CHAPTER 17
VALID ORIGINAL CLAIM

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2.17.1 INTRODUCTION

A claimant must file a "valid original claim" in order to qualify for benefits. A valid original claim is a claim filed by a claimant who meets the following qualifications:

(a) able to work and available for work;

(b) is not subject to any disqualification or suspension;

(c) his or her previously established benefit year, if any, has expired; and

(d) he or she has been paid remuneration by employers liable for contributions or for payments in lieu of contributions, other than employers from whom the claimant lost employment due to misconduct, for employment during at least two calendar quarters of the base period, with total base period remuneration of one and one-half times the high calendar quarter remuneration, and with at least two hundred twenty one (221) times the minimum wage (rounded down to the nearest $100) during the high calendar quarter in the base period.[1]

In addition, the high quarter wages are capped at twenty-two (22) times the maximum benefit rate. The capped wages are used to determine whether the claimant has total base period remuneration of one and one-half times the high calendar quarter. [2]

The claimant's benefit year begins on the Monday in the week in which the claimant filed his or her valid original claim.[3]

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[1] *See* Labor Law § 527 (1). For claims filed in 2019, the required high quarter earnings were $2,400. This amount will increase every time the minimum wage increases.

[2] Labor Law § 527 (1); *In re Claim of Wojnar*, 5 A.D.3d 899 (3d Dep't 2004) (capping high quarter wages intended to determine whether valid original claim exists and whether claimant's earnings exceed that figure).

[3] *See* Labor Law § 521 ("A claimant's benefit year" is the period of 52 consecutive weeks beginning with the first Monday after he or she files a valid original claim); Labor Law § 519 ("A 'week' means seven consecutive days beginning with Monday"); 12 NYCRR 473.1 (b) ("A claimant shall file an original claim and register for employment on any day from Monday through Friday. Any claim filed in accordance with this section shall be deemed filed as of the first day of the claimant's unemployment in the statutory week in which filed, excluding, however, any prior day on which a disqualifying condition would have existed if the claimant had actually filed on such day").

A claimant must work in employment and receive remuneration equal to at least ten times the claimant's benefit rate since at least the beginning of the prior valid original claim in order to establish a subsequent valid original claim.[4]

2.17.2 BASE PERIOD

A claimant's basic base period is the first four of the last five completed calendar quarters immediately prior to the calendar quarter in which the claimant filed his or her valid original claim.[5] The alternate base period is the last four completed calendar quarters immediately prior to the calendar quarter in which the claimant filed their valid original claim.[6]

When a claimant meets the requirements of a valid original claim in the basic base period, the Department of Labor will use that period to establish his or her claim. If a claimant does not meet the requirements in the basic base period, the Department of Labor will automatically look at the claimant's alternate base period to determine whether a valid claim can be filed using that condition. A claimant who can establish a claim by using the basic base period but who wishes to use wages from the alternate base period must request to use the alternate base period within ten days of the date of the monetary determination.[7]

If the claimant did not file a valid original claim because he or she did not have sufficient remuneration and received worker's compensation or volunteer firefighters benefits during the base period, the claimant can apply to have the base period extended backward based on the number of calendar quarters he or she received such payments but no more than two calendar quarters.[8]

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[4] Labor Law § 526 (6); *See* Appeal Board No. 595344 (claimant with previous valid original claim unable to establish subsequent claim because he had not worked in employment since beginning of previous valid original claim, despite having received back pay and other remuneration during his base period).

[5] Labor Law § 520 *"…*the term base period shall mean the first four of the last five completed calendar quarters ending with the week immediately preceding the filing of a valid original claim."

