

**Maine Department of Labor  
Bureau of Unemployment Compensation**

**Basis Statement  
and  
Summary of Comments and Responses**

*Chapter 26: Waivers of Repayment of Erroneously Paid Benefits (Overpayments)*

The changes incorporate recent statutory changes to the law under Public Law 2021, Chapter 456, § 6 specifying that waiver determinations will be made in the first instance by the Bureau of Unemployment Compensation (“Bureau” or “BUC). The Rule clarifies that denials of waivers by the Bureau may be appealed to the Division of Administrative Hearings and the Unemployment Insurance Commission. The Rule refines and explains the criteria used in determining whether an overpayment will be waived.

This rulemaking of the Bureau of Unemployment Compensation is authorized by 26 M.R.S. § 1082. The proposed Rules were posted on October 4, 2023. Public hearings were held for each of the three rules on Tuesday, October 24 at the Maine Department of Labor, Frances Perkins Conference Room, 45 Commerce Drive, Augusta ME 04330. No public comments were received at the public hearings, but written comments were submitted by:

- Commenter # 1: Maine Equal Justice
- Commenter # 2: Peer Workforce Navigator Project
- Commenter # 3: Maine AFL-CIO

The public comment period ended November 6, 2023. As set forth below, minor changes were made to the rule as a result of public comments.

**Summary of Public Comments and Responses**

**Suggested addition of a generally applicable section related to claimants with low literacy or limited English Language Proficiency (LEP).**

Some commenters urged that the rule require that all notices, forms, and public information, related to the waiver of overpayments use plain language and be available in a language accessible to claimants with Limited English Proficiency (LEP). The commenters further requested that language to included so that when notice directed to a claimant is inadequate with regard to literacy or language access it must be treated as if no notice has been given.

**(Commenters 1 and 2).**

Commenter 3 asked that all overpayment notices be in plain language and in the claimant’s preferred language.

**Response:** The Bureau notes that physical, mental, education or linguistic limitations are considered in determining whether an overpayment is the fault of the claimant. It is not necessary to include general federal requirements as to claimant notices in this particular rule. The Bureau currently sends a Babel Notice with all its eligibility decisions in 21 different languages. No changes are made as a result of this comment.

**2. Notice.** Some commenters noted their support of the proposal to provide notice of the right to request a waiver, along with instructions and the method of requesting a waiver whenever a decision of the UI Commission, the Division of Administrative Hearings or a deputy establishes that amounts have been erroneously paid to a claimant, and inquired as to whether this included any demand letter that is issued to the claimant. In addition, the commenters asked that any such notice also include the amount of the overpayment and the period during which the overpayment occurred. (Commenters 1 and 2).

**Response:** In response to the comment, the Bureau has added a sentence to the Notice portion of the Rule to specify that such notice will be included in demands for repayment.

**4 (A). Fault considered under the totality of circumstance.** With respect to paragraph A, some commenters asked that the Bureau change the word “could” to the term “should reasonably”, so that the clause would now read: “or should reasonably have been expected to know.” (Commenters 1 and 2).

**Response:** The Bureau notes that the Rule states that “the bureau shall consider all pertinent circumstances.” This means the totality of the pertinent circumstances. In response to this comment, the Bureau has changed Section 4.A. to define fault as acceptance of a payment “which the claimant knew or *should reasonably* have been expected to know, was incorrect”

**4(A) Fault should not include good faith mistake or unintentional errors by claimants.** One commenter asked that a guiding approach should be that to find fault there needs to be demonstrated intentional misrepresentation to receive benefits that the claimant knows they were not eligible for. (Commenter #3).

Other commenters asked that the Bureau add a final sentence to paragraph 4(A) to read: “A good faith mistake of fact by the claimant in the filing of a claim for benefits that results in an overpayment of benefits does not constitute fault.” That language is borrowed from the Massachusetts rule, but it is also consistent with the reasoning in the *Kinney* case where the Court counsels against “excluding from consideration for waiver all innocent, mistaken awards.” Moreover, in considering whether Mr. Kinney was “at fault” in creating the overpayment the court found “there is no suggestion...that the petitioner engaged in any fraud or deceit or otherwise misled the Commission or his employer with respect to the basis of his application for benefits. He believed that he resigned from employment for good cause attributable to his employment.” This language implies that without evidence of fraud, deceit or intentional misrepresentation, fault may not be found.

