

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0283**

*Reversed & Remanded*  
*Eligible ~ Weeks 28-21 and 29-21*  
*Remanded on Weeks 30-21 through 51-21*

**PROCEDURAL HISTORY:** On December 28, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work from July 11, 2021 through December 25, 2021 (weeks 28-21 through 51-21), and therefore ineligible for insurance benefits for those weeks (decision # 104837). Claimant filed a timely request for hearing. On February 9, 2022, ALJ Frank conducted a hearing, and on February 14, 2022 issued Order No. 22-UI-186343, affirming decision # 104837 by concluding that claimant was not available for work during weeks 28-21 through 51-21, and therefore ineligible to receive benefits for those weeks. On March 1, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) On July 17, 2021, claimant filed her initial claim for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$304.<sup>1</sup>

(2) Claimant suffers from a lifelong medical condition which renders her unable to receive the COVID-19 vaccine. Were claimant to be vaccinated against COVID-19, she could suffer significant health consequences, including falling into a coma. Because employers in the field in which claimant worked

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<sup>1</sup> EAB has taken notice of this fact, which is contained in Employment Department records/a generally cognizable fact/within EAB's specialized knowledge. 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.

typically required employees to be vaccinated if working onsite, claimant was only able to work from home. However, claimant was willing to work onsite for employers if she was permitted to do so without becoming vaccinated.

(3) Prior to filing her initial claim, claimant worked for approximately 28 to 35 hours per week as an intervention specialist for her employer. Around July 2021, the employer reduced claimant's hours. Thereafter, claimant only worked between one and twelve hours per week for the employer.

(4) Claimant claimed benefits for the weeks from July 11, 2021 through December 25, 2021 (weeks 28-21 through 51-21), the weeks at issue. The Department paid claimant benefits for all of the weeks at issue. The Department determined that claimant's labor market during the weeks at issue was the Eugene, Oregon area.

(5) During the weeks at issue, claimant continued to work part time for the employer and reported her earnings during each of the weeks. Claimant reported earnings in excess of her weekly benefit amount during week 28-21, and earnings less than her weekly benefit amount for all the other weeks at issue.<sup>2</sup>

(6) During some of the weeks at issue, claimant did not report having made direct contacts with employers who might have hired her, other than her current employer. During other weeks at issue, claimant made contact with other employers who might have hired her for remote-work positions.

**CONCLUSIONS AND REASONS:** Claimant was available for work during the weeks at issue. Claimant actively sought work during weeks 28-21 and 29-21. Order No. 22-UI-186343 is set aside and this matter remanded for further development of the record to determine whether claimant actively sought work during weeks 30-21 through 51-21.

**Available for work.** For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be, in relevant part, capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities. *Former* OAR 471-030-0036(3)(b) (effective December 8, 2019 through August 1, 2020 and December 27, 2020 through September 25, 2021); *Former* OAR 471-030-0036(3)(b) (effective September 26, 2021 through March 24, 2022).<sup>3</sup>

The order under review concluded that claimant was not available for work during the weeks at issue because "claimant had restricted her geographic availability for work during the period claimed to the confines of her own home," and was therefore not capable of accepting and reporting for suitable work

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<sup>2</sup> EAB has taken notice of these facts, which are 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.

<sup>3</sup> As of September 26, 2021, OAR 471-030-0036(3)(b) was amended to remove the word "any" from the rule, thereby requiring individuals to simply be, in relevant part, "capable of accepting and reporting for suitable work opportunities within the labor market in which work is being sought[.]" As the outcome of this matter does not turn on whether claimant was specifically available for *any* suitable work opportunities, the distinction between the two versions of the rule is not addressed further in this decision.

opportunities within her labor market. Order No. 22-UI-186343 at 2. The record does not support that conclusion.

