

OFFICE OF THE SECRETARY OF STATE
DENNIS RICHARDSON
SECRETARY OF STATE

LESLIE CUMMINGS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION
MARY BETH HERKERT
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 471
EMPLOYMENT DEPARTMENT

FILED
03/07/2019 9:20 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Housekeeping Updates to Oregon Administrative Rules Chapter 471 Division 41, Employment Appeals Board

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 04/26/2019 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.

A public rulemaking hearing may be requested in writing by 10 or more people, or by a group with 10 or more members, within 21 days following the publication of the Notice of Proposed Rulemaking in the Oregon Bulletin or 28 days from the date the Notice was sent to people on the agency mailing list, whichever is later. If sufficient hearing requests are received, the notice of the date and time of the rulemaking hearing must be published in the Oregon Bulletin at least 14 days before the hearing.

CONTACT: Sara Cromwell
503-378-2086
Sara.D.Cromwell@oregon.gov

875 Union St NE
Salem, OR 97311

Filed By:
Cristina Koreski
Rules Coordinator

NEED FOR THE RULE(S):

The Employment Appeals Board (EAB) is amending Oregon Administrative Rules (OARs) 471-041-0050, 471-041-0060, 471-041-0065, 471-041-0070, 471-041-0075, 471-041-0080, 471-041-0090, 471-041-0100, and 471-041-0145 to: improve consistency among EAB's filing procedures and the filing procedures offered by the Employment Department and Office of Administrative Hearings during earlier portions of the unemployment insurance benefits appeals process; add new methods of electronic filing to broaden claimant, employer, and Employment Department access to EAB review and define filing dates for the new methods; improve consistency and clarity of the process provided to parties requesting reopening; clarify written argument service requirements and remove a procedural barrier to parties' arguments being eligible for consideration by EAB; add objective standards that apply to EAB's consideration of requests to extend the written argument deadline; improve the transparency and consistency of procedures applying to EAB's consideration of new information; update and clarify requirements for EAB decisions; clarify filing procedures for requests for reconsideration filings at EAB; and remove a procedural barrier to consideration of parties' requests for reconsideration.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

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

FISCAL AND ECONOMIC IMPACT:

The Employment Appeals Board (EAB) does not foresee any substantial fiscal or economic impact due to this rule change. The amendments clarify processes and allow parties greater access to EAB's services, but the procedural changes do not require addition of staff or other resources to implement and EAB is unable to reliably determine how

many unemployment insurance recipients and employers will be impacted.

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 is no impact on state agencies, units of local government or the public.

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

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule:

The Employment Department does not have any reliable way to provide an estimate because this information has not been historically captured by the department.

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

There is no increase in costs for projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services, as a result of amending these rules.

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

There is no increase in costs for equipment, supplies, labor, or increased administration required for compliance as a result of amending these rules.

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

Small businesses were not specifically involved in the development of this rule. However, the department will seek input from small businesses during the public comment period.

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

The department does not have an Administrative Rule Advisory Committee. We will seek input from external parties during the public comment period.

RULES PROPOSED:

471-041-0050, 471-041-0060, 471-041-0065, 471-041-0070, 471-041-0075, 471-041-0080, 471-041-0090, 471-041-0100, 471-041-0145

AMEND: 471-041-0050

RULE SUMMARY: The Employment Appeals Board (EAB) is adding language to OAR 471-041-0050(4), relating to the definition of "mail" for purposes of Oregon Administrative Rule chapter 471, division 041. This change expands the definition of "mail" to include private mail carriers.

CHANGES TO RULE:

471-041-0050

Definitions ¶¶

(1) "ALJ" means Administrative Law Judge.¶¶

(2) "Applicant" means the party on whose behalf the application for review was filed.¶¶

(3) "EAB" means the Employment Appeals Board.¶¶

(4) "Mail" means United States Postal Service mail or private mail carrier.¶¶

(5) "OAH" means the Office of Administrative Hearings.

