

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0664

Order No. 23-UI-226103 Affirmed – Late Request for Hearing on Decision # 84116 Dismissed
Order No. 23-UI-226291 Modified – Overpayment, No Penalties

PROCEDURAL HISTORY: On June 22, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving benefits effective January 26, 2020 (decision # 84116). On July 12, 2021, decision # 84116 became final without claimant having filed a request for hearing. On March 30, 2022, the Department served notice of an administrative decision based in part on decision # 84116, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of \$4,706.00 in regular unemployment insurance (regular UI), \$2,353.00 in Pandemic Emergency Unemployment Compensation (PEUC), \$10,800.00 in Federal Pandemic Unemployment Compensation (FPUC), and \$1,800.00 in Lost Wages Assistance (LWA) benefits that claimant was required to repay, a \$2,678.85 monetary penalty, and a 52-week disqualification from future benefits. On April 3, 2022, claimant filed a late request for hearing on decision # 84116 and a timely request for hearing on the March 30, 2022 administrative decision.

On May 19, 2023, ALJ Enyinnaya conducted hearings on both administrative decisions. On May 25, 2023, ALJ Enyinnaya issued Order No. 23-UI-226103, dismissing claimant's request for hearing on decision # 84116 as late without good cause and leaving that administrative decision undisturbed. On May 26, 2023, ALJ Enyinnaya issued Order No. 23-UI-226291, modifying the March 30, 2022 administrative decision by concluding that claimant did not willfully make a misrepresentation to obtain benefits and was not liable for a monetary penalty or penalty weeks, but was liable for an overpayment of \$7,059 in regular UI benefits, \$10,800 in FPUC benefits, and \$1,800 in LWA benefits to be deducted from future benefits payable to claimant. On June 2, 2023, the Department filed an application for review of Order No. 23-UI-226291 with the Employment Appeals Board (EAB). On June 12, 2023, claimant filed applications for review of Orders No. 23-UI-226103 and 23-UI-226291 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-226103 and 23-UI-226291. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-0664 and 2023-EAB-0636).

WRITTEN ARGUMENT: Claimant submitted a written argument in connection with her appeal of Order No. 23-UI-226103. EAB did not consider this written argument when reaching this decision because claimant did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

Claimant and the Department both submitted written arguments in connection with their appeals of Order No. 23-UI-226291. EAB did not consider claimant's written argument because claimant did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a). EAB considered the Department's written argument when reaching this decision.

FINDINGS OF FACT: (1) Beginning at least as early as the winter of 2017, Bay View Bistro, LLC employed claimant as a server at their restaurant. The restaurant was located in a town on the Oregon Coast and had substantially less business in the winters when there were fewer tourists. In the winters of 2017 and 2018, the employer offered claimant reduced hours and, during some weeks, had no work to offer claimant at all.

(2) In early December 2019, claimant found that business was slowing and the employer was offering her fewer hours. At that time, claimant's manager informed claimant that eventually claimant was "going to be laid off," meaning the employer would not offer claimant any hours as had occurred when business slowed in the winter of prior years. Transcript at 18.

(3) On December 27, 2019, claimant filed an initial claim for regular unemployment insurance (regular UI) benefits. The Department determined claimant had a valid claim with a weekly benefit amount of \$181. Thereafter, claimant claimed benefits each week into early 2020 while working less than full time for the employer. Eventually, claimant stopped claiming benefits each week.

(4) On January 10, 2020, the employer suspended claimant for two weeks as discipline for claimant having previously been absent for a shift without notice. On January 24, 2020, the suspension ended. On or about that date, claimant went to the restaurant to see if she was on the schedule to work. Claimant's manager was not there and claimant was not scheduled to work any shifts on the restaurant's schedule. Thereafter, claimant called the restaurant multiple times but could not reach the manager. Claimant went to the restaurant in person four or five more times through the early part of February 2020, but the manager was not there and claimant was not scheduled to work. Based on the foregoing, claimant believed she remained in an employment relationship with the employer but that the employer had laid her off by not offering her any hours, as had occurred in the winter of prior years.