The commenters note that this approach is consistent with that taken by the Bureau in its SOP memo related to overpayment waivers issued during the pandemic which defined “without fault” as meaning that “the claimant made no intentional misrepresentations or omissions in applying for benefits or completing a weekly certification.” (Commenters 1 and 2).

**Response:** The Bureau declines to define fault as only intentional misrepresentation because the claimant is obligated to know requirements for unemployment benefits such as conducting a work search and being able and available. In response to this comment, the Bureau has added a sentence to section 4.A. to state: “A good faith mistake of fact by the claimant in the filing of a claim for benefits that results in an overpayment of benefits does not constitute fault.”

**4 (B).** Some commenters asked the Bureau to eliminate paragraph 4(B). While agreeing that a claimant who knowingly makes a false or misleading statement is not eligible for a waiver, that circumstance is already addressed in paragraph (C) below.

The commenters stated that such a list will too easily be read to flag each of these UI eligibility issues as “fault” without emphasizing the need for an objective determination of fault, of equity and good conscience and of whether collection will defeat the purpose of the Act which are at the heart of any waiver determination. A person can violate one of these rules and still have acted without fault, for example, by not having understood the rule; not being able to read notices, not receiving notices, not being able to navigate the UI portal or phone system, transportation breakdowns, evictions, being temporarily mentally or physically ill, coping with family emergencies, or similar pressing circumstances that can interfere with complying with Department requirements. (Commenters 1 and 2).

**Response:** The Rule expressly states “unless individual circumstances show otherwise,” allowing for the type of analysis urged by the commenters. The Bureau makes no change as a result of this comment.

#### **4. Proposed additions to Section 4.**

- **Replace the deleted language stating that notice that benefits may have to be repaid may not be the sole basis denying a waiver.** Related to the concern discussed above, we ask that the language which this proposed rule would repeal at (2)(C)(9) be restored. We request that it be added to the paragraph at Section 4 to read: “The Commission [Bureau]... would not deny a waiver solely because the claimant relied on the receipt of benefits with notice that to do so might result in an overpayment that must be repaid in the future.” This would help to ensure that a waiver would not be denied when an individual claimed and received benefits in good faith even when they were given notice that those benefits might have to be repaid. (Commenters 1 and 2).

**Response:** The Bureau declines to make this change because, among other reasons, the language was deleted because it is unclear. Furthermore, as explained in response to a comment above, the Bureau has added express language that a good faith mistake of fact does not constitute fault.

Additionally, the rule provides that all pertinent circumstances will be considered when determining fault.

- **We urge you to include additional circumstances to Section 4 for which an individual may be considered “without fault” pursuant to recent federal guidance.** These circumstances include those in which:
  - i. the individual provided all information correctly as requested by the state, but the state failed to take appropriate action with that information or took delayed action when determining eligibility;
  - ii. the individual provided incorrect information due to conflicting, changing, or confusing information or instructions from the state;
  - iii. the individual was unable to reach the state despite their best efforts to inquire or clarify what information the individual needed to provide; or
  - iv. other similar difficulties (*e.g.*, education, literacy, and/or language barriers) in understanding what information the state needed from the individual to properly determine eligibility.

We note that two of these circumstances that we request you to add above were included as examples of “without fault” in the Bureau’s SOP issued during the pandemic. EG: (1) a claimant is “without fault” if they made a mistake in completing an application or weekly certification due to a misunderstanding of the information being requested. (2) a claimant may be considered without fault if the size of the overpayment was increased due to Agency delays processing the decision. (Commenters 1 and 2).

**Response:** These concepts, to the extent the Bureau finds that they are appropriate considerations, are in the Rule. Delay by the agency is set forth as a consideration in Section 5.E. Physical, mental, education or linguistic limitations are considered in determining whether an overpayment is the fault of the claimant, as set forth in Section 4.A. In response to a previous comment, a sentence was added to Section 4.A. to expressly state that a good faith mistake of fact does not constitute fault.

**5(A)-(E) Criteria for determining that recovery of the overpayment would defeat the purpose of benefits authorized or be against equity or good conscience.** We urge you to make the following changes to this section:

**5(A).** With respect to paragraph (A) some commenters suggested that while the Bureau may have the “discretion” to make a judgment as to whether requiring repayment would be against equity and good conscience, that discretion, or judgment is bound by the statute and these rules and we ask that this be explicitly noted in the final rule. The commenters express concern that certain language at Section 5, particularly Section (5)(A) and the use of the word “may” throughout, could result in arbitrary decisions to waive or not waive an overpayment without

appropriate consideration of the carefully crafted standards that we believe will be finally adopted in this rule. (Commenters 1 and 2).