The record shows that claimant's restriction to working from home is the result of two conflicting conditions: her medical inability to become vaccinated against COVID-19 and the general requirements of employers in her field that she must be vaccinated in order to work in-person at their facilities. However, OAR 471-030-0036(3)(b) only requires individuals to be available for *suitable* work opportunities. Under ORS 657.190, a determination of whether work is suitable for an individual depends on a number of factors which include, in relevant part, "the degree of risk involved to the health, safety and morals of the individual." Here, work that would require claimant to become vaccinated as a precondition for working on-site for an employer in claimant's field would pose an unreasonable risk to her health. Therefore, no such work would be suitable for claimant under ORS 657.190. However, the record also shows that claimant continued to work remotely for her employer during the weeks at issue, and does not otherwise indicate that claimant was unlikely to be hired for remote work by other employers in her field. Therefore, because claimant was available for remote work opportunities with both her employer and other employers, and those work opportunities were suitable work opportunities within claimant's labor market, she was available for work during the weeks at issue.

**Actively seeking work – weeks 28-21 through 38-21.** To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed as defined by OAR 471-030-0036(5)(a); ORS 657.155(1)(c). However, during a state of emergency declared by the Governor under ORS 401.165, the Department may waive, otherwise limit, or modify the requirements of OAR 471-030-0036. OAR 471-030-0071 (September 13, 2020). Paragraph (4) of Oregon Employment Department Temporary Rule for Unemployment Insurance Flexibility (March 8, 2020), <http://records.sos.state.or.us/ORSOSWebDrawer/Recordpdf/7604239> [hereinafter OED Temporary COVID-19 Rule], provides the following:

The federal Families First Coronavirus Response Act permits states to temporarily modify their unemployment insurance laws regarding work search requirements on an emergency basis to respond to the spread of COVID-19 (Section 4102(b)). Because of the vital importance to public health and safety of mitigating the spread of COVID-19, social distancing measures must be maintained. Accordingly, effective the week ending March 28, 2020, notwithstanding OAR 471-030-0036, and unless otherwise notified in writing by the Employment Department, a person will be considered actively seeking work for purposes of ORS 657.155 if they are willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise are no longer in effect.

Absent the exceptions created by the OED Temporary COVID-19 Rule, the version of OAR 471-030-0036 effective during weeks 28-21 through 38-21 required individuals to conduct at least five work seeking activities per week, two of which must be a direct contact with an employer who might hire the individual, unless, in relevant part, the individual was temporarily unemployed. OAR 471-030-0036(5)(a). "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." OAR 471-030-0036(5)(a)(B).

For individuals who are temporarily unemployed, OAR 471-030-0036(5)(b) defines "actively seeking work" as follows:

(A) They are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer;

(B) There is a reasonable expectation that they will be returning to work for their regular employer. The work the individual is returning to must be full time or pay an amount that equals or exceeds their weekly benefit amount;

(C) The department will not consider the individual to be temporarily unemployed if they were separated from their employer for reasons other than a lack of work, the work the individual is returning to is not with their most recent employer, or the length the individual is unemployed is longer than the period described in subsection (D) of this section; and

(D) The department will consider that the period for which an individual is temporarily unemployed:

(i) Begins the last date the individual performed services for the employer. In the case of an individual still working for the employer, it is the last date worked during the week in which the individual had earnings less than their weekly benefit amount; and

(ii) Cannot be greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work as described in subsection (B) of this section.

As a preliminary matter, the Department's witness testified at hearing that the Department did not reinstate the work-search requirements until the week of July 25, 2021 (week 30-21). Transcript at 5. Therefore, under the OED Temporary COVID-19 Rule, claimant could meet the actively seeking work requirement for weeks prior to week 30-21 merely by remaining willing to look for work when state and local emergency declarations related to the coronavirus expire or otherwise were no longer in effect. The record, including claimant's work searches (contained in Exhibits 1 and 2), shows that claimant was continuously looking for work, either with her current employer or other employers, during the weeks at issue. As such, the record supports the conclusion that claimant was, more likely than not, willing to look for work once the emergency declarations were no longer in effect, and claimant therefore actively sought work during weeks 28-21 and 29-21.