(5) On March 21, 2020, claimant restarted her regular UI initial claim. When she did so, the Department's restart form asked claimant to report her work status, and claimant chose the status of "still working" for the employer. Transcript at 6. Claimant believed "still working" was an accurate description because she believed she remained in an employment relationship with the employer since, although she had not made contact with the manager or been scheduled for any hours, she thought she would continue working for them when business picked up.

(6) Claimant claimed benefits for the weeks from March 15 through 21, 2020 (week 12-20), March 29 through November 7, 2020 (weeks 14-20 through 45-20), November 15 through 21, 2020 (week 47-20),

and December 6, 2020 through January 9, 2021 (weeks 50-20 through 01-21). These are the weeks at issue.

(7) The Department paid claimant \$181 in regular UI benefits for each of weeks 12-20 and 14-20 through 38-20, for a total of \$4,706 in regular UI benefits. The Department paid claimant \$181 in PEUC benefits for each of weeks 39-20 through 45-20, 47-20, and 50-20 through 01-21, for a total of \$2,353 in PEUC benefits. The Department paid claimant \$600 in FPUC benefits for each of weeks 14-20 through 30-20 and \$300 for each of weeks 53-20 and 01-21, for a total of \$10,800 in FPUC benefits. The Department paid claimant \$300 in LWA benefits for each of weeks 31-20 through 36-20, for a total of \$1,800 in LWA benefits.

(8) After the Department paid claimant for the weeks at issue, it determined that claimant had separated from work with the employer, and subsequently adjudicated the work separation. On June 22, 2021, the Department issued decision # 84116, which concluded that claimant had quit working for the employer without good cause and was disqualified from receiving benefits effective January 26, 2020. Order No. 23-UI-226103, Exhibit 1 at 1. On July 12, 2021, decision # 84116 became final without claimant having filed a request for hearing.

(9) On April 3, 2022, claimant filed a late request for hearing on decision # 84116. ALJ Enyinnaya conducted a hearing regarding decision # 84116, and on May 25, 2023 issued Order No. 23-UI-226103, dismissing claimant's request for hearing as late without good cause and leaving decision # 84116 undisturbed.

CONCLUSIONS AND REASONS: Order No. 23-UI-226291 is modified. Claimant is liable for an overpayment of \$4,706 in regular UI benefits and is liable to repay the benefits or have the amount of the benefits deducted from future benefits payable during the five-year period following the date the March 30, 2022 administrative decision becomes final. Claimant is liable for overpayments of \$2,353 in PEUC benefits, \$10,800 in FPUC benefits, and \$1,800 in LWA benefits to be recovered in accordance with the same procedures as apply to recovery of claimant's regular UI overpayment. Claimant is not liable for a monetary penalty or penalty weeks.

Order No. 23-UI-226103. Based on a *de novo* review of the entire record in the case, and pursuant to ORS 657.275(2), Order No. 23-UI-226103, which dismissed claimant's request for hearing on decision # 84116 as late without good cause, is **adopted**.

Order No. 23-UI-226291. Based on a *de novo* review of the entire record in the case, and pursuant to ORS 657.275(2), the portion of Order No. 23-UI-226291 concluding that claimant did not willfully make a false statement to obtain benefits and therefore is not liable for a monetary penalty or penalty weeks is **adopted**. The remainder of this decision relates to claimant's overpayments and the methods by which the Department may seek recovery of the overpayments.

Overpayment of Regular UI benefits. ORS 657.310(1)(a) 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.* Such benefits “may be collected for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.” ORS 657.310(1)(c).

ORS 657.315(1)(a) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

The order under review concluded that claimant was overpaid \$7,059 in regular UI benefits that she was liable to repay the Department under ORS 657.315. Order No. 23-UI-226291 at 5. The record supports that claimant was overpaid regular UI benefits. The record does not support the conclusions that the amount of claimant's regular UI overpayment was \$7,059 or that ORS 657.315 governs the methods by which the Department may recover the overpayment.

