CHAPTER 10
DISMISSAL PAY

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2.10.1 INTRODUCTION

A claimant will be ineligible to receive benefits during any week during a dismissal period in which he or she receives dismissal pay from an employer that exceeds the maximum statutory unemployment benefit rate.[1] In deciding cases under this statute, the ALJ must determine: (1) whether the payments constitute "dismissal pay"; (2) whether the first payment was made within 30 days of the claimant's last day of employment; (3) whether the payment exceeds the maximum benefit rate; and (4) what time frame constitutes the "dismissal period."

2.10.2 PAYMENT DUE TO SEPARATION

The term "dismissal pay" is defined as "one or more payments made by an employer to an employee due to his or her separation from service of the employer regardless of whether the employer is legally bound by contract, statute or otherwise to make such payments. The term does not include payments for pension, retirement, accrued leave,[2] and health insurance or payments for supplemental unemployment insurance."[3] There does not have to be a written separation agreement for payments to be considered dismissal pay.[4]

In determining whether payments are dismissal pay, a key element to consider is whether the claimant would have received the payment if he or she had not been separated from employment.[5] Further, where the employer only begins discussions after a claimant has already been terminated from employment and thereafter offers the claimant an agreement, the payment

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[1] Labor Law § 591 (6)(a)

[2] Appeal Board No. 584541 (Payment of 80 hours of paid time off ("PTO") to claimant upon separation from employment pursuant to employer's policy does not fall within the definition of dismissal pay).

[3] Labor Law §591(6)(b).

[4] *See, e.g.,* Appeal Board No. 582183 (oral agreement between the employer and claimant to continue paying the claimant's salary, without fringe benefits, with subsequent email from employer indicting dismissal period began on a certain date constituted dismissal pay).

[5] Appeal Board No. 592231 ("Whereas a contract is an exchange of mutual obligations, the dismissal pay statute contemplates payments by employers in exchange for promises from a departing employee…[R]egardless of any concessions the employer obtained from the claimant, the fact remains that the claimant and employer entered into their agreement, and the employer paid the claimant his lump sum amount, only because the claimant was leaving the employer's employ").

may not be dismissal pay if the evidence establishes that it was to compensate him or her for something other than the separation.[6]

Where there is a written agreement, it is important to identify the nature of any payments made to the claimant. Payments do not need to be characterized as "severance" or "dismissal" pay by the employer for the payments to constitute dismissal pay pursuant to the statute.[7] Additionally, the fact that an agreement may contain contractual provisions addressing other mutual obligations and separate considerations does not necessarily negate a finding that a payment constitutes dismissal pay.[8]

Upon separation from employment, a claimant may sign a general release waiving any future claims against the employer. The Board has repeatedly held that signing a general release does not preclude a finding that payments constitute dismissal pay where there is no evidence of any existing or potential lawsuit that the claimant agreed not to pursue under the terms of the agreement and in exchange for the severance amount paid.[9] Additionally, the Board has held that signing an agreement containing confidentiality provisions[10] or provisions designed to protect the employer's business[11] does not preclude a finding that payments made under the agreement constitute dismissal pay. This is true even where the employer has agreed to pay extra money as

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[6] Appeal Board No. 601009 (Payment of $20,000 made pursuant to non-disclosure/non-compete agreement entered into three days after claimant had separated from employment that lasted only two weeks was not dismissal pay); compare Appeal Board No. 585299 (payment established as dismissal pay where employer and claimant began discussions about a separation agreement prior to the claimant's last day of work on December 31, final version of "Executive Officer Severance Agreement General Waiver and Release" was sent to claimant on January 3, and claimant signed agreement February 6).

[7] Appeal Board No. 592231 ("That the claimant's agreement with the employer does not characterize the claimant's payment as 'severance' is not dispositive"); Appeal Board No. 584209 (agreement characterizing payment as "an additional benefit" did not preclude finding that the payment was dismissal pay).

[8] Appeal Board No. 581210 (Board rejected claimant's contention that payment was in exchange for his forfeiture of "equity units" in the company as the units had not yet vested, claimant would not have been entitled to payment with respect to those units, and there was a separate and distinct section of the agreement which addressed the sale of the claimant's equity units back to the employer in consideration for the employer's forgiveness of a promissory note previously issued to the claimant).

[9] *See* Appeal Board Nos. 583022, 581385, 581306, and 580783.

[10] Appeal Board No. 581500 (that claimant signed separation agreement purporting to keep agreement confidential does not preclude a finding that the payment to the claimant constituted dismissal pay).

