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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 471
EMPLOYMENT DEPARTMENT

FILED

02/24/2022 4:18 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Conformity of Administrative Rules to address passage of SB 172 (2021)

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/31/2022 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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Filed By:
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HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 03/22/2022

TIME: 4:00 PM - 6:00 PM

OFFICER: Anne Friend

ADDRESS: Virtual

Oregon Employment Department

Director's Office

Salem, OR 97311

SPECIAL INSTRUCTIONS:

Registration instructions are on our Rulemaking website:

<https://www.oregon.gov/EMPLOY/Agency/Pages/OED%20Administrative%20Rules.aspx>

NEED FOR THE RULE(S)

SB 172 had an operative date of June 23, 2021. It allows the Director of the Oregon Employment Department to deduct all or part of unemployment insurance (UI) benefit overpayments against future weekly benefits within five years following final decision for overpayments that were the fault of the claimant but not due to willful misrepresentation by the claimant.

OAR 471-030-0017 defines when remuneration is reportable to the Department for purposes of UI. This proposed rule will change reporting requirements for individuals receiving back pay while claiming UI. Prior to the passage of SB 172, back pay was not reportable. SB 172 makes back pay reportable when paid, unless it is awarded after a shutdown due to a lapse in federal appropriations, then it shall be allocated equally to the weeks of the shutdown.

The Department is also proposing to promulgate a new administrative rule, OAR 471-030-0320. This rule addresses the percentage of future weekly benefits that may be offset pursuant to Oregon Revised Statutes (ORS) 657.215, 657.310, and ORS 657.315 and clarifies that when a decision is issued under ORS 657.306 the five-year time limit called for in SB 172 begins immediately following the week the decision establishing an overpayment became final. The percentage of

future weekly benefits offset will be determined based on whether the overpayment recovery would go against “equity and good conscience” as defined by the Internal Revenue Service (IRS).

Lastly, the Department is proposing that OAR 471-030-0053 be permanently amended to make the verbiage consistent with the amended ORS 657.317. Currently, a waiver is defined as a temporary, renewable hardship deferral. Under SB 172, a waiver extinguishes all liability for repayment for eligible individuals.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

Oregon Revised Statutes, available online at www.oregonlegislature.gov or from the agency; and Oregon Administrative Rules, available online at sos.oregon.gov/archives/Pages/oregon_administrative_rules.aspx or from the agency.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

A commitment to equity acknowledges that not all people, or all communities, are starting from the same place due to historic and current systems of oppression. Equity is the effort to provide different levels of support based on an individual's or group's needs in order to achieve fairness in outcomes. Equity actionably empowers communities most impacted by systemic oppression and requires the redistribution of resources, power, and opportunity to those communities.

While amending our administrative rules for UI eligibility requirements, the UI Division looked at the racial equity impact on these administrative rules and answered the question below.

What are the racial equity impacts of this particular rule(s), policy or decision and who will benefit from or be burdened?

It is difficult to say at this point what the racial equity impacts of these rule changes will be. The Department will carefully gather data on overpayment offsets and waiver claims while the rule changes are being implemented. The Department anticipates that the dataset will be ready by the end of 2022 and will be able to analyze whether the rule changes caused unintended consequences with regards to racial equity. One potential unintended consequence the department will be looking for is whether certain racial groups are disproportionately being denied waivers or offsets.

Are there strategies to mitigate the unintended consequences?

If the Department determines that unintended consequences arose from the implementation of these rule changes it will examine whether there needs to be changes to the approval criteria for overpayment waivers and offsets. It will also expand communications and outreach efforts to ensure that members of historically disadvantaged communities are aware of their ability to request waivers. The Department's UI Division, Communications Office, Equity and Inclusion Office and possibly other divisions would coordinate on those efforts.

FISCAL AND ECONOMIC IMPACT:

The Employment Department anticipates the adoption of this rule may have a fiscal and economic impact to employers that pay into the Unemployment Insurance Trust Fund and reimbursing employers; this may include small businesses, state agencies, and units of local government.

The Department would need to hire two permanent Revenue Agent 1's and five permanent Compliance Specialist 1's at a cost of \$1,109,781 per biennium.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)):

There are no state agencies, units of local government, or members of the public likely to be economically affected by the rule.