The Department paid claimant \$181 in regular UI benefits for each of weeks 12-20 and 14-20 through 38-20 for a total of \$4,706. It paid claimant \$181 in PEUC benefits for each of weeks 39-20 through 45-20, 47-20, and 50-20 through 01-21 for a total of \$2,353 in PEUC benefits. Therefore, the correct amount claimant was paid in regular UI benefits was \$4,706, not \$7,059.

The \$4,706 in regular UI benefits claimant received were benefits to which she was not entitled because when claimant restarted her claim, she reported that her work status was “still working” when, based on decision # 84116, claimant had quit work without good cause. Order No. 23-UI-226103 dismissed claimant's request for hearing on decision # 84116 as late without good cause, leaving that decision undisturbed, and EAB has affirmed Order No. 23-UI-226103. Therefore, the conclusion in decision # 84116 remains in effect. As such, decision # 84116 and its conclusion that claimant quit without good cause and was disqualified from receiving benefits effective January 26, 2020 are binding as a matter of law.

Unemployed individuals who are disqualified from receiving unemployment insurance benefits are not eligible to receive benefits. ORS 657.155(1)(e) (“An unemployed individual shall be eligible to receive benefits with respect to any week only if . . . the individual is not disqualified from benefits[.]”). Under ORS 657.176(2)(c), if the Department finds that an individual voluntarily left work without good cause, the individual “shall be disqualified from the receipt of benefits” until the claimant earns four times their weekly benefit amount for work performed in subject employment starting with the week after the week of the voluntary leaving. Because claimant quit without good cause, she was disqualified from receiving benefits effective January 26, 2020. The record does not show that she earned four times her weekly benefit amount before she received benefits for the weeks at issue, so there is no indication that claimant's disqualification ended before she received the benefits. Accordingly, claimant was overpaid benefits for the weeks at issue because, as of January 26, 2020, she was disqualified from receiving benefits and therefore received benefits to which she was not entitled.

Because claimant reported that she was “still working” on her restart form, the Department was not aware that claimant quit work without good cause. It therefore paid claimant for the weeks at issue

when, if it was aware that claimant had voluntarily quit without good cause, it would not have done so. Therefore, claimant's statement that her work status was "still working" constituted a false statement or omission of material fact that caused her to receive regular UI benefits to which she was not entitled. Although claimant may have sincerely believed "still working" was an accurate description of her work status because she believed she remained in an employment relationship with the employer, claimant's belief that she did not make a false statement is immaterial because ORS 657.310(1)(a) provides that its provisions are applicable regardless of the individual's knowledge or intent.

As such, claimant made a false statement by reporting "still working" and was overpaid \$4,706 in regular UI benefits. Claimant is liable under 657.310(1)(c) to repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to claimant during the five-year period following the date the March 30, 2022 administrative decision becomes final.

Repayment of PEUC Benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9025, claimant also received \$2,353 in PEUC benefits to which she was not entitled because she was not eligible for benefits under state law, as explained above. Pursuant to 15 U.S.C. § 9025(e)(2), an individual who receives PEUC payments to which the individual was not entitled is liable to repay those benefits, unless the Department waives such repayment because it determines that the payment of those benefits was without fault on the part of the individual and such repayment would be contrary to equity and good conscience. The record does not show the Department has waived repayment here.

Therefore, claimant is liable for the overpayment of \$2,353 in PEUC benefits she received during the weeks at issue. Under 15 U.S.C. § 9025(e)(3), the Department may recover the PEUC benefits by deduction from any future PEUC payments payable to her or from any future unemployment compensation payable to her under any state or federal unemployment compensation law administered by the Department during the three-year period following the date she received the PEUC benefits to which she was not entitled.

United States Department of Labor guidance documents elaborate that while a PEUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies "must recover the amount of PEUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [UI] paid by the State." U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 17-20 (April 10, 2020) (UIPL 17-20), at I-11. "After three years, a State may continue to recover PEUC overpayments through means other than benefit offsets, according to State law." UIPL 17-20 at I-11; *see also* U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 17-20, Change 1 (May 13, 2020) at I-8 ("[15 U.S.C. § 9025(e)(3)] requires benefit offset as one method of recovery, but states can also use other means to recover PEUC overpayments as allowable under state or Federal law[.]"). Accordingly, because the provision of state law governing claimant's regular UI overpayment is ORS 657.310(1)(c), claimant is liable to repay the amount of her PEUC overpayment or have it deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date the March 30, 2022 administrative decision becomes final.