[11] Appeal Board No. 592231 (Board rejected claimant's contention that the payment was made in exchange for concessions from the claimant to protect the employer's business, noting that the term "dismissal pay" does not exclude payments that an employer is legally bound by contract to make and the payment was made only because the claimant was leaving the employer's employ).

an inducement to sign a separation agreement,[12] where an additional "separation award" has been paid to the claimant upon separation after the agreement was signed,[13] or where the payment served the dual purpose of offering an incentive to employees to stay with the company until its closure and as a severance award for years of loyal service.[14]

However, a payment identified as an "annual incentive payment" that was paid to a claimant in addition to a lump sum payment equivalent to one week of pay for every year of employment, was found to be a bonus made at the employer's discretion and not dismissal pay.[15]

2.10.3 PAYMENT WITHIN 30 DAYS OF LAST DAY OF EMPLOYMENT

In order for a payment made due to separation to be considered "dismissal pay" under the statute, the initial payment must be made within thirty days of the claimant's last day of employment.[16]

LAST DAY OF EMPLOYMENT

The last day of employment is not always the same as the claimant's last actual day of work. The Board has repeatedly held that where an employer designates a last day of employment on a date subsequent to the claimant's last physical day of work, and the claimant receives a continuation of his or her wages until that subsequent date, the last day of employment is the later date.[17] This is true even where an employer stops providing or paying for health or other fringe

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[12] Appeal Board No. 587224 (payment of one week of severance pay pursuant to employer's policy and an additional payment of one month of "enhanced severance pay" paid to the claimant because she signed the general release agreement were both made due to claimant's separation from employment and were properly determined to be dismissal pay).

[13] Appeal Board No. 581385 ("lump sum separation payment" and extra "separation award" were both considered dismissal pay).

[14] Appeal Board No. 579726 (payment made to claimant for "maintaining employment through the bankruptcy proceedings in lieu of any and all severance or other payments made as a 'comparable severance benefit'" was determined to be dismissal payment as it was paid only upon a termination date set by the employer and as both an incentive to stay with the employer and for the claimant's years of loyal service).

[15] See Appeal Board No. 591517 ("[A] bonus, or incentive pay, is a gratuity awarded at the discretion of the employer beyond an employee's normal pay… the claimant's payment of incentive pay should not be used in calculating the claimant's dismissal pay period").

[16] Labor Law §591(6)(d).

[17] Appeal Board No. 593060 (Board held that claimant's last day of employment was September 30, 2016 where the claimant's last physical day of work was September 12, 2016, the separation agreement specified the claimant's separation date was September 30, 2016 and claimant was paid his full salary and benefits until the later date); Appeal

benefits.[18] However, where a claimant does not receive regular wages between the last physical day of work and the date designated by the employer as the last day of employment, the Board has found that the last physical day of work constitutes the last day of employment for dismissal pay purposes.[19]

It should also be noted that Commissioner of Labor regulation §490.5[20] regarding the date of termination in situations where dismissal payments are made, predates the revision to Labor Law §591(6) and is not controlling when determining the last day of employment.[21] Additionally, the definition of "date of layoff" under the New York State Worker Adjustment and Retraining Notification (WARN) Act also predates the revisions to the Labor Law and is not controlling when defining the last day of employment for dismissal pay purposes.[22] However, under circumstances where either the NYS or Federal WARN Act would require an employer to provide compensation to employees because of the employer's failure to provide adequate notice of a mass layoff or

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Board Nos. 591311 (Board determined that claimant's last day of employment was May 20 where clamant last physically worked on April 20 but received his regular pay through May 20); Appeal Board No. 581056 (last day of employment determined to be January 15 where claimant last physically worked on December 27 but continued to receive his regular pay through January 15); Appeal Board No. 590709 (Board held that claimant's last day of employment was March 20 since although she had last physically worked on December 14, she was paid her regular salary and benefits through March 20).

[18] *See* Appeal Board No. 582183 ("We also find that the employer's nonpayment of fringe benefits after January 10, 2014 is of no legal consequence. [12 NYCRR §490.5] of the Commissioner of Labor's regulations is not controlling, as it predates the New York State Legislature's revision of the current governing statute regarding dismissal pay"); Appeal Board No. 581056 (Board found that where claimant was continuing to receive his regular pay, his employment continued and whether he accrued vacation and sick pay after his last physical day of work was not dispositive).

[19] See Appeal Board No. 590887 (Board held that claimant's last day of work (January 18, 2016) was also her last day of employment despite employer's written agreement stating claimant's position was abolished on February 1, 2016, where the claimant performed no services of any kind after her last day of work, there was no evidence that she received any pay other than severance pay with respect the period after January 18 and it appeared the date of February 1 was an administrative choice for the employer's record-keeping purposes).

