

From: NYSAR <nyrealtors@nysar.org>
Sent: Wednesday, April 1, 2020 10:23 AM
Subject: Flash Update: FAQ - Pandemic Unemployment Assistance



April 1, 2020

Dear New York REALTOR®,

Please be advised that we have some updates to the information on Pandemic Unemployment Assistance (PUA). Below you will find changes to the minimum weekly benefit under PUA. In addition, we have been advised that independent contractors will need to apply for unemployment insurance benefits. Once determined ineligible, you will be able to apply for PUA.

The Coronavirus Aid, Relief and Economic Security (“CARES”) Act includes increased unemployment insurance compensation benefits for individuals who are generally not eligible for unemployment benefits in ordinary circumstances. Specifically, the CARES Act adds Pandemic Unemployment Assistance (“PUA”), which provides benefits for independent contractors and self-employed individuals such as real estate salespeople who are not otherwise eligible for unemployment compensation. This is a dramatic departure from prior law and definitive regulations and rules for how PUA will be administered have not yet been published. At this time, we expect that traditional rules for benefit administration may be applied to independent contractors and self-employed individuals consistent with the way that eligibility rules have historically applied to traditional employees. **The process to apply for PUA is extremely fluid, however, and we will update this memorandum as additional guidance is**

made available.

The following is a list of frequently asked questions and our answers, based upon the current state of the law.

Q - Generally, when is an individual eligible for unemployment insurance compensation? How might these standards be applied to independent contractors?

A - Unemployment insurance is generally allowed only when someone is not working. Working is defined generally. In traditional employee-employer relationships, steps taken by a salesperson related to procuring a sale, like calling on a prospective customer, answering customers questions or demonstrating a product are all considered work even though a commission is not earned until a sale is consummated. The same standards are likely to apply to an independent contractor. Steps taken such as showing a house, meeting with a prospective client, and communicating with potential buyers and sellers are all activities which fit the general definition of work even though they are all preliminary to being paid a commission at the closing.

Q - What if a licensee is approved for PUA and continues to “work” by showing houses etc., will the PUA be reduced or does that only happen when they earn the commission when the closing occurs and they collect their commission?

A - New York does allow for something called “partial unemployment” in circumstances where a work week is reduced. For example, if someone is reduced from a full-time five days per week job, to a part-time job of less than four days per week, they are eligible for a partial payment based on a pro rata formula.

PUA is available for individuals who are self-employed or independent contractors. As with traditional employees, if independent contractors or self-employed individuals continue to work, they should be eligible for partial unemployment. With traditional employees, this would be based on how much their work week has been reduced. Although the determination of how a weekly benefit is calculated under PUA may be different, our practical advice is that realtors should keep track of their total hours and make a good faith estimate of what percentage of time they worked during a traditional work week. For example, if a traditional week involves forty to fifty hours of work and currently the realtor is working twenty to twenty-five hours, they can in good faith report they are working half time. A log keeping track of time will be very helpful for this purpose.

PUA will be comprised of two payments:

Revised 4/1/2020

- New York's maximum weekly unemployment benefit is \$504. A self-employed individual who works during a week, will have their benefit amount reduced by wages earned that week. However, it appears that the partial unemployment weekly benefit amount will not be less than 50% of the average weekly payment of regular compensation in the State of New York. This is \$172 for the period from January 1, 2020 through March 31, 2020 and \$182 for the period from April 1, 2020 through June 30, 2020.
- Individuals who receive partial PUA payments will also be eligible to receive an additional \$600 per week benefit through July 31, 2020, pursuant to the Federal Pandemic Unemployment Compensation ("PUC").

Because regulations are not yet published, we recommend that members maintain a log showing the detail of the work tasks and dates and times those tasks were performed. As we describe above, if traditional definitions apply to PUA benefits, the log will need to show that your work was limited to the specific days when the tasks performed are bundled. This log will be of immense benefit to you in the event of an audit.

Q - If a licensee is paid a commission for a property that closed how does that impact the PUA under the following circumstances:

- a) the closing occurred before the Executive Order but the commission was paid after***
- b) the closing occurred after the Executive Order and the commission was paid during the Executive Order***

A - We cannot be sure of the differing impact of earning a commission versus receiving payment of the commission. For this reason, we advise that members should apply for unemployment pursuant to PUA and provide accurate detailed information for benefits calculations. We expect additional regulatory guidance the US and NY Departments of Labor that should clarify the answers to these questions. In the meantime, we believe that benefits will be reduced and/or not be paid based upon when the independent contractor has "earnings" in a given week.

Q - If real estate related activities are deemed "essential," how would it impact the availability of PUA on the industry?

A - Even if real estate related activities are deemed essential, whether an individual will be eligible for PUA depends upon whether or not that individual is able to work. For this purpose, whether an industry is “essential” is not relevant to the test

Q - What must an independent contractor “show” that they are affected by COVID-19.

A - Independent contractors need to show that they are unable to work due to COVID-19. They do not need to show any additional impacts to be eligible for PUA. There are additional eligibility criteria for PUA that are inapplicable to self-employed individuals or independent contractors.

Q - The online application questions seem geared towards traditional employees as opposed to IC's with questions like, who is your employer and how many employers have you worked for in the last eight years? When was your last day of employment? Will you go on a job interview? Apparently, these are all mandatory questions and IC's are unsure how to respond. Is there any guidance we can provide?

A - Since the application process has not been updated yet, applicants should answer these questions as honestly and thoroughly as possible. PUA benefit decisions should be made by the government based upon the current laws regardless of the form of the current application. We do anticipate that the NY DOL will update the application based upon the current laws at some point.

For now, the applicant should state, “I am an independent contractor and have been so for (x) months/years.” The applicant should also state, “I am available for work.” Historical information about last employer, etc. should be answered truthfully.

The applicant may need to complete a separate application for PUA after the initial unemployment insurance application is reviewed.

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