CHAPTER 11
RETIREMENT PAYMENTS

2.11.1 Introduction....1
2.11.2 Elements of Labor Law § 600....1
Types of Payments....1
Plan Maintained or Contributed to by Base Period Employer....3
Base Period Employer....4
Effect of Base Period Employment....4
2.11.3 Calculating the Reduction....5
2.11.4 Limitation on Review....6
Effect of Review....7

2.11.1 INTRODUCTION

A claimant's benefit rate will be reduced if the claimant receives a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the claimant's previous work if the base period employer contributed to the pension or similar payment and the base period employment affected the claimant's eligibility for, or increased the amount of, such payment.[1] The reduction bears a direct relationship to the underlying purpose of Unemployment Insurance (UI) Law to provide income to unemployed workers who are without earned income.[2] In deciding cases under the statute, the ALJ must determine whether a payment made to a claimant is (1) the type of payment covered by the statute, that is a pension, retirement, annuity or other similar periodic payment based on previous work; (2) whether the base period employer maintained or contributed to the plan through which the payment is made; and (3) whether the claimant's base period employment or remuneration affected the claimant's eligibility for, or increased the amount of, the payment. All three elements must be established for a "retirement payment"[3] to result in a reduction of the claimant's benefit rate under the statute.

2.11.2 ELEMENTS OF LABOR LAW § 600

TYPES OF PAYMENTS

Certain retirement payments are specifically excluded by the language of the statute. These include payments made pursuant to the Social Security Act or the Railroad Retirement Act of 1974,[4] payments made from a qualified trust to an eligible retirement plan as defined in § 402 of the internal revenue code (commonly known as eligible rollover distributions),[5] and payments from a fund or plan to which the claimant was the sole contributor.[6]

While a traditional pension, retirement or annuity payment may easily be found to fall within the scope of the statute, determining whether a payment falls within the "other similar periodic

---

[1] Labor Law § 600.1(a).

[2] *See Matter of Schiavo*, 107 A.D.3d 1293,1294 (3d Dep't 2013); s*ee also, Matter of Gold,* 282 A.D.2d 855 (3d Dep't 2001); and *Matter of DeVoe*, 193 A.D.2d 1042 (3d Dep't 1993) quoting *Matter of Liss,* 80 A.D.2d 716 (3d Dep't 1981).

[3] The terms "pension payment" and "retirement payment" are used interchangeably throughout case law.

[4] Labor Law § 600.1 (a).

[5] Labor Law § 600 (1) (d); *see also* 26 U.S.C. § 402.

[6] Labor Law § 600 (1) (b).

payment" language of the statute may be less straightforward. To determine whether a payment requires a reduction in the benefit rate, the Court has traditionally focused on the purpose of the UI Law as well as the statute's legislative intent to prevent "pensioner-claimant" windfalls.[7]

Courts have held that the payment does not need to be made pursuant to an established pension plan to be considered a retirement payment so long as the payment serves the same purpose as a traditional retirement payment. For example, payments made in lieu of participation in a pension plan,[8] periodic payments made pursuant to employment contract provisions,[9] and payments made pursuant to profit sharing plans based on a claimant's years of service with the employer,[10] have all been found to trigger a reduction in the claimant's benefit rate.

A claimant's benefit rate may also be subject to reduction if the claimant receives payments from an employer funded plan even where the employer terminates the claimant's employment,[11] or when the claimant retires for medical reasons upon the advice of a physician.[12] It also makes no difference whether the claimant receives the payments in installments or in a lump sum or whether the claimant was intending to retire at the time he or she was eligible for the payments.[13]

---

[7] *Matter of Landsman*, 37 A.D.2d 667, 668 (3d Dep't 1971).

[8] *See Matter of Landsman*, *supra* (Weekly payments to claimant upon his separation from employment at age 72 which were based on his years of service and granted because he was not covered under the employer's pension plan due to of his age at the time of the plan's inception, were determined to be retirement payments under the statute).

