EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION TAA
	CORRESPONDENCE SYMBOL OTAA
	DATE October 19, 2011

ADVISORY: **TRAINING AND EMPLOYMENT GUIDANCE LETTER NO.** 8-11

TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE LIAISONS
ONE-STOP CENTER SYSTEM LEADS
STATE WORKFORCE ADMINISTRATORS
STATE AND LOCAL WORKFORCE BOARD CHAIRS AND DIRECTORS
STATE LABOR COMMISSIONERS

FROM: JANE OATES
Assistant Secretary

SUBJECT: Availability of Equitable Tolling of Deadlines for Workers Covered Under Trade Adjustment Assistance (TAA) Certifications

1. **Purpose**. This Training and Employment Guidance Letter (TEGL) informs states of the Department of Labor's (Department) interpretation of the Trade Act, applicable to workers without regard to whether they were covered by certifications issued under the 2002 Amendments or the 2009 Amendments or any future law governing the TAA program, allowing equitable tolling of the statutory and regulatory TAA deadlines for: 1) enrolling in training as a condition of eligibility for Trade Readjustment Allowances (TRA) under section 231(a)(5)(A) of the Trade Act; 2) making a *bona fide* application to a training program as a condition of eligibility for Additional TRA under section 233(b); and 3) applying for job search allowances under section 237(a)(2)(C) and relocation allowances under section 238(a)(2)(E) and (c) of the Trade Act. In this context, this TEGL emphasizes to State Workforce Agencies or agencies designated by Governors as "Cooperative State Agencies" (CSAs) (also jointly referred to as "states") the critical importance of their responsibility to notify adversely affected workers that they are covered under a TAA certification and to supply them with TAA benefit information that explains these deadlines.

2. **References**. Chapter 2 of Title II of the Trade Act of 1974, as amended (Pub. L. No. 93-618, as amended) (Trade Act); Trade and Globalization Adjustment Assistance Act of 2009, Division B, Title I, Subtitle I of the American Recovery and Reinvestment Act of 2009, (Pub. L. No. 111-5) (2009 Amendments); Trade Adjustment Assistance Reform Act of 2002, Division A, Title I, Subtitle A of the Trade Act of 2002 (Pub. L. No. 107-210) (2002 Amendments); 20 CFR Part 617; TEGL No. 22-08, Operating Instructions for Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade and Globalization Adjustment Assistance Act of 2009; TEGL No. 11-02, Operating Instructions for

RESCISSIONS None	EXPIRATION DATE Continuing

Implementing the Amendments to the Trade Act of 1974 Enacted by the Trade Act of 2002, and its Change 1.

3. **Background**. Section 617.4 of 20 CFR requires states to provide TAA benefit information and assistance to workers, as provided under their agreements with the Secretary of Labor to implement the TAA program. As provided in this regulation, states must provide:

   A. Full information to workers about the benefit allowances, training, and other TAA employment services, the petition and application procedures, and the appropriate filing deadlines, for trade adjustment assistance allowances, training and services; and

   B. Whatever assistance is necessary to enable groups of workers, including unorganized workers, to prepare applications for program benefits.

States must provide this notice and assistance to all workers in a group covered under any TAA certifications, without regard to whether the certification is under the 2002 or 2009 Amendments or under any future law governing the TAA program. TEGL No. 11-02 and TEGL No. 22-08 also provide that states, as agents of the Secretary, must notify certified workers of potential Trade Act benefits and services, make eligibility determinations for individuals, and deliver TAA benefits and services.

Section 617.50(d) of 20 CFR explains that state law provisions and regulations on good cause for waiver of time limits, or for late filing of any claim, do not apply to TAA claims, except as provided by 20 CFR Part 617. This regulation applies to workers seeking TRA or TAA training under certifications issued under the 2002 Amendments, and also to workers seeking job search and relocation allowances without regard to whether they were covered under certifications issued under the 2002 or the 2009 Amendments or under any future law governing the TAA program. Under section 234(b) of the Trade Act as amended by the 2009 Amendments, state laws and regulations on good cause for waiver of time limits or late filing of claims apply to workers covered under certifications issued under the 2009 Amendments with respect to an application for TRA or enrollment in training.

TEGL No. 11-02, Change 1 describes the deadline for enrollment in training as a condition of TRA under section 231(a)(5)(A) of the Trade Act of 1974 (the "8/16 deadline") under the 2002 Amendments, as follows:

> "...either the last day of the 8th week after the week of issuance of the certification of eligibility covering the worker or the last day of the 16th week after the worker's most recent total qualifying separation, whichever is later (commonly referred to as the 8/16 week deadline)."

TEGL No. 11-02, Change 1 further explains that:

> The "8/16 week deadline" for a worker will be reached while the worker is still receiving unemployment insurance (UI). Some workers are not aware that this deadline may apply before they exhaust their UI. The state is responsible for informing workers of these requirements. The state must also assist such workers in enrolling in an approved training program prior to the 8/16 week deadline, or

issue the workers waivers [under section 231(c)] prior to the 8/16 week deadline, if appropriate.