Further inquiry is necessary to resolve two separate questions, which will in turn determine whether claimant was actively seeking work during weeks 30-21 through 38-21. First, the OED Temporary COVID-19 Rule remained in effect through week 38-21. Thus, until and unless the Department notified claimant in writing that she was required to begin seeking work, claimant was not required to perform any work seeking activities in order to be considered to have actively sought work during those weeks. On remand, inquiry should be made to determine when, if at all, the Department notified claimant in writing that she was required to seek work.

Second, the record suggests that claimant may have been temporarily unemployed for some or all of the weeks including weeks 29-21 through 33-21. The record shows that the last week in which claimant earned more than her weekly benefit amount was week 28-21; and that for every week thereafter, including week 29-21, claimant continued to work but earned less than her weekly benefit amount. Therefore, under OAR 471-030-0036(5)(b)(D)(i), claimant became temporarily unemployed on the last date on which she worked during week 29-21. Under OAR 471-030-0036(5)(b)(D)(ii), claimant could not have been considered temporarily unemployed for longer than the period of four weeks that followed the week in which she became temporarily unemployed. In this case, the last of those four weeks was week 33-21. However, it is not clear from the record whether claimant had, during those weeks, a reasonable expectation that she would be returning to full time work (or work that paid an amount that equaled or exceeded her weekly benefit amount) for the employer as required by OAR 471-030-0036(5)(b)(B). On remand, the ALJ should develop the record to show whether claimant had an expectation, during weeks 29-21 through 33-21, of returning to full time work (or work that paid an amount that equaled or exceeded her weekly benefit amount) for the employer; and, if so, when she expected to return to such work and whether those expectations were reasonable.

If the record shows that claimant had written notice from the Department prior to some or all of weeks 30-21 through 38-21 that she was required to seek work, and, if so, that claimant was not temporarily unemployed during some or all of weeks 30-21 through 33-21, the ALJ should make a week-by-week inquiry to determine whether claimant performed five work seeking activities, including two direct contacts with employers who might have hired her, during any weeks in which she was required to seek work.

**Actively seeking work – weeks 39-21 through 51-21.** As of September 26, 2021, the OED Temporary COVID-19 Rule, and its exception to the requirement that claimants seek work, was no longer in effect. Therefore, regardless of whether claimant had written notice of the requirement that she seek work, the actively seeking work requirements of OAR 471-030-0036(4)(a)<sup>4</sup> applied to claimant for weeks 39-21 through 51-21. The record as developed is insufficient to determine whether claimant met those requirements for any of weeks 39-21 through 51-21. For many of these weeks, claimant reported that her direct employer contacts were made to one or both of the two legal entities<sup>5</sup> that, together, constituted the employer for whom claimant worked. *See* Exhibit 1 at 2–4; Exhibit 2 at 7–9. Despite the fact that the employer was organized into two separate entities, however, the record shows that claimant was for practical purposes working for, and contacting, only one employer. For some of the weeks, claimant also reported what appear to be contacts with at least one additional employer. On remand, the ALJ should make a week-by-week inquiry to determine whether claimant performed five work seeking activities, including two direct contacts with employers who might have hired her, during each of weeks 39-21 through 51-21. Additionally, the ALJ should inquire as to whether claimant’s contacts with her regular

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<sup>4</sup> The September 26, 2021 temporary amendments to OAR 471-030-0036, effective September 26, 2021 through March 22, 2022, did not change the description of what constitutes “work-seeking activities,” as discussed previously in this decision. However, that description, previously found in subparagraph (5)(a), was renumbered and is now located at subparagraph (4)(a).

<sup>5</sup> Transcript at 18.

employer during weeks 39-21 through 51-21 were made in the manner required by the employer, as required by *Temporary* OAR 471-030-0036(4)(a)(B).<sup>6</sup>

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant actively sought work during weeks 30-21 through 51-21, Order No. 22-UI-186343 is reversed, and this matter is remanded.

**DECISION:** Order No. 22-UI-186343 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** May 5, 2022

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-186343 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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<sup>6</sup> “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.”



# 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.

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