

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0154**

*Affirmed*  
*Eligible for Benefits Weeks 44-21 through 46-21*

**PROCEDURAL HISTORY:** On November 24, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was available for work from October 31, 2021 through November 20, 2021 (weeks 44-21 through 46-21) and therefore is eligible for unemployment insurance benefits for those weeks (decision # 134934). The employer filed a timely request for hearing. On January 20, 2022, ALJ Kaneshiro conducted a hearing, at which claimant failed to appear, and issued Order No. 22-UI-184493, affirming decision # 134934. On January 24, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Prior to October 17, 2021, claimant was employed by St. Charles Health System, Inc. as a registered nurse.

(2) In September 2021, the employer enacted a policy, in line with an executive order issued by the governor and administrative rules adopted by the Oregon Health Authority (OHA), which required all employees to either become vaccinated against COVID-19 or obtain a religious or medical exception from vaccination. Under the employer's policy, employees who were unvaccinated and granted an exception from vaccination were not permitted to work on-site at the employer's medical facilities. Instead, such employees would be required to either accept an unpaid leave of absence or attempt to find another position in the company which allowed for remote work.

(3) On September 27, 2021, claimant requested a religious exception, which the employer granted. Thereafter, the employer notified claimant that she could either attempt to find another position in the company which allowed for remote work, or accept a leave of absence. Claimant elected to accept a leave of absence, and remained employed and on a leave of absence with the employer through at least January 20, 2022.

(4) On November 4, 2021, claimant filed an initial claim for unemployment insurance benefits. The Department determined claimant's weekly benefit amount to be \$733.

(5) Claimant claimed benefits for the weeks from October 31, 2021 through November 20, 2021 (weeks 44-21 through 46-21), the weeks at issue. The Department paid claimant benefits for those weeks.

(6) Claimant's regular occupation was a registered nurse. The Department determined that claimant's labor market for this work was Bend, Prineville, Redmond, Sisters, Tumalo, and Deschutes County, and that such work was performed in claimant's labor market during all hours and days.

(7) During the weeks at issue, claimant sought work as a travel nurse, and other nursing positions. Claimant made two direct contacts with employers, and performed three other work seeking activities, during each of the weeks at issue.

**CONCLUSIONS AND REASONS:** Claimant was able to work, available for work, and actively seeking work during the weeks at issue.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c).

To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed as defined by OAR 471-030-0036(3) (December 8, 2019); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, or a public health emergency declared under ORS 433.441, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (effective September 13, 2020). Temporary OAR 471-030-0036(3) (September 26, 2021 through March 24, 2022) provides that a person shall be considered available for work if, at a minimum, the individual is:

(a) Willing to work full time, part time, and accept temporary work opportunities, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and

(b) Capable of accepting and reporting for suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities[.]

\* \* \*

(h) For the purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if:

(A) The individual turns down an offer of or misses scheduled, suitable work[.]

\* \* \*

With few exceptions that do not apply here, to be actively seeking work as required under ORS 657.155(1)(c), an individual "must conduct at least five work-seeking activities per week," with two of the five work-seeking activities being direct contact with an employer who might hire the individual. Temporary OAR 471-030-0036(4)(a) (September 26, 2021 through March 24, 2022). "Direct contact"

means “making contact with an employer . . . to inquire about a job opening or applying for job openings in the manner required by the hiring employer.” Temporary OAR 471-030-0036(4)(a)(B).

During the weeks at issue, claimant was on leave with her regular employer because she was not vaccinated against COVID-19 and had received a religious exception. Because the employer would not have permitted claimant to continue performing work in her regular role as a registered nurse due to her vaccination status, the record does not show that any scheduled, suitable work was available to claimant with her regular employer during that time.

Further, the record does not show that claimant was not capable of accepting and reporting for suitable work opportunities within the labor market in which she was seeking work during the weeks at issue. The only evidence in the record that would suggest otherwise is the fact that claimant was not vaccinated, which might have rendered her incapable of accepting or reporting for work if other nursing jobs in claimant’s labor market typically required nurses to be vaccinated at the time, as claimant’s regular employer did. However, at hearing, the employer’s witness acknowledged that there were “some health systems who have chosen not to abide by the Governor’s mandate, and are allowing employees to work while unvaccinated.” Transcript at 20. Further, while the employer’s witness testified that the employer did not hire unvaccinated travel nurses, the record does not show where claimant was applying for travel nurse work. Transcript at 20. Given the divergent governmental response to the COVID-19 pandemic from state to state and locality to locality, claimant may well have applied to work as a travel nurse in places where vaccination was not required in order to perform nursing work on-site at medical facilities.

Because the Department paid claimant benefits for the weeks at issue, the Department has the burden of proof to show that benefits should not have been paid. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits). For the reasons discussed above, the Department has not met their burden here. The record therefore shows that claimant was capable of accepting and reporting for suitable work during the weeks at issue. Additionally, the record shows that claimant performed the required work seeking activities under OAR 471-030-0036(4)(a)(B) during each of the weeks at issue, and no evidence in the record suggests that claimant was either physically or mentally incapable of performing the work she sought during the weeks at issue.<sup>1</sup> Therefore, claimant was able to work, available for work, and actively seeking work during the weeks at issue, and is therefore eligible for benefits for those weeks.

**DECISION:** Order No. 22-UI-184493 is affirmed.

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

**DATE of Service:** March 9, 2022

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<sup>1</sup> *See* Temporary OAR 471-030-0036(2).

**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](https://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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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