Also, the regulation 20 CFR 617.15(b)(2), provides that:

> Additional TRA requires that the individual make a bona fide application for TAA training within 210 days from either the date of the certification or the most recent TAA separation.

This regulation applies only to workers seeking TAA training under certifications issued under the 2002 Amendments, because this 210-day deadline was repealed by the 2009 Amendments.

Also, the Trade Act contains additional filing deadlines for applying for job search allowances (section 233(b) and relocation allowances (section 237(a)(2)(C)), that are codified in the Department's longstanding regulations at 20 CFR 617.31(c), and 20 CFR 617.41(c), respectively. These regulations apply to all workers in a group covered under any TAA certifications, without regard to whether the certification is under the 2002 or 2009 Amendments or under any future law governing the TAA program.

4. Availability of Equitable Tolling.

A. What Is Equitable Tolling? Equitable tolling is a doctrine that permits the suspension of statutory and administrative deadlines where equity demands; it is not a statutory provision requiring a waiver of deadlines for "good cause". Unlike many statutory provisions allowing for "good cause" waiver of time limits, or for late filing of any claim, equitable tolling of a deadline may only apply in egregious circumstances where an individual acted with due diligence to meet that deadline. Federal courts have found that this well-established doctrine may provide relief with respect to TAA time limits, although no federal court has applied this doctrine to the time limits addressed by this TEGL. For additional information see *Former Employees of Sonoco Products Co. v. Chao*, 372 F.2d 1291, 1297-98 (Fed. Cir. 2004); *Former Employees of Fisher & Company, Inc. v. U.S. Department of Labor*, 507 F. Supp. 2d 1321, 1328) (CIT 2007); *Lady Kelly, Inc. v. U.S. Secretary of Agriculture*, 427 F. Supp. 1171, 1174-75 (CIT 2006). However, in these TAA decisions, and generally, courts rarely find that equitable tolling is appropriate.

B. When Should Equitable Tolling Apply? The Department has determined that equitable tolling will be applied in situations where it would be manifestly unfair to deny a worker TRA eligibility based on the worker's failure to meet the statutory deadline for enrolling in training, or to deny other TAA benefits such as Additional TRA, job search allowances or relocation allowances, based on a missed deadline. To apply equitable tolling in a particular situation, the state must determine that, whether or not the Department or the state was at fault, the worker exercised due diligence in meeting these TAA benefit eligibility deadlines.

For example, equitable tolling may apply where a worker was not informed of the 8/16 deadline while receiving unemployment insurance and before the 8/16

deadline expired. Another situation where equitable tolling may be appropriate is where the state did provide notice of TAA benefits and deadlines and where a worker did everything necessary to enroll in training by the 8/16 deadline, but was unable to do so because the state did not approve the training in time.

C. What Happens When A Deadline Is Equitably Tolled? When a deadline is equitably tolled, the deadline to enroll in training, apply for Additional TRA, job search allowances and relocation allowances is affected as follows:

i. Training: In the limited situations where a state finds that equitable tolling of the 8/16 deadline is appropriate where the worker did not receive timely notice, which meets the requirements of 20 CFR 617.4, and the worker acted diligently to obtain TAA benefits when notice was eventually provided, the deadline for enrollment in training will begin on the date the worker knew or should have known of the 8/16 deadline and will end on the last day of the 8th week (or the 56th day) following that date.

ii. Additional TRA: Likewise, the same action must be applied if the worker did not receive timely notice, which meets the requirements of 20 CFR 617.4, that eligibility for Additional TRA requires a bona fide application for TAA training as provided at 617.15(b)(2). Accordingly, the 210-day period must be afforded to the individual from the date the worker knew or should have known about the 210-day deadline.

iii. Job Search Allowances: The same action also must be applied in situations covering job search allowances. The time limits would be tolled if it is established that the worker did not receive timely notice, which meets the requirements of 20 CFR 617.4, that under 617.31(c), an application for job search allowances must be submitted before the 365th day after the certification, or the individual's last total separation, or as applicable, the 182nd day after the completion of TAA training. If the individual did not receive timely notice, which meets the requirements of 20 CFR 617.4, about the job search allowances, and if the individual did not complete TAA training, the 365-day period will begin when the individual knew or should have known about the deadline. If the individual completed TAA training, the 182-day period will begin when the individual knew or should have known about the deadline.

iv. Relocation Allowances: Similarly, the same action must be applied in situations covering relocation allowances. The time limits would be tolled if it is established that the worker did not receive timely notice, which meets the requirements of 20 CFR 617.4, that under 617.41(c), an application for relocation allowances must be submitted before the 425th day after the certification, or the individual's last total separation, or as applicable, the 182nd day after the completion of TAA training. If the individual did not receive timely notice, which meets the requirements of 20 CFR 617.4, about the relocation allowances, and if the individual did not complete TAA training, the 425-day period will begin when the individual knew or should have known of the deadline. If the individual completed TAA training, the 182-day period will begin when the individual knew or should have known about the deadline.

5. **Instructions**.