**Response:** The statute, 26 M.R.S. § 1051(5) uses the terms “discretion” and “judgment.” It is not necessary to state in a rule that the agency is bound by the statute and the rules. No changes will be made as a result of this comment.

**5(B).** With regard to the factors that may cause financial hardship listed in paragraph (B), some commenters requested that the Bureau add the following: “age, health and expenses for the support of others for whom the individual is legally responsible”.

Some commenters also request that the Bureau add language here establishing that any repayment that would undermine the financial stability of the claimant and their family, must be considered to “defeat the purpose for which benefits were authorized.” Some commenters noted that there is no specific definition of the phrase “such recovery would defeat the purpose of benefits otherwise authorized” in the proposed rule and asked for that additional language to provide guidance as to its application in waiver determinations. (Commenters 1 and 2).

**Response:** Section 5 sets forth “[c]riteria for determining whether recovery of the overpayment would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.” Those criteria include “financial hardship” and sets forth factors “not limited to” income and expenses and debts. If additional factors were added to the rule, the application for a waiver would be unnecessarily more complicated. The rule as written sufficiently allows for the considerations requested in the comment and no further changes will be made.

**5 (C).** Some commenters expressed their appreciation for the addition of this paragraph providing for the presumption of financial hardship in cases where the claimant self-attests that they are current recipients of “SNAP, TANF, LIHeap, MaineCare (including having a dependent child on MaineCare), SSI or SSDI.” Noting that some other states have also taken the approach of using means tested programs as a proxy for financial hardship, some commenters noted that some states have expanded the programs considered. For example, Colorado recently passed a law adding subsidized housing benefits and state or federal earned income tax credits to their list of public programs that will be used to determine that recovery is inequitable. The Commenters asked the Bureau to add these benefits to the list of public benefits proposed to ensure that approach is available to persons who may receive one of these benefits, but not another.

Commenters also noted that LIHEAP, is now referred to by the administering agency, MaineHousing, as simply “HEAP”. (Commenters 1 and 2).

**Response:** The Bureau will change LIHEAP to HEAP. The Rule covers presumption of financial hardship based on long-standing means-tested programs to avoid the need for such claimants to submit financial information. However, claimants who do not fall under these presumptions can submit any information they feel is relevant as to financial hardship. No further changes will be made to the Rule as a result of this comment.

Some commenters noted that the Bureau adopted the criteria of 185% of the federal poverty level to demonstrate financial hardship based on the gross income test for the Supplemental Nutrition Assistance Program (SNAP) at the time, but since then, SNAP has increased its eligibility level to 200% of the federal poverty level (FPL). The commenters requested that the final rule adopt 200% FPL as well, noting that Colorado recently adopted 400% of the federal poverty level as the measure that they apply to indicate financial hardship. (Commenters 1 and 2).

**Response:** A 185% of the federal poverty level is a presumption of financial hardship, which eliminates the need for the claimant to submit other financial information or documentation. However, claimants who do not fall under these presumptions can submit any information they feel is relevant as to financial hardship. No further changes will be made to the Rule as a result of this comment.

**5(D).** Some commenters asked that the Bureau remove the word “fully” in this paragraph as it relates to the claimant being “fully without fault.” The commenters recommended replacing it with the following language: “The Bureau will consider collections of an overpayment as without fault and against equity and good conscience, regardless of financial circumstances, where the agency was primarily responsible for the error.” It seems unfair to penalize a claimant by using such a high standard in cases where the agency was largely responsible for the error. (Commenters 1 and 2).

**Response:** The Bureau declines to change this language and to allow an overpayment when the claimant has some fault without considering financial circumstances. In situations involving both agency error and fault on the part of the claimant, the Bureau will consider all pertinent circumstances.

**5. Suggested additional Paragraph related equity and good conscience as it relates to reliance on overpaid funds.** Some commenters requested that additional criterion, included in federal guidance, be included in the final rule as a standard for determining whether recovery would be against equity and good conscience: “the recipient can show that due to the [sic] notice that such payment would be made or because of the incorrect payment either they have relinquished a value right or changed their position for the worse” (Commenters 1 and 2).

**Response:** The Bureau notes that such considerations would be part of considering all pertinent circumstances. The Bureau makes no changes to the Rule as a result of this comment.