(2) Cost of compliance effect on small business (ORS 183.336):

a. Estimate the number and type of small businesses subject to the rule:

As of the fourth quarter of 2021, there are 115,096 employers with 50 employees or less in Oregon that are subject to UI law.

b. Projected reporting, recordkeeping, and other administrative activities required for compliance, including costs of professional services:

The department does not anticipate any change in expected reporting, record keeping, and administrative costs required to comply with these rules.

c. Equipment, supplies, labor and increased administration required for compliance:

The department does not anticipate any increase in costs of professional services, equipment supplies, labor and increased administration required to comply with these rules.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Representatives from Oregon Business and Industry (OBI), the Oregon State Chamber of Commerce, and other organizations representing small businesses were consulted repeatedly as draft language was in development.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? NO IF NOT, WHY NOT?

The department did not consult with an administrative rule advisory committee. The department opted not to conduct one because, as specified under Oregon Revised Statute ORS 657.695, the department has an Employment Department Advisory Council. By law, this council serves to assist in the effective development of policies and programs with respect to unemployment insurance and employment service and is composed of people representing employers and employees in equal numbers, and representatives of the public who shall elect their chairperson. Additionally, the department consulted with groups representing workers, businesses and other stakeholders while throughout the rule language drafting process. The department did consult with the council prior to the filing of this proposed rulemaking and will continue to seek input from stakeholders during the public comment period and at the public rulemaking hearing.

RULES PROPOSED:

471-030-0017, 471-030-0053, 471-030-0320

AMEND: 471-030-0017

RULE SUMMARY: To allow for continued implementation of Senate Bill (SB) 172 from the 2021 Legislative Session

CHANGES TO RULE:

471-030-0017

~~Benefits and Claims~~: Defining and Allocating Remuneration, Holidays, and Vacations ¶

(1) Definitions. For purposes of applying ORS 657.100 and 657.150, and as used in this rule:¶

(a) "Employment" means:¶

(A) Being in an employer-employee relationship during a period of time for which remuneration was paid or payable; or¶

(B) Providing a service or product for cash or cash value.¶

(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;¶

(d) Where no employer-employee relationship exists, "remuneration" means the gross amount of compensation for the product or service, less only the value of tangible components involved in producing or providing the product or service and limited to the tangible components that remain with the party receiving the service or product;¶

(e) "Bonus" means an extra payment given by an employer in consideration of performance, production or a share of profits;¶

(f) "Back pay" means payment awarded as reimbursement by an employer for loss of wages during a period for which no services were performed and no payment was intended;¶

(g) For purposes of ORS 657.150(7), the term "holiday" means those holidays listed in 187.010(1)(b)-(j) and (2), 187.020 and any holiday designated by the employer, union contract or otherwise;¶

(h) For 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.¶

(i) For purposes of ORS 657.150(6)(a), the term "minimum hourly wage" means the minimum wage rate as computed under 653.025(2).¶

(2) For purposes of section (1) of this rule, except for agricultural labor and domestic service, remuneration shall include the value, determined pursuant to OAR 471-031-0055(3), of compensation paid in any medium other than cash.¶

(3) Allocating Remuneration: 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;¶

(b) In the case of products, allocated to the week in which the product was sold;¶

(c) In the case of bonuses, allocated equally to the weeks during which the individual worked within the period being rewarded;¶

(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~~ claimant 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.¶

(4) Back pay is ~~not~~ reportable for ~~or~~ and deductible from unemployment insurance benefits, and shall be allocated as follows:¶

(a) When awarded after the end of a shutdown due to a lapse in federal appropriations, allocated equally to the weeks in which the shutdown occurred;¶

(b) When awarded in all other circumstances, allocated to the week in which it is paid.¶

(5) The effective date of this rule is June 23, 2021.

Statutory/Other Authority: ORS 657

Statutes/Other Implemented: ORS 657.100, 657.150

AMEND: 471-030-0053

RULE SUMMARY: OAR 471-030-0053 clarifies provisions around waiving the recovery of overpayments to allow for continued implementation of Senate Bill (SB) 172 from the 2021 Legislative Session.