[6] Labor Law §§ 520 (2) and 527 (2)

[7] Labor Law §527 (2) (b) (i)

[8] Labor Law § 527 (3)

2.17.3 WEEKLY BENEFIT RATE

The benefit rate is the weekly amount of money a claimant may receive for a full week of eligibility. This rate is calculated based on the claimant's base period employment and earnings. It is equal to one twenty-sixth (1/26th) of the high quarter wages paid to the claimant in his or her base period, provided the claimant has remuneration paid in all four calendar quarters during the basic or alternate base period. If the claimant has remuneration in all four quarters but has high quarter wages of $3,575 or less, the weekly benefit rate will equal one twenty-fifth (1/25th) of the high quarter earnings.[9]

When a claimant only has earnings in two or three quarters of the base period the benefit rate is equal to 1/26th of the average of the two highest quarters. For a claimant who has earnings in two or three quarters but whose high calendar quarter earnings are more than $3,575 but less than $4,000, the claimant's benefit rate is 1/26th of the high calendar quarter. A claimant who has earnings in two or three quarters but does not have earnings over $3,575 will have a benefit rate equal to 1/25th of the high calendar quarter wages.[10]

Number of quarters with wages in base period	**High quarter wages**	**Percentage used to establish benefit rate**
Four quarters	Greater than $ 3,575	1/26th of high quarter wages
Four quarters	Equal to or less than $ 3,575	1/25th of high quarter wages
Two or three quarters	Greater than $ 4,000	1/26th of average of two high quarter wages
Two or three quarters	Between $ 4,000 and $ 3,575	1/26th of high quarter wages
Two or three quarters	Equal to or less than $ 3,575	1/25th of high quarter wages

A claimant who did not work in all the weeks of the quarter with the highest wages may request his or her benefit rate be recalculated using the average weekly wage in the base period.[11] In order to qualify for this adjustment, the claimant must be eligible to file a valid original claim using either the basic, alternate or extended base period; and have at least 20 weeks of work in the

[9] Labor Law § 590 (5) (a)

[10] *Id.*

[11] Labor Law § 590 (12)

base period.[12] If a claimant submits such a request for reconsideration and it is determined that one-half of the average weekly wage of all wages paid for all weeks of employment in the base period is at least five dollars more than the weekly benefit amount previously calculated, the claimant is entitled to that amount as a benefit rate.[13]

There are maximum and minimum benefit rates. As of January 1, 2020, the minimum benefit rate is $104 per week if the claimant does not have wages in the high quarter exceeding $3,575, and $143 if the claimant has wages in the high quarter exceeding $3,575 but less than $4,000.[14] In October 2019, the maximum benefit rate changed to 36 percent of the "average weekly wage of the state…as determined by the commissioner."[15] That percentage is expected to increase every year until 2026 when it is expected to be set at 50 percent of the average weekly wage, so long as the increase can be supported by the balance of the fund.[16] The 2018 average weekly wage was established by the Commissioner to be $1401.17,[17] and the new maximum benefit rate beginning in October 2019 is $504.

2.17.4 REMUNERATION / WAGES

For the purposes of calculating a valid original claim, "remuneration" means every form of compensation for employment paid by an employer to an employee, whether paid directly or indirectly, including salaries, commissions,[18] bonuses, and the reasonable money value of board, rent, housing, lodging or similar advantage received.[19] Additionally, where an employee receives gratuities, the value of the gratuities is deemed remuneration paid by the employer.[20] Payments

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[12] *See, e.g.* Appeal Board Case No. 562639

[13] Labor Law § 590 (12) (b)

[14] Labor Law §§ 590 (a) and (b)

[15] Labor Law § 529 (2) ("The average weekly wage of the state of New York for the previous calendar year as determined by the commissioner no later than the thirty-first day of May each year").

[16] Labor Law §§ 590 (a) and (b).

[17] https://www.labor.ny.gov/stats/avg_wkly_wage.shtm

[18] *See, e.g.,* Appeal Board No. 572141 (payment made to claimant was comprised solely of commissions and was properly credited to the claimant as remuneration on the date the payment was made).

[19] *Matter of Reif,* 8 N.Y.2d 927 (1960) (employer liable for contributions based on remuneration in the form of board, lodging and meals).