Statutory/Other Authority: ORS 183, 657.610, 657.685

Statutes/Other Implemented: ORS 657.685(6)

AMEND: 471-041-0060

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0060 to make substantive and non-substantive changes as follows:

1. Non-substantive change to refer to "hearing decisions" as "Orders," reflecting how the Office of Administrative Hearings (OAH) refers to its orders orally and in writing, improving consistency and reducing confusion to unemployment insurance recipients, employers, and agency staff when appealing orders to EAB;
2. Adding electronic filing to the methods by which unemployment insurance recipients, employers, and agency staff may file applications for review with EAB and establishing that EAB accepts all methods of filings sent to the Employment Department and Office of Administrative Hearings; and
3. Amending rule to clarify how EAB treats applications for review filed at EAB by parties who failed to appear at a hearing but whose requests for hearing were not dismissed for failure to appear, eliminate inconsistencies in the process provided to such parties based on whether they filed an application for review with EAB or a request to reopen with OAH, thereby reducing confusion among unemployment insurance recipients, employers, and agency staff, and providing all parties with a transparent and consistent process; establishing exceptions.

CHANGES TO RULE:

471-041-0060

Application for Review ¶

(1) An application for review may be filed on forms provided by OAH or the Employment Department and other similar offices in other states. Use of the form is not required, provided the ~~party~~applicant requests review of a specific ~~hearing decision~~ALJ Order, or otherwise expresses intent to appeal a ~~specific hearing decision~~n ALJ Order. ¶

(2) An application for review may be filed in person, ~~or by mail or by fax~~, fax, or electronic means to EAB, or any office of the Employment Department, including OAH, or any Employment Security Agency in any other state or jurisdiction where a ~~party~~the applicant is claiming benefits. ¶

(3) An application for review that does not conform to the requirements of this rule is subject to dismissal. ¶

(4) Except as otherwise stated in this rule, EAB will treat an application for review by a ~~party~~claimant or employer that failed to appear at a hearing as a request to reopen the hearing under ORS 657.270. ¶

(5) An application for review filed by a claimant or employer that failed to appear at the hearing and whose request for hearing was not dismissed because that party failed to appear as a ~~for failure to appear~~ will be treated as an application for review if: ¶

(a) The applicant expresses in the application for review that they are not requesting to reopen the hearing under ORS 657.270, or ¶

(b) The application for review does not include a written statement that sets forth the reason(s) for missing the hearing as required under OAR 471-040-0040(3).

Statutory/Other Authority: ORS 657.610

Statutes/Other Implemented: ORS 657.685

AMEND: 471-041-0065

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0065 to:

1. Define filing dates for mail sent through carriers other than the United States Postal Service;
2. Simplify the filing date definition for faxed documents and align EAB's definitions with those of the Employment Department and Office of Administrative Hearings; and
3. Establish a filing date definition for documents filed electronically.

The amendments will make the process for filing an application for review more accessible to unemployment insurance recipients, employers, and agency staff because it broadens EAB's accessibility and aligns EAB's processes with those already in use in other unemployment insurance benefits and unemployment insurance benefits appeals offices.

CHANGES TO RULE:

471-041-0065

Filing Dates ¶

(1) Filing dates shall be determined as follows:¶

(a) If delivered in person, the filing date is the date of delivery, as evidenced by the receipt date stamped or written by the public employee who received the document.¶

(b) If mailed, the filing date is the date that the document is deposited in the United States mail in an envelope with first class postage, as evidenced by the postmark affixed to the envelope by the United States Postal Service.¶

~~(c) If fax mailed, the filing date is the receipt date stamped or written on the fax transmission by the public employee who receives the document. EAB's normal business hours are Monday through Friday, 8:00 am to 5:00 pm, Pacific Time. If EAB receives a faxed document after 5:00 pm, or on a Saturday, Sunday or legal holiday, it will be marked as received the following business day~~rough a carrier other than the United States Postal Service, the filing date is the date that the document is deposited with that carrier, as evidenced by the date affixed to the envelope by that carrier.¶

~~(d) If faxed, the filing date is the encoded date on the faxed document.¶~~

~~(e) If filed by electronic means, the filing date is the encoded date on the electronic document.¶~~

(2) Where the information specified in section (1) of this rule is missing ~~or~~, unclear, or improbable the filing date is the date that EAB determines to be the most probable date of filing.

Statutory/Other Authority: ORS 183, 657.610, 657.685

Statutes/Other Implemented: ORS 657.685(6)

AMEND: 471-041-0070

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0070 to make substantive and non-substantive changes as follows:

1. Non-substantive change to refer to "hearing decisions" as "Orders," reflecting how the Office of Administrative Hearings (OAH) refers to its orders orally and in writing, to reduce confusion by unemployment insurance recipients, employers, and agency staff when appealing those orders to EAB; and
2. Removing permissive and unnecessary reference to EAB's statutory remand authority.