Repayment of FPUC Benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received \$10,800 in FPUC benefits to which she was not entitled because she was not eligible for benefits under state law as explained above. *See* U.S. Dep't of Labor, Unemployment Insurance

Program Letter No. 15-20 (April 4, 2020) at I-7 (“If an individual is deemed ineligible for regular compensation in a week and the denial creates an overpayment for the entire weekly benefit amount, the FPUC payment for the week will also be denied. And the FPUC overpayment must also be created.”). Pursuant to 15 U.S.C. § 9023(f)(2), an individual who receives FPUC payments to which the individual was not entitled is liable to repay those benefits, unless the Department waives such repayment because it determines that the payment of those benefits was without fault on the part of the individual and such repayment would be contrary to equity and good conscience. The record does not show the Department has waived repayment here.

Claimant therefore is liable for the overpayment of \$10,800 in FPUC benefits she received during the weeks at issue. Under 15 U.S.C. § 9023(f)(3)(A), the Department may recover the FPUC benefits by deduction from any future FPUC payments payable to claimant or from any future unemployment compensation payable to claimant under any state or federal unemployment compensation law administered by the Department during the three-year period following the date she received the FPUC benefits to which she was not entitled.

United States Department of Labor guidance documents elaborate that while an FPUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies “must recover the amount of FPUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [UI] paid by the State.” U.S. Dep’t of Labor, Unemployment Insurance Program Letter No. 15-20 (April 4, 2020) (UIPL 15-20), at I-7. “After three years, a State may continue to recover FPUC overpayments through means other than benefit offsets, according to State law.” UIPL 15-20 at I-7. Accordingly, because the provision of state law governing claimant’s regular UI overpayment is ORS 657.310(1)(c), claimant is liable to repay the amount of her FPUC overpayment or have it deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date the March 30, 2022 administrative decision becomes final.

Repayment of LWA Benefits. Repayment of LWA overpayments is governed by the provisions of Section 262(b) of the Continued Assistance for Unemployed Workers Act of 2020.¹ That provision provides that an individual who receives LWA payments to which the individual was not entitled is liable to repay those benefits, unless the Department waives such repayment because it determines that the payment of those benefits was without fault on the part of the individual and such repayment would be contrary to equity and good conscience. The record does not show the Department has waived repayment here. Therefore, claimant is liable for the overpayment of \$1,800 in LWA benefits she received during the weeks at issue.

In sum, Order No. 23-UI-226291 is modified. Claimant is liable for an overpayment of \$4,706 in regular UI benefits and is liable to repay the benefits or have the amount of the benefits deducted from future benefits payable during the five-year period following the date the March 30, 2022 administrative decision becomes final. Claimant is liable for overpayments of \$2,353 in PEUC benefits, \$10,800 in FPUC benefits, and \$1,800 in LWA benefits to be recovered in accordance with the same procedures as

¹ The Consolidated Appropriations Act, 2020, including Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020 was signed into law on December 27, 2020.

apply to recovery of claimant's regular UI overpayment. Claimant is not liable for a monetary penalty or penalty disqualification from future benefits.

DECISION: Order No. 23-UI-226103 is affirmed. Order No. 23-UI-226291 is modified, as outlined above.

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

DATE of Service: July 12, 2023

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.

NOTE: The Department may defer recovery or completely waive the overpaid amount if certain standards are met. To make a request for Waiver of Overpayment Recovery, call 503-947-1995 or email OED_Overpayment_unit@employ.oregon.gov. You must submit waiver applications that correspond to the program for which you were overpaid benefits. **If you were overpaid benefits under both state and federal benefits programs, you will need to file two separate waiver applications.** To access a State UI Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for "State UI Overpayment Waiver". To access a Federal Program Overpayment Waiver application go online to <https://unemployment.oregon.gov/waivers> and click the link for "Federal Program Overpayment Waiver".

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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
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.