CHANGES TO RULE:

471-030-0053

~~Benefits and Claims: Waiving Recovery of Overpayments ¶¶~~

- ~~Reserved~~ (1) This rule addresses waiving recovery of overpayments pursuant to ORS 657.317.¶¶
- (2) Recovering overpaid benefits is against equity and good conscience if the claimant requesting a waiver has no means to repay the benefits and has total allowable household expenses that equal or exceed 90% of the total household income less unemployment benefits. The Employment Department will use the IRS Collection Financial Standards to determine maximum allowable household expenses. The Employment Department may allow expenses higher than those provided for in the IRS Collection Financial standards if the claimant requesting a waiver provides documents showing that using those IRS Collection Financial Standards would leave the claimant an inadequate means of providing for basic living expenses.¶¶
- (3) If a waiver is granted, the Department will stop collection activity of the overpaid benefits that are waived. The Department will give written notice of any waivers that are granted, indicating the amount of the overpaid benefits for which the waiver is granted.¶¶
- (4) The amount of overpaid benefits that are waived will be removed from the balance of remaining benefits that the claimant has remaining on the claim.¶¶
- (5) Waivers are effective the Sunday of the week in which the request for waiver was filed with the Employment Department. The Department shall apply the provisions under OAR 471-010-0040 in determining the date the request for waiver is received.¶¶
- (6) If a request for a waiver of recovery is denied the claimant will receive an administrative decision as defined in OAR 471-030-0039.¶¶
- (7) Overpaid benefits that have been recovered prior to the filing of a waiver request will not be waived.¶¶
- (8) If a claimant is paid more than once for the same week(s), only the amount in excess of the final entitlement is eligible to be waived.¶¶
- (9) In applying ORS 657.315 when a claimant is not eligible for a waiver under the provisions of this rule, the provisions under OAR 471-030-0320 shall apply for offsetting overpaid benefits. ¶¶
- (10) In applying ORS 657.317(3), a waiver will not be granted if the overpayment is a result of willful misrepresentation or fraud as established in ORS 657.215.¶¶
- (11) Overpayments caused by the negotiation of an original and a replacement check that were issued for the same period pursuant to OAR 471-030-0049 will not be waived.¶¶
- (12) The determination to waive recovery of overpayments under ORS 657.317 and this rule shall be made by employees authorized by the Director.¶¶
- (13) The effective date of this rule is June 23, 2021.

Statutory/Other Authority: ORS 657.610

Statutes/Other Implemented: ORS 657.267, 657.268, 657.315, 657.317

ADOPT: 471-030-0320

RULE SUMMARY: Creating this rule to implement Senate Bill 172 (2021) which establishes how overpayments may be recovered.

CHANGES TO RULE:

471-030-0320

Recovery by Offset of Overpaid Benefits and Recovery Periods

(1) This rule addresses the percentage of future weekly benefits that may be offset pursuant to Oregon Revised Statute (ORS) 657.215, 657.310, and ORS 657.315.¶

(2) The department shall offset 100% of the benefits payable for each week claimed when the overpayment is due to misrepresentation under ORS 657.215.¶

(3) The department shall offset 100% of the benefits payable for each week claimed when the overpayment is determined not liable for penalty under ORS 657.310(2)(a) except in circumstances when the overpayment is the result of receipt of back pay as described in OAR 471-030-0017, the department shall offset 50% of the benefits payable for each week claimed.¶

(4) The department shall offset 50% of the benefits payable for each week claimed when the overpayment is determined to have been paid erroneously under ORS 657.315 except that:¶

(a) If an individual meets the requirement for a waiver under OAR 471-030-0053 the overpayment is cancelled.¶

(b) If an individual's request for waiver submitted under OAR 471-030-0053 cannot be canceled under OAR 471-030-0053(2) and shows total allowable household expenses that are less than 90% but greater than or equal to 80% of the total household income less unemployment insurance benefits, the department shall offset 0% of the benefits payable for each week claimed for a period of six (6) months. After six (6) months, the offset will be at 50%.¶

(5) The department will reconsider at any time the offset requirements provided in section (4) of this rule if the individual's financial situation changes and the individual:¶

(a) Submits a new request for waiver;¶

(b) Submits a statement explaining the change in their financial situation; and¶

(c) Submits supporting documentation showing the change in their financial situation.¶

(6) Offsetting overpaid benefits, as described in sections (3) and (4) of this rule, is limited to the five years following the week in which the decision establishing an overpayment became final. When a decision is issued under ORS 657.306 the five years begins immediately following the week the decision establishing an overpayment became final.¶

(7) The effective date of this rule is June 23, 2021.

Statutory/Other Authority: ORS 657.215, 657.310, 657.306, 657.315

Statutes/Other Implemented: SB 172 (2021)