[20] 12 NYCRR 4910.5: "(b) Termination of employment if dismissal payment is made. An employee's "employment" by an employer who has discharged him permanently or has laid him off for an indefinite period (no date for his return to work having been established) is terminated after the last day on which he was required to report for work even if he receives payments from the employer in addition to remuneration for the specific hours, days, weeks, or other periods during which he performed actual services. This principle applies likewise if such payments are made in lieu of paid vacation to which the employee is entitled or in lieu of notice."

[21] *See* Appeal Board No. 582183 ("Section 490.5 of the Commissioner of Labor's regulations is not controlling, as it predates the New York State Legislature's revision of the current governing statute regarding dismissal pay"). Appeal Board cases holding the contrary should no longer be followed.

[22] Appeal Board No. 591517 (although this decision does not specifically address the fact that the WARN Act predate the provisions of the dismissal pay statute, it correctly holds that when a claimant continues receiving regular pay and benefits, the claimant's employment is continued until such time as they are removed from payroll).

plant closing, such payments would not constitute dismissal pay for unemployment insurance purposes.[23]

WITHIN 30 DAYS

The date on which the payment is made by the employer, rather than the date on which the claimant received the payment, is controlling.[24] Where payments due to separation are made in installments, the Board uses the date of the initial payment to determine whether the dismissal payment was made within thirty days.[25] If the date of an initial payment occurs on or before a date that is 30 days after the last day of employment, then it will be considered dismissal pay, even if the initial payment occurs prior to the claimant's actual last day of employment[26] or if the initial payment is deducted from a subsequent supplemental payment.[27]

2.10.4 DISMISSAL PERIOD

The statute makes clear that the employer may establish the dismissal period in a written separation agreement between the claimant and the employer, in a collective bargaining agreement, in the employer's policy or in some other such agreement.[28] Further, even in the

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[23] For more information on the requirements of the WARN Act and its impact on Unemployment Insurance, see Labor Law §§860 through 860-i; 12 NYCRR Part 921; Labor Law §598; and 29 U.S.C. §1201, *et seq.*

[24] *See, e.g.,* Appeal Board No. 580740 (583552A adherence on relevant issue) (payment was determined to be within thirty days where delivery of the check was attempted on the 30th day, but the claimant did not receive the check until the 31st day).

[25] Appeal Board No. 590887 (Board found that payment was made within thirty days where claimant's last day of employment was January 18, her first installment of dismissal pay was paid on January 29 and second installment was paid on February 19).

[26] See Appeal Board No. 592042 (Claimant's initial dismissal payment was received on April 15 prior to his last day of work on July 1, 2016 and was therefore "not excluded by Subsection 5916(d) of the Labor Law"); Appeal Board No. 603036 ("Significantly, the Board has held that a dismissal payment is made within 30 days of the last day of employment when the payment is made prior to the employment relationship ending even if the payment is made more than 30 days prior to the claimant's last day of employment) (citing Appeal Board Nos. 590709 and 592042).

[27] Appeal Board No. 585299 ("The fact that the initial severance pay was deducted from a subsequent lump sum severance pay does not render the initial payment ineffective").

[28] Labor Law §591(6)(c) defines "dismissal period" as:

The time designated for weeks of dismissal pay attributable to the claimant's weekly earnings in accordance with the collective bargaining agreement, employment contract, employer's dismissal policy, dismissal agreement with the employer or other such agreement. If no such agreement, contract or policy designates a dismissal period, then the dismissal period shall be the time designated in writing in advance by the employer to be considered the dismissal period. If no time period is designated, the dismissal period shall commence on the day after the claimant's last day of employment. If the dismissal payment is in a lump sum amount or for an indefinite period, dismissal payments shall be

absence of a written agreement, the employer can define the dismissal period if it is done in advance, in writing. It has been held that an agreement between a claimant and an employer stating that the amount paid represents a designated number of weeks of the claimant's salary also establishes the dismissal period,[29] even when a specific beginning and ending date of the dismissal period are not identified and the payments are divided between a basic severance payment representing a certain number of weeks and a supplemental severance payment representing an additional number of weeks.[30]

Although the terms of a separation agreement will generally establish the amount of dismissal payments and the dismissal pay period, there may be times where the evidence establishes that the terms of the separation agreement are superseded by a subsequent agreement. For example, in a series of cases addressing dismissal pay where a grocery store went bankrupt, the Board found that the terms of the separation agreements were superseded by a subsequent agreement approved in Federal Bankruptcy Court. In these cases, the union representing the employees and the employer grocery store chain entered into an agreement to pay the claimants a percentage of the previously agreed upon severance pay, leaving it up the claimant to try to recover the remainder of the lump sum severance amount through proceedings in Bankruptcy Court. The Board concluded that the amount that each claimant could hope to recover from proceedings in Bankruptcy Court was merely speculative. Therefore, rather than relying on the duration of the dismissal pay period in the original separation agreements, the Board used the reduced lump amount paid to the claimants, divided by the claimant's actual weekly remuneration or average weekly wage, to determine the duration of the dismissal pay period.[31]

WHEN DURATION OF DISMISSAL PERIOD IS NOT DESIGNATED

Where a separation agreement provides for payment of a lump sum amount and no dismissal pay period is designated, the first day of the dismissal pay period begins on the day immediately

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allocated on a weekly basis from the day after the claimant's last day of employment and the claimant shall not be eligible for benefits for any week for which it is determined that the claimant receives dismissal pay. The amount of dismissal pay shall be allocated based on the claimant's actual weekly remuneration paid by the employer during his or her employment or, if such amount cannot be determined, the amount of the claimant's average weekly wage for the highest calendar quarter.

