O'Scannlain, Solicitor, U.S. Dep't of Lab., to Scott S. Dahl, Inspector Gen. U.S. Dep't of Lab. (June 5, 2020), *on file with the Committee.*

[12] *Supra* note 10.

[13] *ETA Advisories*, U.S. Dep't of Lab. Emp'l and Training Admin. https://www.dol.gov/agencies/eta/advisories

[14] *Unemployment Insurance During Covid-19: The Cares Act and the Role of Unemployment Insurance During the Pandemic: Hearing Before Senate Comm. on Finance, 116th Cong. (June 9, 2020), available at https://www.finance.senate.gov/hearings/unemployment-insurance-during-covid-19-the-cares-act-and-the-role-of-unemployment-insurance-during-the-pandemic.*

[15] Peter Ganong, et al., US Unemployment Insurance Replacement Rates During the Pandemic, National Bureau of Economic Research (May 2020), available at http://www.nber.org/papers/w27216.

including one from Senate Finance Chairman Grassley requiring claimants to verify identity and provide proof of lost income due to COVID-19,[16] yet no consensus was reached.

On July 31, 2020, the CARES Act authorization for $600 weekly supplement expired. On August 7, 2020, an OIG audit found that ETA could do more to mitigate risk of waste, fraud, and abuse of UI under the CARES Act. OIG made four recommendations, including, to prevent millions of dollars of overpayments, ETA should consider encouraging states to contact large employers to alert them about their obligation to identify individuals who refuse to return to work without valid justification, and to report them to the state workforce agency.[17] OIG's audit found that ETA's guidance[18] to states to identify those individuals was minimal, and encouraged ETA to be more proactive in order to ensure that only those individuals who were able and available for work, which is a condition for eligibility, were receiving benefits. OIG's audit found that 23 percent of state websites did not contain detailed information for employers to report individuals who refused to return to work.

On August 8, 2020, President Trump issued the Memorandum on Authorizing the Other Needs Assistance Program[19] which directed up to $44 billion to the Lost Wages Assistance (LWA) program. For states that opted into the program, individuals receiving UI benefits of at least $100 per week could receive an additional $300 in LWA weekly plus an additional $100 if the state chose to contribute.[20] These benefits began on July 26, 2020, and ended on September 6, 2020, due to the amount of available funds.[21]

On October 21, 2020, OIG reported[22] that states cited the self-certification legislative requirement as a top fraud vulnerability in the PUA program. Ninety-eight percent said their state faced challenges implementing the program and identified a lack of resources to address the high volume of claims, unclear and untimely guidance from ETA, and incompatible legacy systems as top challenges in implementing the program and detecting and deterring fraud.

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[16] American Workers Families and Employee Assistance Act, S.4318 (2020).

[17] U.S. Dep't of Lab., Off. of Inspector Gen., *COVID-19: More Can be Done to Mitigate Risk to Unemployment Compensation Under the CARES Act* (Aug. 07, 2020), *available at* https://www.oig.dol.gov/public/reports/oa/2020/19-20-008-03-315.pdf.

[18] EMP. AND TRAINING ADMIN., UIPL 23-20, PROGRAM INTEGRITY FOR THE UNEMPLOYMENT INSURANCE (UI) PROGRAM AND THE UI PROGRAMS AUTHORIZED BY THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT OF 2020 - FEDERAL PANDEMIC UNEMPLOYMENT COMPENSATION (FPUC), PANDEMIC UNEMPLOYMENT ASSISTANCE (PUA), AND PANDEMIC EMERGENCY UNEMPLOYMENT COMPENSATION (PEUC) PROGRAMS (May 11, 2020), *available at* https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2020/UIPL_23-20.pdf.

[19] President Donald J. Trump, Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019 (August 8, 2020), available at https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-authorizing-needs-assistance-program-major-disaster-declarations-related-coronavirus-disease-2019/

[20] *Lost Wages Supplemental Payment Assistance Guidelines*, FEMA (May 15, 2023). https://www.fema.gov/disaster/historic/coronavirus/governments/supplemental-payments-lost-wages-guidelines

[21] Cong. Research Serv., Unemployment Insurance (UI) Benefits: Permanent-Law Programs and The COVID-19 Pandemic Response (Jan. 31, 2022), available at, https://crsreports.congress.gov/product/pdf/R/R46687.

[22] U.S. Dep't of Lab., Off. of Inspector Gen., COVID-19: STATES CITE VULNERABILITIES IN DETECTING FRAUD WHILE COMPLYING WITH THE CARES ACT UI PROGRAM SELF-CERTIFICATION REQUIREMENT (Oct. 21, 2020), *available at* https://www.oig.dol.gov/public/reports/oa/2021/19-21-001-03-315.pdf.

On December 27, 2020, a fourth pandemic relief package, the Continued Assistance Act (CAA), a provision of the Consolidated Appropriations Act, 2021, provided another stimulus payment to individuals, reauthorized existing pandemic UI programs (including restarting the FPUC plus-up) and created a fourth new UI program.

- FPUC was restarted as a weekly $300 supplement for all UI benefits, on top of other state and federal UI benefit payments, beginning after December 26, 2020, and ending after March 13, 2021.

- PEUC was reauthorized for 11 additional weeks of extended UI benefits for individuals who exhausted state and federal UI benefits for weeks of unemployment beginning on December 26, 2020, and ending on March 14, 2021. CAA created a phaseout period for PEUC so that individuals still receiving PEUC on March 14, 2021, who had not exhausted eligible weeks of PEUC (24 total), could receive benefits until April 10, 2021.

- PUA was reauthorized for 11 additional weeks beginning on December 26, 2020, and ending on March 14, 2021. CAA created a phaseout period for PUA so that individuals still receiving PEUC on March 14, 2021, who had not exhausted eligible weeks of PUA (50 total), could receive benefits until April 10, 2021. New PUA applications could not be backdated earlier than December 1, 2020.

