

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0388

Modified
Overpayment Not Assessed Week 15-20
Overpayment Assessed Weeks 18-20 and 19-20

PROCEDURAL HISTORY: On February 25, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant received benefits to which he was not entitled for the weeks of April 5, 2020 through April 11, 2020 and May 3, 2020 through May 9, 2020 (weeks 15-20 and 19-20), and assessing an overpayment of \$677.00 in regular unemployment insurance benefits and \$600.00 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department. Claimant filed a timely request for hearing. On April 19, 2021, ALJ Wyatt conducted a hearing at which the employer failed to appear, and on April 28, 2021 issued Order No. 21-UI-165735, modifying the February 25, 2021 administrative decision by concluding that claimant was not overpaid benefits for week 15-20, but was overpaid \$518.00 in regular benefits and \$600.00 in FPUC benefits for week 19-20. On May 15, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant was not overpaid benefits for the week of April 5, 2020 through April 11, 2020 (week 15-20) is **adopted**. The remainder of this decision addresses claimant's remuneration for the weeks including April 26, 2020 through May 9, 2020 (weeks 18-20 and 19-20), and the overpayments assessed for those weeks.

FINDINGS OF FACT: (1) Claimant worked for Nordstrom, Inc. from September 12, 2001 until October 16, 2020. The employer furloughed claimant from March 17, 2020 until August 1, 2020 due to the COVID-19 pandemic. Claimant did not work while he was furloughed.

(2) When claimant filed his initial claim for benefits, the Department determined that his weekly benefit amount (WBA) was \$518.00.

(3) On May 7, 2020, the employer issued claimant a paycheck for the pay period of April 26, 2020 through May 9, 2020. The check included a payout of \$730.55 in paid time off (PTO) for the same period of time. Claimant did not request the PTO payout. Rather, the employer paid each of their Oregon employees, including claimant, their respective accrued PTO balances if the employee had not worked for more than 35 days.

(4) Claimant claimed benefits for the weeks including April 26, 2020 through May 9, 2020 (weeks 18-20 through 19-20). Claimant did not report earnings during these two weeks.¹ The Department paid claimant his full WBA of \$518, as well as \$600 in FPUC benefits, for each of these two weeks.

CONCLUSIONS AND REASONS: Claimant had earnings in the amount of \$365.28 during both week 18-20 and week 19-20. Claimant was overpaid \$193.00 in regular benefits for each week, and was not overpaid FPUC benefits during either week.

Remuneration. ORS 657.150(6) states:

An eligible unemployed individual who has employment in any week shall have the individual's weekly benefit amount reduced by the amount of earnings paid or payable that exceeds whichever is the greater of the following amounts:

- (a) Ten times the minimum hourly wage established by the laws of this state; or
- (b) One-third of the individual's weekly benefit amount.

OAR 471-030-0017(1) (January 11, 2018) states, in relevant part:

* * *

(b) "Earnings" means remuneration;

(c) Where an employer-employee relationship exists, "remuneration" means compensation resulting from the employer-employee relationship, including wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips;

OAR 471-030-0017(3) states in relevant part that, for purposes of ORS 657.100 and 657.150(6), remuneration or an applicable pro-rata share thereof shall be allocated as follows:

- (a) In the case of services, allocated to the week in which the service was performed;

* * *

¹ EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

(d) If the dates of sale or service are not clearly established, allocation shall be made upon a reasonable estimate provided by the claimant. If the individual cannot or will not provide a reasonable estimate, the remuneration shall be allocated equally over the period during which services were rendered or products were sold.

In his written argument, claimant asserted that because the PTO payout resulted from “benefits earned before the pandemic,” and because he was not “free to use the time for any purpose” or “freed from work/job/employment duties” as he was “mandated . . . to stay home” as a result of government restrictions, the PTO payout should be excluded from the definition of “vacation” per OAR 471-030-0017(1)(h).² Claimant’s Written Argument at 2.

