

**ADVISORY:** UNEMPLOYMENT INSURANCE PROGRAM LETTER No. 04-10, Change 7

**TO:** STATE WORKFORCE AGENCIES

**FROM:** JANE OATES  
Assistant Secretary

**SUBJECT:** Extended Benefits Program – Temporary Changes made by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, and Reminder of the Continuation of the Emergency Unemployment Compensation Nonreduction Rule.

1. Purpose. To provide additional information about the temporary changes to the federal-state extended benefits (EB) program made by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, and remind states of the continuation of the Emergency Unemployment Compensation (EUC08) nonreduction rule.
2. References. Sections 501 and 502 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312; the Federal-State Extended Unemployment Compensation Act of 1970 (“EB law”), 26 U.S.C. 3304 note; 26 U.S.C. 3304(a)(11); 20 CFR Part 615; Unemployment Insurance Program Letter (UIPL) No. 45-92; UIPL No. 4-10, changes 3 and 6; UIPL No. 24-10; and Employment and Training Administration (ETA) 539 Report (OMB number 1205-0028).
3. Summary of EB Changes. P.L. 111-312 permits states to amend their laws to temporarily modify the provisions concerning EB “on” and “off” indicators. Specifically, it permits states to make determinations of whether there is an EB “on” or “off” indicator by comparing current unemployment rates to the unemployment rates for the corresponding period in the three preceding years. This comparison is called a “look-back”. (Under permanent EB law, the look-back compares current unemployment rates to rates in the previous two years.) This modification to the look-back provisions will enable many states to remain “on” EB much longer. This authority expires on December 31, 2011. This UIPL provides:
  - Additional information about this optional temporary change to the EB program.
  - Draft legislation that states may use when enacting legislation to implement it.
  - Revised reporting instructions for the ETA 539.
4. EB Background. Permanent EB law establishes “on” or “off” indicators to determine when EB periods begin and end in a state. To ensure that EB is only payable during periods of high and rising unemployment, both the mandatory indicator based on the insured unemployment rate (IUR) and the optional indicator based on the total unemployment rate (TUR) include look-back requirements. Under the mandatory IUR indicator (section 203(d) of the EB law), a state will begin and remain in an EB period

(under which up to 13 weeks of EB is available) if the IUR for the previous 13 weeks is at least 5 percent and is 120 percent of the average of the rates for the corresponding period in each of the two previous years. Under the optional TUR indicator (section 203(f) of the EB law), a state will begin and remain in an EB period (under which up to 13 weeks of EB is available) if the average TUR, seasonally adjusted, for the most recent three months is at least 6.5 percent and is 110 percent of the rate for the corresponding three-month period in either or both of the two previous years. Additionally, under the optional TUR indicator, a state will begin and remain in a high unemployment period (section 202(b)(3)(B) of the EB law)(under which up to 20 total weeks of EB is available) if the TUR is at least 8.0 percent and is 110 percent of the rate for the corresponding 3-month period in either or both of the two previous years.

Under permanent EB law, because of sustained high unemployment rates during the last two years, many states are expected to trigger “off” EB based on the TUR indicator by early spring 2011. Even though states’ TURs are expected to remain high enough to continue to meet the first requirement of an EB “on indicator” (i.e., a TUR of at least 6.5 percent), they would not likely continue to meet the look-back requirement because the average TUR, seasonally adjusted, for the most recent three months would no longer be 110 percent of the rate for the corresponding three-month period in either or both of the two previous years.

To enable states to remain “on” EB, section 502 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 amends the EB law to permit states to use a three-year look-back for the mandatory IUR or optional TUR indicator. (In general, unemployment rates three years ago were low enough to meet the look-back requirements for the EB “on” indicators.) This optional authority applies only to weeks of unemployment beginning after December 17, 2010, through weeks of unemployment ending on or before December 31, 2011. Since EB is payable under state law, states must amend the EB provisions in their laws to apply the three-year look-back when determining EB “on” or “off” indicators. States that want to use the three-year look-back should ensure this provision is effective before they would trigger “off” EB based on the two-year look-back. Otherwise, the state must remain “off” EB for at least 13 weeks, as required by section 203(b)(1)(B) of the EB law.

Attachment I offers draft legislation for the convenience of states wishing to adopt the temporary three-year look-back.

5. **EB Reporting.** States that adopt the three-year look-back provision for the IUR indicator will need to modify the reporting of the ETA 539 to reflect the actual number of prior years used in the calculation of the look-back percentage. Current guidance for the ETA 539 only allows for two years in the computation of the average rate in prior years, referred to as “AR” and defined on page I-1-14 of current reporting guidance. Revised guidance, provided in Attachment II, provides for states to use the appropriate number of prior years in the computation of the look-back percentage. These instructions have been approved by the Office of Management and Budget as a non-substantive change to the existing ETA 539 collection.