- CAA created a new temporary UI program: Mixed Earner Unemployment Compensation (MEUC). In states that elected to participate, a claimant who received at least $5,000 in self-employment income in the most recent tax year, and received a UI benefit other than PUA, could receive an additional $100 payment.

CAA also enacted new integrity measures. PUA claimants filing for benefits after January 31, 2021, had to provide documentation of employment or self-employment within 21 days (or state deadline if later). States had to verify the identity of PUA applicants. CAA also included a statutory requirement for weekly self-certification for those unable to who cannot work or seek work due to COVID-19 reasons. Additionally, beginning January 26, 2021, per a new return-to-work reporting requirement, states had to have a process to address work refusals, a method for employers to report work refusals, and provide notifications to individuals related to work refusals.

On March 11, 2021, the newly installed Biden Administration and the Democratic Majority in the House and Senate, enacted a fifth stimulus relief package, the American Rescue Plan Act (ARPA),[23] that allowed additional stimulus payments to individuals and further extended pandemic UI programs for an additional six months—even though by this point most states had been fully open for business for more than six months and the roll-out of COVID-19 vaccines was well underway. One hundred million vaccine doses had been administered to Americans by March 19, 2021, and 200 million vaccine doses had been administered to

[23] American Rescue Plan Act of 2021, Pub. L. No. 117-2, Stat. 4 (2021).

Americans by April 21, 2021. By July 4, 2021, 67 percent of the adult working population had received at least one dose of a COVID-19 vaccine.

- The FPUC weekly $300 supplement for all UI benefits, on top of other state and federal UI benefit payments, was extended through weeks of unemployment ending on or before September 6, 2021.

- PEUC was extended for 29 additional weeks of extended UI benefits for individuals who exhausted state and federal UI benefits for weeks of unemployment beginning on March 14, 2021, through weeks of unemployment ending on or before September 6, 2021.

- PUA was reauthorized for 29 additional weeks beginning on March 14, 2021, through weeks of unemployment ending on or before September 6, 2021.

<u>The combination of being able to backdate certain claims, in addition to the various legislative extensions, meant that claimants could potentially receive up to 79 weeks of pandemic-related UI payments in total.</u>[24]

[24] U.S. Dep't of Lab. Off. of Inspector Gen., *OIG Oversight of the Unemployment Insurance Program* (last updated Dec. 15, 2023), *available at* https://www.oig.dol.gov/doloiguioversightwork.htm.

Time to Return to Work, But Benefits Still Available

It was shortsighted to extend the UI benefits, including the $300 plus-up, for six full months in March 2021. It was already evident in the summer of 2020 that providing large UI benefits payments without requiring evidence recipients were searching for work was a deterrent for some individuals returning to work and may have contributed to worker shortages in some industries. If the expectation was that much of the adult working population would be able to return to work as soon as vaccines became widely available, then it would follow that benefits did not need to be extended.

Between June 12, 2021, and July 31, 2021, 26 states announced their intention to voluntarily terminate their agreements with the Department of Labor and to stop paying some or all the pandemic UI benefits before their expiration dates.[25] States cited various reasons for ending benefits early including: increased job opportunities, fewer COVID-19 related barriers to re-entering the workforce, decreased unemployment rates, and work deterrent effects based on

> *South Carolina's businesses have borne the brunt of the financial impact of the COVID-19 pandemic. Those businesses that have survived—both large and small, and including those in the hospitality, tourism, manufacturing, and healthcare sectors—now face an unprecedented labor shortage.*
>
> *This labor shortage is being created in large part by the supplemental unemployment payments that the federal government provides claimants on top of their state unemployment benefits. In many instances, these payments are greater than the worker's previous pay checks. What was intended to be short-term financial assistance for the vulnerable and displaced during the height of the pandemic has turned into a dangerous federal entitlement, incentivizing and paying workers to stay at home rather than encouraging them to return to the workplace.*
>
> *These federal entitlements pose a clear and present danger to the health of our State's businesses and to our economy. Since the Biden administration and Congress appear to have little to no comprehension of the damage being done and no appetite to terminate the federal payments, the State of South Carolina must take action.*
>
> **Henry McMaster, Governor, State of South Carolina**

[25] Cong. Research Serv., *States Opting Out of COVID-19 Unemployment Insurance (UI) Agreements* (updated Aug. 20, 2021), *available at* https://crsreports.congress.gov/product/pdf/IN/IN11679.

exorbitant UI benefits.[26] Fundamentally, states' goals for ending benefits were to stop paying people to stay home and get people back to work. Some states, including Montana,[27] chose to replace pandemic UI benefits with back-to-work bonuses from the Coronavirus Relief Fund (CRF).

On September 6, 2021, the authorization and funding for all temporary pandemic UI programs (FPUC, PUA, PEUC, MEUC) expired.

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[26] Letter from Henry McMaster, Governor, State of South Carolina, to Daniel Ellzey, Director, Dep't of Emp't and Workforce (May 6, 2021). *See also* Letter from Beth Townsend, Director, Iowa Workforce Dev., to Kim Reynolds, Governor, State of Iowa (May 10, 2021). *See also* Press Release, The Office of Alabama Governor, Governor Kay Ivey Announces End of Participation in All Federal Pandemic Unemployment Compensation Programs (May 10, 2021). *See also* Press Release, Office of the Texas Governor, Governor Abbott Announces End to Federal Pandemic-Related Unemployment Benefits (May 17, 2021).

[27] News Release, State of Montana Newsroom, Montana to Launch Return-to-Work Bonuses, Return to Pre-pandemic Unemployment Program to Address Workforce Shortage (May 4, 2021).