[9] *See Matter of Sherbell*, 133 A.D.2d 892 (3d Dep't 1987) (Monthly payments provided to claimant upon his separation under an employment contract provision entitled "Retirement Benefits and Other Payments in Lieu of Severance Payment" were retirement payments covered by the statute, even though they were not made pursuant to a formal pension plan covering all employees).

[10] *See Matter of Favorito*, 195 A.D.2d 679 (3d Dep't 1993) (Lump-sum payments from the employer's pension plan and a profit-sharing plan were determined to be retirement payments since the employer had contributed to both plans); *Matter of Hager,* 42 A.D.2d 798 (3d Dep't 1973) (Payment made from a plan entitled "retirement Trust (profit-sharing)" was retirement payment despite claimant's argument that it was a profit-sharing agreement not subject to the statute).

[11] *See Matter of Lipsky,* 44 A.D.2d 95 (3d Dep't 1974), *aff'd* 36 N.Y.2d 947 (Claimant's benefit rate was properly reduced even though the claimant was discharged by his employer for reasons other than retirement, where he applied for and began receiving retirement payments from a plan financed solely by the employer).

[12] *See Matter of Healy*, 238 A.D.2d 653 (3d Dep't 1977) (Claimant's benefit rate was properly reduced where he left employment of 24 years due his failing health and upon the advice of his physician and received a lump sum retirement payment that he rolled over into an individual retirement account (IRA)).

[13] *See Matter of Healy, supra; Matter of Rolland*, 232 A.D.2d 710 (3d Dep't 1996) (Claimant's benefit rate properly reduced where claimant, who was not of retirement age, received lump sum payment pursuant to employer funded pension plan and reinvested it into an IRA instead of receiving a periodic payment); *Matter of Busman*, 172 A.D.2d 939 (3d Dep't 1991) (Claimant's benefit rate was properly reduced where she rolled over lump sum retirement payment into a simplified employment pension IRA (SEP-IRA) and was eligible to withdraw those funds without penalty, despite the fact that she chose not to withdraw the funds and did not intend to retire at the time she separated from employment).

Additionally, payments known as "bridge" payments that are designed to "ease people into retirement" or made as a "bridge to retirement" have also been found to fall within the scope of § 600, so long as there is evidence that such a lump-sum or periodic payment serves the same purpose as a traditional retirement payment.[14]

PLAN MAINTAINED OR CONTRIBUTED TO BY BASE PERIOD EMPLOYER

Prior to 2014, the receipt of a pension to which a base period employer contributed would reduce the claimant's benefit rate by 0%, 50% or 100% depending on the amount of contributions made by the claimant. As a result, both Court and Board cases frequently contained an analysis of the reduction percentage. Labor Law § 600 was amended in 2013. As of January 1, 2014, a claimant's benefit rate is reduced by 100% of the weekly pension payment from a base period employer regardless of whether the claimant also made contributions to the plan.[15] It is important to remember that if the claimant was the sole contributor to the plan or fund from which payment is made, no reduction shall apply.[16]

A plan or fund is considered "maintained or contributed to" pursuant to the statute where the employer makes contributions to the fund. It does not matter if it is an individual employer's plan, or a collective trust where contributions to the plan were made by many employers.[17]

Additionally, both the Board and courts have found that union retirement plans are funded by the employers who are parties to a collective bargaining agreement when the contributions to the retirement plan are made separately from the union members' paychecks, are not subject to withholding taxes, and union members cannot make contributions on their own. The fact that the