   A. *Application of Equitable Tolling to Pending and Future Claims*. In order to apply this interpretation concerning equitable tolling effective as soon as possible after issuance of this TEGL, to all workers in a group covered under any TAA certification, whether the certification is under the 2002 or 2009 Amendments or any future law governing the TAA program, states are required to:

      1. Inform all appropriate staff, including the appellate divisions of the state agency, of the availability of equitable tolling to eligibility deadlines for TAA benefits applicable to TAA claims or applications made by workers, as described in this TEGL; and

      2. Take appropriate action to apply equitable tolling in all determinations, redeterminations, and appeals on TAA deadlines issued on or after the date of this TEGL in accordance with 20 CFR 617.50(c) and 20 CFR 617.51.

   B. *Waiver of training requirement as a condition of TRA*. As established by TEGL No. 11-02, Change 1, waivers may only be issued before the expiration of the applicable deadline for enrollment in training, not after it has expired. This TEGL provides, however, that the deadlines may be extended for equitable reasons. Accordingly, where the enrollment deadline has been extended, for example, from April 1 to May 3, the worker, to qualify for TRA, must either be enrolled in training by that date or have a waiver of the training requirement. A state may not issue a waiver after May 3.

   C. *Extenuating Circumstances*. The exception to the 8/16 deadline for "extenuating circumstances" under section 231(a)(5)(A)(ii)(III) of the Trade Act, as explained in TEGL No. 11-02, continues to apply. The availability of equitable tolling does not preclude states from finding that extenuating circumstances justify a 45-day extension of the enrollment period. States will apply the 45-day extension of the enrollment period when appropriate to provide workers a longer period of time to be eligible for TRA, enroll in training or obtain a waiver, as a first option – before resorting to the application of equitable tolling.

6. **Inquiries**. Please direct all inquiries to the appropriate Regional Office.

7. **Attachment**.

   - Attachment 1: Availability of Equitable Tolling of Deadlines for Workers Covered Under Trade Adjustment Assistance Certifications TEGL - Questions and Answers

Attachment 1

Availability of Equitable Tolling of Deadlines for Workers Covered Under Trade Adjustment Assistance (TAA) Certifications

Questions and Answers

1. What is this TEGL about?

This TEGL reminds states of the critical importance of their responsibility to notify adversely affected workers that they are covered under a TAA certification and to provide them with TAA benefit information that explains TAA deadlines.

It also announces that the Department of Labor (Department) recognizes that TAA benefit deadlines may be equitably tolled for workers after those deadlines have passed.

2. What is equitable tolling?

Equitable tolling is a legal principle evolved from the common law of equity. The principle of equitable tolling provides that the statute of limitations will not bar a claim if the individual, despite reasonable care and diligent efforts, did not discover the injury until after the limitations period had expired. Courts have the authority to provide "equitable" remedies in situations where it would be unjust or unfair not to provide relief to a party as appropriate. If the court applies the doctrine, the failure to meet the deadline is excused and the individual will be allowed to proceed as if the time to meet the deadline had not expired.

Generally, when the time to meet a deadline is "tolled", it means that the time to meet the deadline has been stopped. Tolling the time to meet a deadline provides additional time to meet that deadline.

3. Why is the Department issuing this policy now?

The Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA) provided relief to workers who failed to meet deadlines for applying for Trade Readjustment Allowances (TRA) for "good cause" as provided in state laws and regulations for waiver of time limits or late filing of claims. These provisions expired in February 2011, and workers again were without statutory relief from strict TRA deadlines. Thereafter, the Illinois State Supreme Court, issued an opinion in *Williams v. Board of Review*, 2011 Westlaw 1049884 (Ill. March 24, 2011), applying the doctrine of "equitable tolling" to toll the strict deadline for enrolling in training (that was in effect before the TGAAA) because the worker, Ms. Williams, had not been notified by the State of her certification or advised of TAA training and benefit enrollment deadlines as required under 20 CFR Part 617.

In view of this decision and Federal court decisions applying this well-established doctrine in cases involving different Trade Act provisions, the Department now recognizes that equitable tolling may be available in situations where it would be manifestly unfair to deny a worker TAA benefits based on a missed deadline.

4. Does this TEGL apply to past determinations, or only to future decisions?

States are being instructed to take appropriate action to apply equitable tolling in all determinations, redeterminations, and appeals on TAA deadlines issued on or after the date of this TEGL in accordance with 20 CFR 617.50(c) and 20 CFR 617.51.

In particular, states are being asked to inform all appropriate staff, including the appellate divisions of the state agency, of the availability of equitable tolling to eligibility deadlines for TAA benefits applicable to TAA claims or applications made by workers, as described in this TEGL.

5. What specific deadlines are addressed in this TEGL?

This TEGL describes how equitable tolling applies to TAA benefit deadlines; and specifically identifies:

a) Deadline to enroll in training (Section 231(a)(5)(A) of the Trade Act)
b) Deadline to apply for Additional TRA (20 CFR 617.15(b)(2))
c) Deadline to apply for Job Search Allowances (20 CFR 617.31(c))
d) Deadline to apply for Job Relocation Allowances (20 CFR 617.41(c))

However, this list is not exclusive, and other TAA benefit deadlines may be equitably tolled in appropriate cases.