Regardless of whether the PTO payout was “vacation” pay, the record shows that the payout was remuneration under OAR 471-030-0017(1)(c) because claimant remained employed by the employer during the furlough, and the payment therefore constituted compensation resulting from the employer-employee relationship. Per OAR 471-030-0017(1)(c), such compensation includes “wages, salaries, incentive pay, sick pay, compensatory pay, bonuses, commissions, stand-by pay, and tips.” The rule does not specify that the types of compensation listed under that paragraph are the *only* types of compensation resulting from the employer-employee relationship which are considered remuneration. Therefore, *any* type of compensation resulting from the employer-employee relationship, unless otherwise proscribed by law or rule, is considered remuneration for purposes of determining whether an individual had “earnings” under ORS 657.150(6) paid or payable during a week in which benefits were claimed. As a result, claimant’s PTO payout is considered “earnings,” and the benefits claimed during the weeks in which the earnings accrued must be reduced accordingly.

The order under review concluded that the PTO payout of \$730.55 discussed above exceeded claimant’s weekly benefit amount for week 19-20. Order No. 21-UI-165735 at 3. The record does not support that conclusion. The paystub for the pay period at issue specifically states that the payout was for the dates of April 26, 2020 through May 9, 2020. Exhibit 1 at 17. At hearing, the Department’s witness offered contradictory testimony, stating that the employer’s representative had reported that claimant grossed \$730.55 “between the dates of May 7th and May 9th.” Transcript at 12. However, the Department’s witness did not offer more evidence to explain the apparent discrepancy between the employer’s representative’s report and the paystub which claimant submitted, and neither the employer nor their representative appeared at hearing. Therefore, the weight of the evidence favors claimant’s documentary evidence, which was issued to him directly by the employer, and the payout is therefore attributable to the entire period of April 26, 2020 through May 9, 2020.

Further, because the “dates of sale or service” during which the PTO hours were applied are not “clearly established,” and because claimant was not otherwise able to “provide a reasonable estimate” for the same, the remuneration must be equally allocated over the two-week period, per OAR 471-030-0017(3)(d). Therefore, claimant had earnings in the amount of \$365.28 during both weeks 18-20 and 19-20. Accordingly, per the formula indicated by ORS 657.150(6), claimant’s WBA should be reduced to \$325.00 for each of these two weeks.

² OAR 471-030-0017(1)(h) provides, “[f]or purposes of ORS 657.150(7), the term “vacation” means a specific period of time, paid or unpaid, during which the individual is freed from work/job/employment duties and responsibilities and is free to use the time away from work for any purpose the individual chooses.”

Overpayment of regular benefits. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.* In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

Claimant was paid his full WBA of \$518.00 for both weeks 18-20 and 19-20. Claimant had earnings in the amount of \$365.28, and therefore was only eligible for benefits in the amount of \$325.00, for each of these weeks. Therefore, claimant was overpaid by \$193.00 in regular benefits for each of these weeks, for a total overpayment of \$385.24 in regular benefits. Because claimant was paid benefits to which he was not entitled as result of his failure to disclose the fact that he had earnings during those weeks, claimant is liable to repay the overpaid benefits to the Department or have the amount of the benefits deducted from any future benefits otherwise payable to him.

Overpayment of FPUC benefits. Under the CARES Act Pub. L. 116-136, for any week in which an individual is otherwise entitled under state law to receive regular benefits, the individual is also entitled to \$600.00 in FPUC benefits. Pub. L. 116-136, § 2104(b)(1).

The order under review concluded that because the PTO payout exceeded claimant's WBA for week 19-20, and he was therefore not entitled to regular benefits during that week, claimant was also ineligible to receive FPUC benefits during week 19-20 and liable to repay the \$600 in FPUC the Department had paid him. Order No. 21-UI-165735 at 4. However, as discussed above, the PTO payout should be allocated across both week 18-20 and 19-20. Because this results in claimant remaining eligible for some regular benefits during both weeks, claimant is also eligible for FPUC benefits during those weeks. Therefore, claimant was not overpaid \$600 in FPUC benefits for week 19-20 and is not liable to repay those funds to the Department.

For the above reasons, claimant was overpaid \$386.00 in regular benefits which he is required to repay to the Department, and was not overpaid FPUC benefits.

DECISION: Order No. 21-UI-165735 is modified, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: June 21, 2021

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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