---

[14] *See Matter of Richmond*, 96 A.D.2d 1132 (3d Dep't 1983) (a "special" lump-sum payment equal to 13 weeks of vacation received for the first three months after separation and paid to the claimant in addition to his pension payment, was found to constitute a payment within the scope of § 600 where there was evidence that such payment was a crucial feature of the employer's retirement package and structured to "ease people into retirement"); *Matter of Ziegler,* 28 A.D.3d 895 (3d Dep't 2006) (lump-sum payment from a retirement acceleration program and which did not include any funds from the employer's pension fund was found to be a similar periodic payment subjecting the claimant to a benefit rate reduction); Appeal Board No. 541656 (payment made to employees with more than twenty-seven years of service as a retirement incentive and to carry the claimant through until he could receive his pension and under which the claimant would continue to accrue service time and retain seniority was found to be a bridge payment requiring a reduction in the claimant's benefit rate); *see also* Appeal Board Nos. 555449 and 541563.

[15] The amendments to Labor Law § 600 also eliminated previous subsections (1) through (6) and re-designated subsection (7) as subsection (1) which now governs all aspects of the reduction of the claimant's benefit rate due to retirement payments. Thus, reference in decisions to subsection (7) can now be read as referencing subsection (1)).

[16] Labor Law § 600 (1) (b).

[17] *See, e.g., Matter of Tinsley*, 50 A.D.2d 961 (3d Dep't 1975) (in finding ample support that the base period employer maintained or contributed to the plan, which was a collective trust, the Court noted that the different entities participating in the plan did so as separate entities and were responsible only for payments to their own employees).

union members may have voted on the amount to be allocated to the plan as part of a benefit package does not mean the plan is funded by the union members.[18]

The reduction will apply regardless of the number of employers that employed the claimant during the base period or the fact that employers not in the claimant's base period also contributed to the pension fund.[19] Further, that the employer's contributions to a union retirement fund were part of an overall negotiated benefits package[20] or that employees can determine how to allocate the employer's contributions,[21] is not relevant in determining whether the retirement plan was funded by the employer.

BASE PERIOD EMPLOYER

The term "base period employer" is an employer for which the claimant rendered services during the base period. Where the claimant did not work for the employer in the base period but only received remuneration from that employer within the period, the claimant's benefit rate is not subject to the reduction. For example, receipt of a back-pay award during the base period does not render the employer a base period employer.[22] Additionally, where a claimant has worked for multiple employers in the base period, so long as one of those employers contributed to the fund, the claimant's benefit rate is properly reduced.[23]

EFFECT OF BASE PERIOD EMPLOYMENT

If the claimant's base period employment affects the claimant's eligibility for or increases the amount of the retirement payment, a reduction in the claimant's UI benefit rate is warranted.

---

[18] *See* Appeal Board Nos. 553418 and 556800; *Matter of Germain*, 220 A.D.2d 918 (3d Dep't 1985).

[19] *See* Appeal Board No. 595425 (Board rejected claimant's argument that the reduction to his benefit rate should be recalculated because only one of his base period employers contributed to the pension fund).

[20] *See, e.g.,* Appeal Board No. 570607.

[21] *See* Appeal Board No. 571017, adhered to by Appeal Board No. 575303A (the Board found irrelevant the fact that the claimant and other union members could decide on how their benefit money was allocated in the fund, finding that this was not indicative of the funds coming from a claimant's salary); and Appeal Board No. 570929 (where the Board found the union pension plan was funded by the employer and not by the claimant's wages because even though union members had voting rights to allocate a percentage of their pay raises to the pension funds, the money for the pension fund came entirely from the employer and was not deducted from taxable income to the employees).

[22] *See* Appeal Board No. 540634A and Appeal Board No. 547813.

[23] *See Matter of Hall,* 162 A.D.2d 96 (3d Dep't 1990) (where the claimant's last employer before applying for UI benefits did not contribute to his pension but two other employers for whom he worked in his base period did contribute); Appeal Board No. 595425 (rejecting claimant's argument that the reduction should be recalculated because only one of his base period employers contributed to the fund).