[20] Labor Law § 517; *see also,* Appeal Board No. 583387 ("tips received by the hair stylists and nail technicians in the instant matter were received during the course of their employment, thus such tips constitute 'remuneration'") and Appeal Board No. 540158 ("tips received by the exotic performers from the customers in exchange for the performance

made by an employer to an employee who is on paid leave are also considered remuneration, as are payments made by an employer to an employee in anticipation of termination of their employment but while the employee is still an active employee and on-call for the employer.[21] Payments made which constitute accrued vacation pay and accrued holiday pay are considered remuneration to be included in establishing a valid original claim.[22]

Certain payments by employers are excluded from the definition of remuneration. Remuneration does not include payments by an employer to a fund to provide benefits in connection with retirement, disability, sickness or death,[23] payments without deduction of the tax imposed upon an employee under the federal insurance contributions act,[24] payments on account of retirement,[25] any payment on account of sickness or disability made by an employer to an employee after the expiration of six calendar months following the last calendar month in which the claimant worked for such employer,[26] payments made to or from certain trusts or annuity plans

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must certainly be considered to have been received during the course of the performers' employment and, consequently, constitute remuneration").

[21] Appeal Board No. 560258 (a "week of employment includes any statutory week during any part of which an employee is on paid vacation or other paid leave of absence even though no actual work is performed") (citing 12 NYCRR § 470.2 (g)); Appeal Board No. 540089 (while claimant could not use sick leave payments to establish entitlement, she could use vacation / paid leave of absence wages in establishing a claim as wages paid during the claimant's paid vacation/leave of absence periods are considered compensation); Appeal Board No. 604349 (payments made to the claimant before the last day of her active employment constitute remuneration regardless of whether the claimant actually performed work for the employer; the work requirement of Labor Law § 527 (6) is not controlling because the claimant in this matter did not have a prior valid original claim; the claimant in this matter was providing a service of being "on-call" while paid her regular salary until her position was eliminated).

[22] Appeal Board No. 583637, citing Appeal Board No. 518332 and Special Bulletin A-710-10 (C) (5) ("…accrued holiday pay paid after termination of employment constitutes remuneration during the base period since it is, in effect, payment for prior services.")

[23] Labor Law § 517 (2) (a); *see also,* Appeal Board No. 555606 ("payment of health benefits is not considered remuneration"); Appeal Board No. 540089 (claimant, who received sick leave payments at half-pay pursuant to plan established by employer could not use those payments to establish entitlement to unemployment insurance benefits); *Matter of Rappaport,* 144 A.D.2d 141 (3d Dep't 1998) (weeks of paid sick leave were not remuneration and such payments did not make the claimant not totally unemployed); *Matter of Hines,* 161 A.D.2d 909 (3d Dep't 1990) (payments received by claimant pursuant to employer's disability plan could not be used to establish claim for benefits); *Matter of Bachuretz,* 140 A.D.2d 785 (3d Dep't 1988) (maternity leave payments made to claimant could not be used to establish claim for benefits); *Matter of Luxenberg,* 149 A.D.2d 778 (3d Dep't 1989) (workers compensation payments could not be used to establish claim for benefits).

[24] Labor Law § 517 (2) (b); 26 U.S.C. § 3101 *et seq.*

[25] Labor Law § 517 (2) (c)

[26] Labor Law § 517 (2) (d); *see also,* Appeal Board No. 569688

meeting specific requirements under the Internal Revenue Code,[27] compensation other than cash to an employee for service not in the course of the employer's trade or business,[28] payments, other than vacation or sick pay, made to an employee age 65 or older if the employee did not work for the employer at the time the payment was made,[29] dismissal payments,[30] or payments made by an employer who is not liable for contributions under the unemployment insurance law.[31] In addition, wage credits used to establish a previous valid original claim cannot be used to establish a subsequent valid original claim.[32]