CHANGES TO RULE:

471-041-0070

Late Application for Review

(1) An application for review is timely if it is filed within 20 days of the date that OAH mailed the ~~hearing decision~~ ALJ Order sought to be reviewed. EAB shall dismiss a late application for review, unless the filing period is extended in accordance with this rule.¶¶

(2) The filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875.¶¶

(a) "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing.¶¶

(b) "A reasonable time" is seven days after the circumstances that prevented timely filing ceased to exist.¶¶

(3) ~~The applicant shall~~ EAB shall dismiss a late application for review unless the applicant includes with the late application for review a written statement describing the circumstances that prevented a timely filing. ~~Nothing in this rule prevents EAB from referring the matter to OAH for a hearing if in EAB's discretion, a hearing is necessary to EAB's determination under section (2).~~

Statutory/Other Authority: ORS 183, 657.610, 657.685

Statutes/Other Implemented: ORS 657.685(6)

AMEND: 471-041-0075

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0075 to clarify the circumstances under which EAB will send acknowledgment of receipt of an application for review, and to expand the methods by which EAB may provide parties with such acknowledgment.

CHANGES TO RULE:

471-041-0075

Acknowledgement of Application for Review ¶

When EAB receives a valid and timely application for review of an ALJ Order that is adverse to the applicant's interests, it shall notify all parties promptly by mail or ~~email~~ electronic means.

Statutory/Other Authority: ~~ORS 183, 657.610~~ ORS 183, 657.610, ORS 183, 657.685

Statutes/Other Implemented: ORS 657.685(6)

AMEND: 471-041-0080

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0080 to:

1. Make a non-substantive change to harmonize the rule with amended OAR 471-041-0075;
2. Amend language clarifying that parties' declaration of service upon opposing parties does not require certification or use of costly certified mail services;
3. Expand methods by which parties may send written argument to EAB;
4. Alleviate parties' obligation to send copies of written argument to the Employment Department and allocate that obligation to EAB instead, thus reducing the likelihood that unemployment insurance recipients' and employers' arguments cannot be considered by EAB due to inexperienced parties' inadvertent failures to comply with specialized EAB rules;
5. Replace EAB's discretionary authority to rule upon parties' requests for extension of time to file written argument with objective measures and a good cause standard; defining good cause consistent with the definition applied to parties' requests for postponement of hearings that may occur earlier in the unemployment insurance benefits appeals process; and
6. Institute a requirement that EAB provide all parties with notice of the new deadline whenever a party's written argument extension request is allowed.

CHANGES TO RULE:

471-041-0080

Presentation of Argument ¶

(1) Parties may submit written argument within 20 days of the date that EAB ~~mails or email~~provides the notice required by OAR 471-041-0075.¶

(2) A party's written argument will not be considered unless it:¶

(a) ~~Includes a statement that a copy has been provided to the other opposing party or parties. Example: "I certify declare that on I mailed by first class mail [date] I sent a copy of this document to the opposing party, addressed as follows: ABC Company, 123 Main St., Portland, OR, 9XXXX [description of sending method]."~~¶

(b) ~~Is received within the time allowed.~~¶

(3) ~~Written argument may be delivered in person, by mail, or by fax.~~¶

(4) At the discretion of EAB, or sent by mail or other carrier, fax, or electronic means. EAB will make copies of any arguments received available to the Oregon Employment Department by electronic means.¶

(4) Any party may request that the time period allowed for submitting written arguments under section (1) may be extended for one or more periods, not to exceed a total of 14 days be extended.¶

(a) EAB may grant an extension of time to submit written argument if:¶

(A) The request is in writing;¶

(B) The request is promptly made after the party becomes aware of the need for the extension;¶

(C) The request is made prior to issuance of the EAB decision;¶

(D) The party has good cause, as stated in the request, for the extension; and¶

(E) The total period allowed for written argument, including all extensions, will not exceed 35 days from the application for review filing date.¶

(b) For the purpose of subsection (4)(a) of this rule, good cause exists when:¶

(A) The circumstances necessitating the extension are beyond the reasonable control of the requesting party; and¶

(B) Failure to allow the extension would result in undue hardship to the requesting party.¶

(c) If a party's extension request is allowed, EAB shall notify all parties of the new written argument deadline orally, in writing, or by electronic means.

Statutory/Other Authority: ORS 183, 657.610, 657.685

Statutes/Other Implemented: ORS 657.685(6), 657.690

AMEND: 471-041-0090

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0090 to:

1. Change non-substantive "new information" references to "additional evidence" to be consistent throughout the rule and with the rule title; and
2. Clarify and standardize when EAB may allow additional evidence, require EAB to notify the parties of the evidence being allowed, and standardizing the process through which parties may object to EAB's decision to allow additional evidence.