Examples of base period employment having such effect include when the claimant becomes eligible to receive retirement payments regardless of age due to base period employment, when a "milestone" year of service is reached in the base period which then triggers an increase in the pension benefit,[24] or where claimant received additional years of service credit during his base period which increased the amount of his pension.[25] The amount of the increase in the retirement payment is immaterial as even a few dollars has been found to trigger the reduction in the benefit rate under the statute.[26] However, when an employer who has funded the claimant's pension plan stops making contributions to the plan before the beginning of the base period and the claimant's eligibility to receive such pension is also not affected by employment in the base period, the pension reduction will not apply.[27]

2.11.3 CALCULATING THE REDUCTION

Prior to 2014, when calculation of the reduction based on a retirement payment was dependent on the relative percentages of contributions by the claimant and the employer, many Court and Board cases included complicated calculations involving actuarial values of a claimant's pension. The statutory amendments of 2014 made these calculations unnecessary and the holdings regarding these calculations obsolete.

Under the current law, if a base period employer funds the retirement benefit in any amount, the claimant's benefit rate is reduced solely in accordance with the plain language of the statute which provides a reduction of not more than the pro-rated weekly amount of the retirement payment.[28] As noted earlier, if the claimant was the sole contributor of the retirement payment, no reduction shall apply.

The retirement payment, whether periodic or lump sum, is converted into a pro-rated weekly amount which is then deducted from the claimant's benefit rate. When the claimant receives a monthly payment, or the record has been developed to determine the monthly rate of a lump-sum payment, the amount of the reduction in the claimant's benefit rate is achieved by multiplying the

---

[24] *See* Appeal Board 554136 (the claimant reached his 30th year of employment which resulted in a significant increase in the amount of his monthly payments); *cf.* Appeal Board No. 577993 (the claimant reached a "milestone" of 30 years of service during her base period but had become eligible for her full pension benefit five years earlier when she reached age 55 and 25 years of service; "milestone" had no effect on her eligibility for or the amount of her pension benefit).

[25] *See Matter of Metropolski*, 136 A.D.2d 783, 784 (3d Dep't 1988) (Holding "[c]learly, had claimant not been employed during the base period, he would not have received the service credit bonus").

[26] *See Matter of Hall,* 162 A.D.2d 96 (3d Dep't 1990) (claimant's services during his base period resulted in a two dollar increase in his monthly retirement payment).

[27] *See* Appeal Board No. 553289.

[28] Labor Law § 600 (1) (b).

monthly payment by 12 (months) and then dividing that sum by 52 (weeks) to obtain the weekly retirement payment.[29]

2.11.4 LIMITATION ON REVIEW

If it has not been established that the claimant will be receiving a pension or retirement payment at the time UI benefits are payable, then benefits must be paid in full, and will be subject to review and repayment pursuant to Labor Law §§ 597 (3) and (4).[30] Labor Law § 597 (3) provides that, in the absence of fraud or willful misrepresentation, a determination regarding a retirement payment may be reviewed within six months (rather than the 12 months applicable to other issues).[31]

To determine when this six-month period begins, the Board has interpreted the statutory phrase "retroactive payment of remuneration" to mean the establishment of the claimant's pension. When a claimant has already begun to receive retirement payments prior to filing a UI claim, the effective date of the claim will be deemed to be the date on which the pension is established. Thus, if the determinations are issued more than six months from the effective date of the claim, the Commissioner of Labor will lack the authority to issue them in the absence of fraud or willful misrepresentation and the merits of any pension reduction or overpayment determination cannot be reached.[32] For cases in which the claimant's first pension payment begins subsequent to filing a UI claim, the six-month period of review runs from the date the claimant receives the first pension payment[33] rather than the date on which the claimant first applied for the pension.[34] The

[29] An ALJ should refer the matter back to the Commissioner of Labor for recalculation where the evidence establishes that the pro-rated weekly amount of the payment differs from the amount contained in the determination. However, for examples of how it is calculated, see Appeal Board No. 595425. *See also Matter of Hager*, *supra* and *Matter of Lipsky*, *supra*.