## **7. Application for Waiver of Overpayment.**

**7(B) Timing.** Some commenters asked that the rule provide that if an individual does submit a waiver request prior to finality that they be given notice that the waiver request will not be considered at this time but that they may resubmit it once the decision has become final as a matter of law, and explaining in plain language what that means.

Commenters also asked that language be included in the final rule indicating where the waiver request form may be obtained (including a link to locate the form) and providing that the waiver request may be submitted electronically through the online form; hand delivered; e-mailed or mailed. (Commenters 1 and 2).



**Response:** The Bureau provides instructions on how to file for a waiver to the claimant with any non-fraud overpayment decision and, as explained in response to a prior comment, with any demand for repayment. Those instructions contain information as to all waiver filing methods. The Bureau will not add a link to request a waiver to the rule, as such a link may become outdated. The Bureau further explains that if a claimant attempts to file for a waiver electronically and the system does not show an overpayment, it is likely because that particular overpayment was the result of a fraud decision, which would be ineligible for a waiver.

If a waiver request is filed prior to decision finality, the Bureau holds the request until such time that the decision becomes final and considers it at that time and render the appropriate decision.

**7(C) No Deadline.** Commenters supported continuation of the longstanding practice of not imposing a deadline on requests for waiver requests. (Commenters 1 and 2)

**7(D) Subsequent requests.** Commenters also supported the codification of the longstanding practice of allowing an individual to submit a subsequent waiver request if circumstances change. (Commenters 1 and 2). One commenter asked for assurance that the final rule include a guarantee of no time limit and if denied, a claimant can submit another waiver request if circumstances change. (Commenter 3).

**Response:** No change is made as a result of these comments, as the provisions of no deadline and allowance for subsequent requests if circumstances change are in the Rule.

#### **7. Request for additional paragraphs.**

- Commenters asked that the rules provide for the return to a claimant of any repayment of an overpayment when it has subsequently been found that the claimant was eligible for a waiver or when the overpayment was erroneously charged or collected. (Commenters 1 and 2).

**Response:** Return of prior repayment will depend on a review of the totality of the circumstances and will be reflected in the decision. No change will be made to the rule as a result of this comment.

- Commenters asked that the final rule include language providing for a claimant to receive acknowledgement when their waiver application has been received by the Bureau. (Commenters 1 and 2).

**Response:** When a waiver request is made electronically through the system the claimant will receive confirmation of completion of the waiver request at that time. No change will be made to the rule.

**8(C) Decision.** Commenters asked for modification of section 8(C) to be clear that the standards established under this rule must be applied to any decision to grant a partial waiver. (Commenters 1 and 2).

**Response:** The Bureau reviews all pertinent circumstances when reviewing a waiver request. No change will be made to the rule.

Commenters objected to the less specific language in the proposed rule that could be interpreted to allow for the reduction of an overpayment based on the decision maker assuming only a "degree" of fault without fully applying the criterion established by Maine law and rule. (Commenters 1 and 2).

**Response:** The rule properly considers the totality of the circumstances. No further change will be made.

**9. Future Benefit deductions.** Commenters supported the proposal to authorize the Bureau to determine that an erroneous payment may be offset from future benefits as the exclusive means of collecting that payment in the future when an individual submits a waiver request but is determined not eligible for a waiver.

However, the Commenters urged that the final rule clarify that this approach must not be viewed or in any manner applied as an alternative to granting a waiver in any case in which the individual is eligible for a waiver under Maine law and rule. The statute is clear that there “is *no recovery* of payments from any person who, in the judgment of the commissioner or the commissioner's designee, is without fault and when, in the judgment of the commissioner or the commissioner's designee, such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.” (Emphasis added). This means that benefit offset may not be offered or applied as means to compromise with an individual eligible for a waiver in lieu of granting a full waiver to that individual. The Commenters suggest including language such as: “However, no recovery through benefit offset or any other means may be attempted if the individual has applied for and is eligible for a waiver under this Chapter.” (Commenters 1, 2 and 3).

**Response:** This concept is set forth in statute and need not be in Rule. The Bureau notes that this process is currently followed and will continue to be followed. No change will be made to the Rule.

Commenters requested that any notices establishing an overpayment that is not subject to recovery through Treasury Offset Payments (TOPS), not mention TOPS as a potential source of recovery for the overpayment. (Commenters 1 and 2).

**Response:** TOP is a federally required program under specific circumstances. It is too administratively complicated to make this determination on a case-to-case basis, while following the federal requirements, especially as the scope of the TOP requirements appear to be subject to change on a fairly regular basis. No change will be made to the Rule as a result of this comment.