CHANGES TO RULE:

471-041-0090

Additional Evidence ¶

~~¶(1) Except as stated in this rule, information not received into evidence at the hearing record will not be considered on review, except, subject to notice and an opportunity to be heard.¶~~

~~(1a) Exhibits offered, but not received into evidence, may be received into evidence as~~AB may receive additional evidence into the record if necessary to complete the record.¶

~~(2b) New information may be considered~~Any party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the information~~additional evidence~~establishes that:¶

~~(aA) The new information~~additional evidence is relevant and material to EAB's determination; and¶

~~(bB) Factors or circumstances beyond the party's reasonable control prevented the party from offering the information into~~additional evidence at~~into the hearing; and record.¶~~

~~(3c) Notice~~EAB may be taken notice of information contained in Employment Department records, generally cognizable facts, and ~~general, technical or scientific facts~~facts within EAB's specialized knowledge.¶

(2) If EAB considers additional evidence when reaching a decision, EAB will notify the parties in the decision, include a copy with or citation to the additional evidence in the decision, and give the parties ten (10) days from the date of the decision in which to file a written objection to EAB's admission of the additional evidence. Unless such objection is received and sustained, the additional evidence will remain in the record.

Statutory/Other Authority: ORS 183, 657.610, 657.685

Statutes/Other Implemented: ORS 657.275, 657.685(6)

AMEND: 471-041-0100

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0100 to expand the methods by which EAB may serve copies of decisions to parties, thereby improving access to EAB decisions for unemployment insurance recipients, employers, and agency staff; clarify what EAB's decisions shall include.

CHANGES TO RULE:

471-041-0100

Notice of Decision ¶¶

(1) Notice of EAB's decision shall be by ~~mail or email~~ United States Postal Service mail or electronic means to each party or its representative at the physical or electronic address of record with EAB and.¶¶

(2) Notice of EAB's decision shall include:¶¶

(1a) A caption identifying the parties and their representatives,¶¶

(2b) The date the notice was issued,¶¶

(c) A statement of appeal rights, and¶¶

(d) Findings of fact,¶¶

(3) ~~C~~ and conclusions and reasons,¶¶

(4) ~~A or a~~ statement of appeal rights, and¶¶

(5) ~~The date that the notice was issued~~ adopting the findings of fact and conclusions and reasons set forth in the ALJ Order.

Statutory/Other Authority: ORS 183, 657.610, 657.685

Statutes/Other Implemented: ORS 657.275, 657.685(6)

AMEND: 471-041-0145

RULE SUMMARY: The Employment Appeals Board (EAB) is amending OAR 471-041-0145 to:

1. Amend language clarifying that parties' declaration of service upon opposing parties does not require certification or use of costly certified mail services;
2. Establish filing methods and filing date definitions for reconsideration requests consistent with OAR 471-041-0065; and
3. Alleviate parties' obligation to send copies of their written argument to the Employment Department and allocate that obligation to EAB instead, thus reducing the likelihood that unemployment insurance recipients' and employers' arguments cannot be considered due to inexperienced parties' inadvertent failures to comply with specialized EAB rules.

CHANGES TO RULE:

471-041-0145

Reconsideration ¶¶

(1) Any party may request reconsideration to correct an error of material fact or law, or to explain any unexplained inconsistency with Employment Department rule, or officially stated Employment Department position, or prior Employment Department practice.¶¶

(2) The request is subject to dismissal unless it:¶¶

(a) Includes a statement that a copy ~~has been~~ provided to the ~~other~~ opposing party or parties. Example: "I ~~certify~~ declare that on ~~I mailed by first class mail~~ [date] I ~~sent~~ a copy of this document to the opposing party or parties, addressed as follows: ABC Company, ~~123 Main St., Portland, OR, 9XXXX~~ [description of sending method]."¶¶

(b) Is filed on or before the 20th day after the decision sought to be reconsidered is mailed.¶¶

(A) Requests for reconsideration may be filed in person, or by mail or other carrier, fax, or electronic means.¶¶

(B) For purposes of this rule the filing date is determined using the same criteria listed in OAR 471-041-0065.¶¶

(C) EAB will make copies of any requests received available to the Oregon Employment Department by electronic means.

Statutory/Other Authority: ORS 183, 657.610, 657.685

Statutes/Other Implemented: ORS 657.685(6)