6. EUC08 Nonreduction Rule Reminder. Section 501 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 extended the phase-out period and expiration date of the EUC08 program. As outlined in UIPL No. 04-10, Change 3, a state's EUC08 agreement will no longer apply and EUC08 will not be payable in a state if the U.S. Department of Labor determines that the method governing the computation of regular compensation under the state law has been modified in a manner such that the average weekly benefit amount of regular compensation which will be payable during the period of the agreement will be less than the average weekly benefit amount of regular compensation which would otherwise have been payable during such period under the state law in effect on June 2, 2010. The period of the agreement includes EUC08 phase-out, which is currently set to expire on June 9, 2012. States considering modification of the method governing the computation of regular compensation that would violate this rule should ensure that such amendments to their law become effective after this date. For additional information about the applicability of the nonreduction rule, see UIPL No. 24-10.
7. Action. State administrators should distribute this advisory to appropriate staff.
8. Inquiries. Questions should be addressed to your Regional Office.
9. Attachments.

Attachment I – Draft Legislation – Temporary Three-Year “Look-back”  
Attachment II – Pending Update to HB401 Guidance for the ETA 539

## ATTACHMENT I

### DRAFT LEGISLATION – TEMPORARY THREE-YEAR “LOOKBACK”

#### DISCUSSION

Below is suggested legislative language for states that choose to amend their extended benefits (EB) law to provide for a temporary three-year “look-back” when determining “on” and “off” indicators as provided in Section 502 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312. This language supplements the draft language for subparagraphs (a)(2)(A) and (C) transmitted in Attachment II to UIPL No. 45-92 by creating a new subsection (b).

This suggested legislative language pertains to both the mandatory insured unemployment rate (IUR) indicator and the optional total unemployment rate (TUR) indicator. Although, in general, states are currently “on” EB through the TUR indicator, states, particularly those with temporary TUR indicators, may want to adopt the language pertaining to the IUR indicator as well as the TUR indicator language. (If authority for the three-year look-back is extended beyond December 31, 2011, it would be possible to remain “on” EB through the IUR indicator after states’ temporary TUR indicators expire due to lack of continued 100 percent Federal funding of most EB costs.) States that have not been “on” EB during this recession may not wish to adopt any of this language, as it would have no practical effect.

There are two parts of the suggested legislative language that states may want to customize—the effective date and expiration date of this provision. The effective date was written to become effective upon enactment of P.L. 111-312. The bracketed bold language following is an alternative effective date based on the date established under state law, if it is later than the date of enactment of P.L. 111-312. The expiration date was written to mirror the current statutory end date for the three-year “look-back” – December 31, 2011. The bracketed bold language following provides an alternative, based on the possibility that Congress will extend this provision. It ties expiration of the provision to the date Congress chooses. There also are placeholders in bold for insertion of citations to the appropriate sections of the state’s code.

#### DRAFT LANGUAGE

(b)(1) With respect to compensation for weeks of unemployment beginning after date of enactment of P.L. 111-312 [**or, if later, the date established under State law**], and ending on or before December 31, 2011 [**or the date established in Federal law permitting this provision**]

(A)(i)(I) there is a State "on" indicator for a week if the average rate of insured unemployment under **section XX of the state's code** for the period consisting of such week and the immediately preceding twelve weeks equals or exceeds 5 percent, and

(II) the average rate of insured unemployment under **section XX of the state's code** for the period consisting of such week and the immediately preceding twelve weeks equals or exceeds 120 percent of the average of such rates for the corresponding 13-week period ending in each of the preceding three calendar years;

(ii) there is a State "off" indicator for a week based on the rate of insured unemployment only if for the period consisting of such week and the immediately preceding twelve weeks, paragraph (1)(A)(i) does not result in an "on" indicator.

(B)(i)(I) there is a State "on" indicator for a week if the average rate of total unemployment (seasonally adjusted), as determined by the United States Secretary of Labor, for the period consisting of the most recent 3 months for which data for all States are published before the close of such week equals or exceeds 6.5 percent, and

(II) the average rate of total unemployment in the State (seasonally adjusted), as determined by the United States Secretary of Labor, for the 3-month period referred to in subclause (I), equals or exceeds 110 percent of such average for any or all of the corresponding 3-month periods ending in the 3 preceding calendar years;

(III) there is a "high unemployment period" as provided in **section YY of the state's code** if subclause (I) were applied by substituting "8 percent" for "6.5 percent";

(ii) there is a State "off" indicator for a week based on the rate of total unemployment only if for the period consisting of the most recent 3 months for which data for all States are published before the close of such week, paragraph (1)(B)(i) does not result in an "on" indicator.