Pursuant to the Labor Law, "remuneration paid" or "wages paid" are credited to a claimant on the date such payments are made,[33] even if they are earned for services performed at an earlier date[34] or are a type of retroactive payment, such as an award of back pay.[35] The Board has found, in very limited circumstances, that an employee may be credited with wages at an earlier date than when they were paid. Where there is a violation of Labor Law § 191 (Frequency of Payments) or where an employer deviates from its regular payroll practice to the detriment of the claimant, the Board has found it reasonable to equate the term "earnings" in Labor Law § 527 (1), with the term "remuneration earned" in 12 NYCRR § 470.2. That regulation states where an employer has a set payroll period, remuneration earned, whether or not paid, is be deemed "paid," in pertinent part, as of (1) the day or the first of several days on which wages definitely assignable to a payroll period are generally paid by the employer or (2) as of the day when both the amount and the liability of the employer for payment thereof have been unconditionally established if the

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[27] Labor Law § 517 (2) (e); 26 USCA §401(a); 26 USCA §501(a)

[28] Labor Law § 517 (2) (f)

[29] Labor Law § 517 (2) (g)

[30] Labor Law § 517 (2) (h); *see also,* Appeal Board Nos. 584435 and 552477 (dismissal payments cannot be used to establish a claim for benefits).

[31] Labor Law § 517 (2) (i); *see also,* Appeal Board No. 541501 (claimant was determined to be an independent contractor and could not use earnings to establish a claim).

[32] Labor Law § 527 (5).

[33] Labor Law § 516.

[34] *See* Appeal Board No. 588462 (although claimant worked during the last two weeks of the first quarter of a year in her base period, payment for those services was not made until April 3 and could not be credited to the claimant until the second quarter of the year)

[35] *See* Appeal Board No. 563507 (claimant was credited with residual payments on the date payments were made despite his argument that, pursuant to the terms of a collective bargaining agreement, he should have been paid the sums at an earlier date)

remuneration is not definitely assignable to a payroll period.[36] For example, where an employer had a definite payroll period but due to technological issues beyond the claimant's control, his payment was delayed,[37] or where the employer violates Labor Law § 191 by improperly delaying the payment of wages to the claimant,[38] the Board has found that remuneration can be deemed paid in the same statutory week in which the claimant earned those wages, rather than when the payment was issued.

2.17.5 WORK IN MULTIPLE STATES

When a claimant has worked both in and outside of New York State, the ALJ must utilize the four tests provided by statute to determine whether the claimant is eligible for benefits from New York State. Initially, the ALJ must determine whether the claimant's work was primarily localized in New York.[39] Work may be deemed "localized" if it is performed both within and outside the state so long as the out-of-state work is incidental to the work performed in-state, that is, if it is "temporary or transitory in nature or consists of isolated transactions."[40] If the claimant's work was primarily localized in New York, then the claimant is eligible for unemployment insurance benefits from New York. If the claimant's work was not localized in any state, including New York, the ALJ must then consider the remaining three-step test in succession as provided by Labor Law.

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[36] 12 NYCRR § 470.2

[37] Appeal Board No. 582235 (claimant was credited with wages in May and June since employer had a set payroll period and but for a technological problem that was no fault of the claimant's he was not paid those wages until July).

[38] *See* Appeal Board No. 591444 A (employer could not explain why claimant was not paid for two weeks of work during two separate quarters in the claimant's base period, Board held that wages that should have been paid to claimant were attributable to the quarters in which the claimant worked and established a valid original claim; employer actions violated Labor Law § 191); Appeal Board No. 578344 (Board held claimant could be credited wages at the time they were assignable to the employer's set biweekly pay periods where claimant worked during three quarters in her base period but was not paid in accordance with Labor Law §191 and instead received a lump sum amount for two quarters of work at one time) (citing 12 NYCRR § 470.2); Appeal Board No. 573732 (same); Appeal Board No. 582941 (claimant credited with earnings during employer's biweekly pay period where he was only paid on a sporadic basis when there were funds to disburse).

