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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 471
EMPLOYMENT DEPARTMENT

FILED

11/28/2022 3:17 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Conformity of Administrative Rules to address passage of SB 172.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/31/2022 11:55 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: 12/19/2022

TIME: 3:00 PM - 5:00 PM

OFFICER: Anne Friend

ADDRESS: Virtual

Oregon Employment Department

Salem, OR 97311

SPECIAL INSTRUCTIONS:

Zoom registration: https://www.zoomgov.com/webinar/register/WN_fw4EJy-zTAGJIX5KjMvtsw

NEED FOR THE RULE(S)

Senate Bill (SB) 172 was effective on 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 and overpayments that were not the fault of the claimant.

The Department is 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).

The Department is also 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

Purpose: 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. This rulemaking is being promulgated in response to the passage of SB 172. Supporters of SB 172 advocated for the bill in order to ease the financial burden of UI claimants who were at fault for receiving overpayments in a non-fraudulent way.

Potentially Impacted Groups:

- Native American, members of Oregon's nine federally recognized tribes, American Indian and Alaska Natives
- Black, African, African American
- Latina, Latino, Latinx, Hispanic
- Asian
- Pacific Islander (including Compact of Free Association Citizens)
- Immigrants, Refugees, Asylum-Seekers, Deferred Status Holders, Temporary Protected Status
- Deferred Action for Childhood Arrivals (DACA), "Dreamers," Non-Immigrant Visa Holders
- Linguistically diverse, English language learners (ELL)
- Economically Disadvantaged
- People with Disabilities
- LGBTQIA2S+
- Farmworkers, Migrant Seasonal Workers

Engagement: The Department has worked closely with the main proponents of SB 172, the Oregon Law Center and the Oregon AFL-CIO throughout the rulemaking process so far. As the Department implements the policy changes going forward it will expand its outreach to include other historically marginalized communities and their advocates.

Tribal Consultation Plan: The Department will coordinate with the nine federally recognized tribes to ensure that claimants from those communities are aware of the policy change and also to reduce potential unintended negative impacts. Since this rulemaking is in response to legislation already passed, this coordination will focus on outreach instead of consultation.

Root Causes: Since benefit claimants are not required to share demographic information (43% of claimants declined to share their race in 2022), the Department's data around the root causes of non-fraudulent, claimant-caused overpayments is limited. That being said, Department has observed anecdotally that claimants whose first language is not English disproportionately struggle with filing for benefits which can cause overpayments. Low-income claimants also cause a disproportionate number of non-fraudulent overpayments due to a variety of factors and a disproportionate number of low-income claimants come from BIPOC communities.

Impact Mitigation: SB 172 and the associated rulemaking is designed to reduce the impact of historical inequities. The

Department does not foresee the rule causing adverse impacts but will carefully monitor the implementation of the policy to ensure that that is case.

Equitable Impacts Advancement:

- What positive impacts on equality and inclusion, if any, could result from this proposal?
 - o This rulemaking proposal should benefit a significant number of BIPOC claimants who were overpaid benefits by reducing their financial burden.
- Which racial/ethnic groups could benefit?
 - o Native American, members of Oregon's nine federally recognized tribes, American Indian and Alaska Natives
 - o Black, African, African American
 - o Latina, Latino, Latinx, Hispanic
 - o Asian
 - o Pacific Islander (including Compact of Free Association Citizens)
 - o Immigrants, Refugees, Asylum-Seekers, Deferred Status Holders, Temporary Protected Status
 - o Deferred Action for Childhood Arrivals (DACA), "Dreamers," Non-Immigrant Visa Holders
 - o Linguistically diverse, English language learners (ELL)
- Are there ways to further maximize equitable opportunities and impacts?
 - o The Department is still exploring options but is in the process of planning for additional offset percentages in modernized UI benefit system, examining its policies around retroactive waiver requests and potentially redefining "equity and good conscience" to potentially broaden the number of people eligible for waivers.
- How will the Department incorporate trauma and trauma-informed practices into this program or project's daily work?
 - o The Department recognizes that those suffering from traumatic incidents are challenged in a variety of ways when navigating the benefits process. The Department will continue to offer training in this area and strongly encourage UI employees to attend.
- How will you continuously train and hold staff accountable for the impact of cultural values and unconscious bias through training, practice scenarios, data analysis of program outcomes, or other methods?
 - o Continuous training of staff to help them recognize potential unconscious biases in their decision-making processes.
- Where are there gaps in knowledge and skill now that need to be addressed?
 - o The Department has not identified specific gaps in knowledge and skill and acknowledges the size and complexity of the UI program makes it difficult to do so. The Department strives for continual improvement in our processes and how we message eligibility requirements to claimants in an effort to eliminate overpayments. Additionally, the UI program is continually looking at program eligibility requirements and evaluating them for ways to remove barriers to receiving benefits and offer as much flexibility as possible while remaining within the federal framework of the UI program.
- Describe which language access option(s) from the Equity Framework you will use to communicate this rule or resulting program documents to persons and groups subject to the rule. Include the selected options for outreach materials, website, customer notices, email listservs, text alerts, and social media posts, as applicable.
 - o Information about state overpayment waivers is available at unemployment.oregon.gov/waivers. The page has been translated into Spanish, Chinese, Russian, Vietnamese, Korean, Arabic, Farsi, Lao and Somali languages.
 - o A Frequently Asked Questions page also offers information about overpayments and waivers in English and in Spanish. More languages are in the works including: Spanish, Simplified Chinese, Traditional Chinese, Vietnamese, Russian, Korean, Arabic, and Somali. However, there is a bug that is preventing some or all of those languages from consistently appearing. This is being worked on.
 - o In April 2021, OED held a webinar (in English, with the option of interpretation in multiple languages) about overpayments and waivers: <https://www.youtube.com/watch?v=-EFNZSmYUnI>
 - o Information about the proposed change to overpayments will be shared on social media, email and listservs.

Measurable Outcomes: 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 2023 and will be able to analyze whether the rule changes caused unintended consequences with regards to racial equity.

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.

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 first quarter of 2021, there are 164,418 private 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? YES

RULES PROPOSED:

471-030-0053, 471-030-0320

AMEND: 471-030-0053

RULE SUMMARY: Amends OAR 471-030-0053 by clarifying provisions around waiving the recovery of overpayments and promulgates

CHANGES TO RULE:

471-030-0053

Benefits and Claims: Waiving Recovery of Overpayments ¶

~~Reserved~~ (1) The effective date of this rule is June 23, 2021. ¶

(2) This rule addresses waiving recovery of overpayments pursuant to ORS 657.317. ¶

(3) Recovering overpaid benefits is against equity and good conscience if the individual 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 individual requesting a waiver provides documents showing that using those IRS Collection Financial Standards would leave the individual an inadequate means of providing for basic living expenses. ¶

(4) 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. ¶

(5) Any funds, which would otherwise have been restored to the balance of the claim impacted by the overpayment decision, will be removed if the overpayment is waived so the individual does not receive more than the claim's maximum benefit amount. ¶

(6) 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. ¶

(7) If a request for waiver of recovery is denied, the individual will receive an administrative decision as defined in OAR 471-030-0039. ¶

(8) Overpaid benefits that have been recovered prior to the filing of a waiver request will not be waived or refunded. ¶

(9) If the individual is paid more than once for the same week(s), only the amount in excess of the final entitlement is eligible to be waived. ¶

(10) In applying ORS 657.315 when the individual 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. ¶

(11) 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. ¶

(12) 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. ¶

(13) The determination to waive recovery of overpayments under ORS 657.317 and this rule shall be made by employees authorized by the Director.

Statutory/Other Authority: ORS 657.610

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

ADOPT: 471-030-0320

RULE SUMMARY: Adopts OAR 471-030-0320 which establishes how overpayments may be recovered.

CHANGES TO RULE:

471-030-0320

Recovery by Offset of Overpaid Benefits and Recovery Periods

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

(2) 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.

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

(4) 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:

(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 50% of the benefits payable for each week claimed for a period of six (6) months. After six (6) months, the offset will be at 100%.

(c) When the overpayment is the result of back pay as described in OAR 471-030-0017, the department shall offset 50% of the benefits payable for each week claimed.

(5) 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 including when the overpayment is the result of back pay as described in OAR 471-030-0017, except:

(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%.

(6) The department will reconsider at any time the offset requirements provided in sections (4) and (5) 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.

(7) Offsetting overpaid benefits, as described in sections (4) and (5) 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.

Statutory/Other Authority: ORS 657.610, ORS 657

Statutes/Other Implemented: ORS 657