

New York State Department of Labor  
Unemployment Insurance Division  
Adjudication Services Office

October - 2015  
Interpretation Services  
Total or Partial Unemployment  
Separation Payments

**Date of Payment**

When determining whether an initial payment of dismissal pay is made more than thirty days from the last day of the claimant's employment, the payment will be considered to have been made on the check date or the date the delivery was attempted.

A.B. 580,740

The Department of Labor issued the initial determination, as modified, holding the claimant ineligible to receive benefits effective April 7, 2014 through April 7, 2015, pursuant to Labor Law §591(6), due to receipt of dismissal pay. The claimant requested a hearing.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the Commissioner of Labor. By decision filed June 4, 2014 (A.L.J. Case No. 014-13850), the Administrative Law Judge overruled the initial determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following:

**Findings of Fact:** The claimant was employed by the employer publishing company; her weekly gross pay was \$1,630.00.

By letter dated February 27, 2014, the claimant –along with other employees selected by the employer to be part of its “Employment Termination Program”-- was notified that her employment had been terminated and that her last day of employment would be April 1, 2014. As part of its notice to the affected laid-off employees, the employer presented an option for the claimant to receive a one-time lump-sum severance payment in the amount of \$84,936.84, which amount was equivalent to 52 weeks of pay and based upon the claimant’s regular annual base salary of \$84,936.84. The employer also sent the claimant a proposed Separation Agreement and Release, which was signed by the claimant on April 10, 2014.

The Separation Agreement and Release provided that it was being signed in connection with the termination of the claimant’s employment, and in exchange for the severance pay and benefits set forth in the employer’s February 27, 2014 letter. The Agreement also included a general waiver and release by the claimant of any and all claims against the employer. At the time she signed this agreement, the claimant had no plan to sue the employer, nor was she contemplating a lawsuit against the employer.

The claimant last worked for the employer on April 1, 2014 and filed a claim for unemployment benefits on April 7, 2014.

By check dated May 1, 2014, the claimant was paid “termination pay” in the gross amount of \$84,936.84, as set forth in the February 27, 2014 letter. The check was mailed to the claimant and delivery was first attempted on May 1, 2014. The claimant was not at home at the time delivery was attempted; she received the check the following day, May 2.

**Opinion:** Pursuant Labor Law § 591 (6) (a), “No benefits shall be payable to a claimant for any week during a dismissal period for which a claimant receives dismissal pay, nor shall any day within such week be considered a day of total unemployment under section five hundred twenty-two of this article, if such weekly dismissal pay exceeds the maximum weekly benefit rate.” Subsection (d) provides further that the provisions of this subdivision shall not apply during any weeks in which the initial payment of dismissal pay is made more than thirty days from the last day of the claimant’s employment.

The term “dismissal pay”, is defined under subsection (b) of Labor Law § 591 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, and health insurance or payments for supplemental unemployment benefits.”

The evidence establishes that the claimant's last day of employment was April 1, 2014. The lump-sum severance payment of \$84,936.84 was paid to the claimant on May 1, 2014, and therefore was paid within the 30-day statutory period. We are not persuaded by the claimant's contention that since she did not receive the payment until May 2 it was not made within the time set forth in the statute. Since delivery of the check to the claimant was attempted on May 1, 2014, and the check is dated May 1, this is the date that will be considered the payment date under these circumstances. The payment was calculated using the claimant's gross weekly earnings of \$1,630.00, which exceed the state's maximum weekly unemployment benefits rate of \$405.

We do not concur with the hearing judge's conclusion that the one-time lump sum payment to the claimant made to her in the context of her separation from employment, was not dismissal pay under Labor Law § 591(6). The evidence establishes that the lump sum paid to the claimant was made solely as a result of her separation from employment. The pay is described as "Termination Pay" on the check payable to the claimant. The fact that the claimant also signed a general "Separation and Release Agreement" purporting to waive any claims against the employer, does not preclude a finding that the payment upon separation constitutes dismissal pay. Significantly, the claimant acknowledged that she had no plans to sue the employer for any reason, including the circumstances of her separation from employment. The employer plainly stated upon advising the claimant of the end of her employment that the severance benefit was for employees being laid off in connection with its termination program. We note that the statute itself excludes certain payments from consideration as dismissal pay, and the amount paid to the claimant does not fit into any of those categories. Moreover, to the extent that the Release signed by the claimant could be construed as waiving her rights to unemployment, the agreement is not valid. See, Labor Law §595.

Accordingly, we find that the amount paid to the claimant due to her separation from employment constitutes dismissal pay, and renders the claimant ineligible to receive unemployment benefits. The "dismissal period", or period of ineligibility when there has been a lump sum payment and no designated dismissal period, is determined by dividing the lump sum by the claimant's actual weekly pay, and that period shall commence on "the day after the claimant's last day of employment" Labor Law § 591(6) (c). The claimant's severance pay was defined as 52 weeks of her regular pay, which results in 52 weeks of ineligibility, beginning April 2, 2014, the day after the claimant's last day of employment. Thus, the claimant is ineligible through April 2, 2015, not April 7, 2015.

**Decision:** The decision of the Administrative Law Judge is reversed.

The initial determination, holding the claimant ineligible to receive benefits effective April 7, 2014 through April 7, 2015, pursuant to Labor Law §591(6), due to receipt of dismissal pay, is modified to be effective April 7, 2014 through April 2, 2015, and, as so modified, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

### **Comments**

1. In this case the claimant contended that as she did not receive the initial dismissal payment within the time set forth by the statute she was eligible for Unemployment Insurance Benefits. The Appeal Board, in rejecting the claimant's contention, found it significant that the reason the claimant did not receive the payment within the 30 day statutory limit was due to her not being at home when the first attempt to deliver the payment to her was made. As that initial attempt was within the 30 day limit the claimant was not eligible for Unemployment Insurance Benefits.
2. The Appeal Board also found it significant that the date on the check was within the 30 day statutory limit.