[39] Labor Law § 511 (2); *see also, Matter of Allen,* 100 N.Y.2d 282 (2003) (physical presence determines localization for the purposes of determining whether claimant is entitled to unemployment insurance benefits under New York Law; Court noted "the uniform rule was intended to promote efficiency, and to ensure that unemployment benefits are paid by the state where an unemployed individual is physically present to seek new work. Unemployment has the greatest economic impact in the community in which the unemployed individual resides; unemployment benefits are generally linked to the cost of living in this area."); Appeal Board No. 557288 (as claimant resided in Nevada and provided all services in Nevada, New York did not have jurisdiction over the claimant's claim).

[40] Labor Law § 511 (2).

Labor Law § 511 (3) provides that the term "employment" includes a person's entire service performed within or both within or without this state if the service is not localized in any state but some of the service is performed in New York and:

(a) the employee's base of operations[41] is in this state; or

(b) if there is no base of operations in any state in which some of the service is performed, the place from which the service is directed or controlled[42] is in this state; or

(c) if the base of operations or the place from which such service is directed or controlled is not in any state in which some part of the service is performed, the person's residence is in this state.[43]

These tests are applied in succession to the entire service provided by the employee, both within and without the state.[44] In some cases, an employee may be covered by New York law even if no services are performed in New York provided that the services are not covered under any other law of any other state.[45]

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[41] The base of operations of an employee is the place he or she starts out to work (in two or more jurisdictions), returns to receive instructions or communications from his or her employer or other person, replenishes stock and material, repairs equipment used, performs any other functions of his or her trade or profession. *See* Department of Labor Form IA 116.3; *In re Boettcher*, 79 A.D.2d 740 (3d Dep't 1980) (base of operations is not necessarily limited to the business' headquarters); Appeal Board No. 556994 (claimant's base of operations was state of Florida where she performed 40% of work in Florida, the company had a branch location in Florida and the claimant resided there). *See also* Appeal Board No. 600442 (claimant's base of operations was state of California, where claimant received direction from California office, route ended in California, trucks were stored in California and paperwork was sent to California) (citing *Normyle* (161 A.D.2d 888 (3d Dep't 1990) (base of operations means something more than where the claimant starts and finishes their work and occasionally receives phone calls; claimant's home was not base of operation).

[42] 'Direction and control' means the place from which the employer directs and controls the activities of employees. It does not need to be the location of the main, principal or corporate office. It is the place that is the source of basic authority over the supervision, job assignments, instructions, and personnel and payroll records. *See* Department of Labor Form IA 116.3 and *In re Boettcher*, *supra*.

[43] Labor Law § 511 (3). *See also,* Appeal Board No. 600442 (Appeal Board unable to rely on claimant's residence to establish New York because the work was localized in the state of California).

[44] *See In re Matter of LaFrance*, 173 A.D. 2d (3d Dep't 1991) (claimant worked as a tractor trailer driver, lived in New York, began and ended their trips in New York, stored their tractor trailer at their home on weekends, claimant filled out application for employment at employer's office in New York, employer had clients in New York; claimant completed remaining employment documents in Ohio, received training in Ohio, and was required to call Ohio daily including weekends to receive assignments; Board's decision finding claimant's base in New York supported by substantial evidence); *Matter of Mallia,* 299 N.Y. 232, 239 (1949).

[45] *See* Labor Law § 511 (4) and § 511 (5); *see also* Labor Law § 561 (where employers voluntarily elect to pay New York State contributions).