[30] Labor Law § 600 (1) (c).

[31] Labor Law § 597 (3).

[32] *See* Appeal Board No. 538145 (as the claimant had received retirement payments prior to the filing of his UI claim and the Board concluded that the claimant had not made a willful misrepresentation to receive benefits, the Commissioner of Labor lacked the authority to issue the determinations one and a half years after the effective date of the UI claim); *see also* Appeal Board Nos. 563049 and 559260.

[33] *See* Appeal Board No. 565166.

[34] *See* Appeal Board No. 566478A (claimant's first pension payment was received March 1, 2011, IDs were issued August 8, 2011, five months and eight days later); *see also* Appeal Board No. 575119.

six-month period of review is not dependent on when the Department of Labor discovers that the claimant is receiving or may be due to receive a pension payment.[35]

EFFECT OF REVIEW

Labor Law § 597 (4) specifically allows for the recovery of overpaid benefits based on retirement payments regardless of whether the claimant accepted the UI benefits in good faith, made a willful misrepresentation, or concealed a pertinent fact in the claim.[36] UI benefit payments issued prior to the finalization of retirement payments are recoverable regardless of the claimant's actions in accepting them. Payment of benefits prior to verification of a claimant's pension is subject to review and recovery even if the claimant fully disclosed receipt of a pension upon applying for benefits.[37]

If the pension payments cover the same period for which the claimant has also received UI benefits, the reduction is retroactive, there has been an overpayment and the overpaid benefits are recoverable, regardless of whether the claimant has made a factually false statement…" [38] In addition to recovery of benefits based on a "retroactive" payment, periodic payments paid to a claimant beginning after the claimant applied for the pension have also been held by the Court to be recoverable when the pension payments cover the same period for which the claimant has received UI benefits.[39]

[35] *See* Appeal Board No. 553052 (Board specifically rejected the Commissioner of Labor's contention that the six-month period for review in the statute should run from the date of discovery rather than in accordance with the plain language of the statute).

[36] Labor Law § 597 (4).

[37] *See Matter of Sanchez,* 56 A.D.3d 846 (3d Dep't 2008); *Matter of Hosenfeld,* 280 A.D.2d 738 (3d Dep't 2001), *Matter of Hammer,* 263 A.D.2d 608 (3d Dep't 1999) and *Matter of Burger*, 109 A.D.3d 1073 (3d Dep't 2013).

[38] *See* Appeal Board 583677; Appeal Board No. 565166 and Appeal Board No. 569142 (claimant filed a claim on January 3, 2011, and applied for his pension in late November 2011, by operation of federal law it was made retroactively effective as of January 1, 2011; benefit reduction was effective as of January 1, 2011).

[39] *See Matter of Burger*, *supra* (Court found the overpayment of benefits recoverable where the claimant filed for UI benefits on or about March 2010 and began receiving monthly pension payments in June 2010); *Matter of Pinezic,* 223 A.D.2d 898 (3d Dep't 1996) and *Matter of Sanchez, supra*.

Practice Tips

The record must first be developed to determine the circumstances surrounding the payment and its purpose to determine whether the payment falls within the scope of the statute.

The record must also establish the claimant's base period to determine whether retirement payments were received from a plan maintained or contributed to by a base period employer.

The specifics of the how contributions were made to the plan as well as how payments were distributed should be developed to determine whether such a collective fund is funded by the base period employer or not.

The record should also be developed as to how such plans are funded to determine whether the employer made any contribution or whether such plan was funded solely by the claimant such as through wage deductions.

Factors to be considered in determining whether contributions to such plans are funded by a claimant's wages may include whether the contributions were deducted from a claimant's pay or whether contributions were subject to withholding taxes.

To determine the weekly amount of the retirement payment, when the claimant receives a lump-sum retirement payment, it is important to develop the record as to the monthly or weekly rate of such payment.