[29] See Appeal Board No 584844 (Dismissal period determined to be 36 weeks where separation agreement provided that the claimant would receive a lump sum payment of $113,391 based on 36 weeks of the claimant's gross weekly earnings of $3,149.75); Appeal Board No. 581028 (Dismissal period determined to be 5 weeks where the separation agreement designated claimant was to receive 5 weeks of salary).

[30] See Appeal Board No. 590887 (Board held dismissal period was 15 weeks where claimant received an initial severance payment representing 5 weeks-worth of pay and an additional severance payment representing 10 weeks of pay).

[31] Appeal Board Nos. 589459, 589502, 589461, 589462, 589465, 589754, 589557 and 590471.

following the claimant's the last day of employment.[32] The duration of the dismissal period will be calculated by dividing the lump sum amount to be paid to the claimant by the claimant's actual weekly remuneration during employment.[33]

ACTUAL WEEKLY REMUNERATION

A claimant's actual weekly remuneration is easily determined if the claimant is paid on a salary basis and receives the same amount of money every week. The amount an employer pays for a claimant's health insurance or other benefits is not included when determining remuneration.[34] Further, the Appeal Board has consistently applied the statute using the "gross," or pre-tax, amount paid to a claimant, not the "net" amount the claimant receives.[35]

AVERAGE WEEKLY WAGE USING HIGH CALENDAR QUARTER

There are times when the claimant's actual weekly remuneration cannot be determined. This generally occurs if the claimant is paid on an hourly basis and does not work the same number of hours per week, or if the claimant receives commission payments at various times in addition to his or her base salary. In those instances, the claimant's weekly wage must be determined by calculating the claimant's average weekly wage during the high calendar quarter of the claimant's base period.[36]

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[32] Labor Law §591 (6) (c).

[33] *See, e.g.* Appeal Board No. 602291 (dividing lump sum amount of dismissal payment by claimant's weekly wage to determine weeks of dismissal period).

[34] Appeal Board No. 602291 (Board rejected claimant's argument that his health insurance payments and other fringe benefits should be considered when determining actual weekly remuneration, citing Labor Law §517 which specifically excludes payment by the employer for medical insurance, retirement fund payments, or payments for other benefits from the definition of "remuneration").

[35] Appeal Board No. 602291 (citing Appeal Board Nos. 587314, 581210 and 580782).

[36] Labor Law §591 (6) (c); Appeal Board Nos. 589557 (Board determined average weekly wage for highest calendar quarter since actual weekly remuneration could not be determined where claimant testified only to his base weekly pay and that he sometimes worked overtime); *see also,* Appeal Board Nos. 589460 and 590471 (same).

Practice Tip:

When developing the record in a dismissal pay case, the ALJ should develop the record on the following:

- What was the claimant's last physical day of work?
- Did the claimant remain on payroll and receive pay after his or her last physical day of work?
- What was the date the claimant stopped receiving pay (other than severance payments)?
- Did the claimant receive any payment due to separation?
- Were there payments for anything other than separation?
- What was the amount of the payment(s) to the claimant?
- How was the amount to be paid to the claimant determined?
- Would the claimant have received the payment if he had not been separated from employment?
- Was there is a separation agreement between the claimant and the employer?
- If yes,
    - Did the agreement define the type of payment the claimant would receive?
    - Did the agreement specify a dismissal period (either by indicating specific dates or indicating that the payment represents a designated number of weeks)?
    - If the written agreement contains a general release from liability, had the claimant taken steps towards filing a law suit against the employer.
- If no,
    - Is there a policy / employment contract / collective bargaining agreement/ other agreement regarding dismissal payments?
    - What was the parties' understanding about the purpose of the payments?
- When was the payment(s) received?
- Was the payment in installments or paid as a lump sum?
- In the event that the dismissal period was not identified, was the claimant paid the same amount every week?
    - If yes, what was the claimant's actual gross weekly remuneration?
    - If no, how was the claimant paid (hourly, commissions, etc.)?
        - What were the claimant's high calendar quarter earnings in the base period (using the claimant information screen or monetary benefit determination)?