Pursuant to the provisions of the Federal Unemployment Tax Act,[46] regulations were enacted which permit an unemployed worker with covered employment or wages in more than one state to combine all such wages and employment in one state. A claim filed under this arrangement is referred to as a "combined-wage claim." The state in which the claim is filed is the paying state and any other state where the claimant had covered employment and wages is the transferring state.[47] The transferring state is to transfer all covered employment during the base period to the paying state without restriction, with certain exceptions described in the regulation.[48] It is then the responsibility of the paying state to determine the claimant's entitlement to benefits, based on the claimant's employment in the paying state and on all employment and wages transferred to the paying state by the transferring state(s).[49] Redeterminations may be made by the paying state in accordance with law based on additional or corrected information received from any source,[50] but an appeal or request for redetermination involving a dispute over the amount of employment and wages subject to transfer "shall be decided by the transferring state in accordance with its law."[51]

The remuneration earned in another state by a New York claimant can be used to break a disqualification as long as the remuneration is considered wages by the other state.[52]

2.17.6 REDUCTIONS IN THE BENEFIT RATE

PENSIONS / RETIREMENT BENEFITS[53]

When a claimant receives a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on his or her previous work from a base period employer, the claimant's benefit rate is reduced if the base period employer contributed to the

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[46] Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 – 3311

[47] 20 CFR § 616.6 (c)

[48] 20 CFR § 616.9

[49] 20 CFR § 616.8 (1); *see also Matter of Johnson*, 199 A.D. 2d 727 (3d Dep't 1993) ("'Base period and benefit year' are defined as 'the base period and benefit year applicable under the unemployment compensation law of the paying State'").

[50] 20 CFR § 616.8 (c)

[51] 20 CFR § 616.8 (d) (3)

[52] See A.B 462,249 (claimant wages earned in South Carolina with employer without any New York nexus can be used to break prior disqualification for voluntary quit without good cause)

[53] For more detailed information on Pensions/Retirement Payments, see Chapter 11, Retirement Payments.

pension and the base period employment affected the claimant's eligibility for, or increased the amount of, the pension.[54] The benefit rate is reduced "by the largest number of whole dollars which is not more than the pro-rated weekly amount of such payment."[55]

If at the time benefits are payable, it has not been established that the claimant will be receiving pension / retirement benefits, unemployment benefits are paid without reduction. The payment of unemployment benefits is subject to review within 6 months from the date the claimant's right to the pension is established in the absence of fraud or willful misrepresentation.[56] If the pension payments cover the same period for which the claimant also received unemployment benefits, the reduction is retroactive and the overpayment of unemployment benefits is recoverable, regardless of whether the claimant made a factually false statement.[57]

WORKERS COMPENSATION REDUCTION

A claimant's unemployment benefit rate is reduced if the claimant receives Workers Compensation benefits. The maximum amount of unemployment benefits a claimant will be entitled to will be the difference between the amount of Workers Compensation benefits and 100% of the claimant's average weekly wage.[58]

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[54] Labor Law § 600; *see also, Matter of Burger*, 109 A.D.3d 1073 (3d Dep't 2013).

[55] Labor Law § 600 (1) (b)

[56] Labor Law § 600 (1) (c); Labor Law § 597 (3) and § 597 (4); *see also,* Appeal Board No. 567299 ("The Appeal Board has consistently held that there was no jurisdiction for the Department to issue a pension reduction re-determination in the absence of an initial determination of willful misrepresentation and when more than six months had passed since the claimant's right to the pension had been established").

[57] *See* Appeal Board No. 583677; *Matter of Burger*, 109 A.D.3d 1073 (3d Dep't 2013) (citing *Matter of Sanchez,* 56 A.D.3d 846 (3d Dep't 2008) (payments of unemployment benefits under these circumstances are a "conditional payment" and are subject to review and recovery, regardless of whether the claimant is at fault).

[58] Labor Law § 591 (5); *see also,* Appeal Board No. 548920 (claimant was entitled to Workers' Compensation benefits and her unemployment insurance benefits were required to be reduced by law despite her contention that she never actually received the Workers' Compensation benefits); *Matter of Burrows*, 31 A.D.3d 1094 (3d Dep't 2006) (benefits claimant received pursuant to NY Gen. Mun. Law § 207-c, which include payment of wages, salary, medical and hospital expenses for police officers injured while on duty, do not constitute Workers' Compensation benefits for purposes of Labor Law § 591 (5)).