

Overview of the Revised Policy on False or Misleading Statements Knowingly Made

Introduction

As administrator of the *Employment Insurance Act*, the EI Commission must take appropriate measures to deter abuse of the system. Under the *Employment Insurance Act*, the Commission has the discretionary power to impose penalties or to prosecute claimants, any individual acting on their behalf or an employer who has knowingly made false or misleading statements with respect to a claim for employment insurance benefits.

Principles of the policy

In response to concerns expressed by the Federal Court of Appeal, Umpires and Boards of Referees as well as the interested public, the Employment Insurance Commission undertook, over the last two years, a review of its policy on false or misleading statements knowingly made.

The revised policy became effective on June 1, 2005 and the Commission will perform quality monitoring of this policy in the year following implementation. This revised policy is intended to create a balance between the seriousness of the misrepresentation and the penalty while deterring abuse of the Employment Insurance Program. This revised policy also provides that employers and claimants are handled similarly, specifically with respect to the concept of ascending levels of penalty for repetitive misrepresentation.

Penalties imposed on claimants

Calculation of penalty amounts

Once the Commission has determined that there has been a false or misleading statement, knowingly made, it must determine the seriousness of the misrepresentation and determine whether there are mitigating circumstances that may reduce the amount of the penalty. The penalty amount is not determined until all these steps have been taken.

In order to ensure nationwide consistency and avoid arbitrary decisions, the Commission has established guidelines to direct its Insurance Agents in the administration of the *Employment Insurance Act* when determining penalty amounts. On a number of occasions, the Federal Court of Appeal has upheld the Commission's policy of using penalty levels (percentages) to set the amount of a penalty as long as the percentages were not applied automatically.

Under the previous policy, the method of calculating the penalty amount was in respect of the number of false or misleading statements knowingly made and could be 100%, 200% or 300% of the benefit rate depending on whether it was the first, second or third or more misrepresentation.

Under the revised policy, the amount of the penalty is calculated in consideration of the following criteria:

- Percentages that have been reduced and may be 50%, 100% or 150% respectively of all net overpayments and underpayments arising from misrepresentation;
- A ceiling per benefit period of \$5,000, \$8,000 or \$10,000, depending on whether it is a first, second, third or more misrepresentation (repetitive misrepresentation);
- The maximum permitted under paragraph 38(2)(a) of the *Act*, or three times the weekly benefit rate for each misrepresentation; or
- The maximum permitted under paragraph 38(2)(c) of the *Act*, or three times the maximum rate of weekly benefits in effect when the act or omission occurred;
- The level of the misrepresentation (repetition); and
- All mitigating circumstances.

To better illustrate these changes, definitions and examples appear below.

Definitions

Misrepresentation:

A false or misleading statement knowingly made. When a misrepresentation applies to one claimant report card, which normally covers two weeks, it is not necessary that false or misleading statements be knowingly made for each of the two weeks covered by the Claimant's Report.

Net overpayment amount:

The net amount of over - and underpayments arising only from misrepresentations knowingly made. If the Commission is convinced that certain false statements by claimants (each of the two weeks) were not knowingly made, these reports will not be included in the calculation of the net overpayment since they do not constitute misrepresentation.

Repetitive misrepresentation:

A misrepresentation is considered repetitive only when it occurs:

- After the date on which the individual has been notified of a penalty;
- After the warning letter has been sent;
- After this individual has been found guilty as a result of legal action; and
- Only when the previous notification was issued within a period of 6 years prior to the notification of the decision corresponding to the current misrepresentation.

Penalties imposed on claimants *

Misrepresentation	% maximum	Maximum per benefit period	Maximum under the <i>Act</i>
First	50% of net overpayment	\$5,000	Three times the weekly rate per misrepresentation
Second	100% of net overpayment	\$8,000	Three times the weekly rate per misrepresentation
Third or more	150% of net overpayment	\$10,000	Three times the weekly rate per misrepresentation

* minus the mitigating circumstances defined as circumstances that lessen the seriousness of a misrepresentation due to unusual or out of the ordinary events existing before or at the time the misrepresentations was knowingly made, or at the time the Commission renders the decision.

The penalty is not calculated in this manner in situations where the benefit period was not established (BPNE). There are two possible scenarios, either the claim was never established and there was no O/P, or the claim was established but later voided and there exist an O/P.

In situation such as these, a penalty pursuant to paragraph 38(2) (c) of the EIA must be imposed.

Examples

When one misrepresentation applies to one claimant report card, which normally covers two weeks, it is not necessary that false or misleading statements be knowingly made for each of the two weeks.

Example 1 – First misrepresentation

Facts:

The Commission considered that for the three claimant's reports the false statements about undeclared earnings were made knowingly.

No mitigating circumstances

Benefit rate \$400

Allowable earnings i.e., no earnings will be deducted from benefits: \$100.

Calculating the amount of benefits paid or payable:

$$\begin{array}{r} \text{(Benefit rate + allowable earnings)} - \text{earnings} = \text{benefits paid/payable} \\ (400 \quad + 100) \quad \quad \quad - 300 \quad = 200 \end{array}$$

Calculating the over- or underpayment:

Benefits paid – benefits payable

	Declared	Benefits	Actual	Benefits	Overpayment	Underpayment
	Earnings	Paid	Earnings	Payable	(OP)	(UP)
				(400+100) - 300		
Report # 1						
Week 1	0	400	300	200	200	
Week 2	0	400	300	200	200	
Report # 2						
Week 1	0	400	300	200	200	
Week 2	0	400	300	200	200	
Report # 3						
Week 1	0	400	300	200	200	
Week 2	600	0	300	200		200
Total (OP/UP)					1,000	200
Net Overpayment					800	
Penalty Rate					50%	
Penalty Amount					400	

Example 2 – First misrepresentation

Facts:

The Commission considered that for the first and second claimant's reports the false statements about undeclared earnings were made knowingly and that for the third claimant's report the false statements about undeclared earnings were not made knowingly.

No mitigating circumstances.

Benefit rate \$400

Allowable earnings i.e., no earnings will be deducted from benefits: \$100.

Calculating the amount of benefits paid or payable:

$$(\text{Benefit rate} + \text{allowable earnings}) - \text{Earnings} = \text{benefits paid/payable}$$

$$(400 + 100) - 300 = 200$$

Calculating the over- or underpayment:

$$\text{Benefits paid} - \text{benefits payable}$$

	Declared	Benefits	Actual	Benefits	Overpayment	Underpayment
	Earnings	Paid	Earnings	Payable	(OP)	(UP)
				(400+100) – 300		
Report # 1						
Week 1	0	400	300	200	200	
Week 2	0	400	300	200	200	
Report # 2						
Week 1	0	400	300	200	200	
Week 2	0	400	300	200	200	
Report # 3						
Week 1	260	240	300	200	40	
Week 2	260	240	300	200	40	
Total (OP/UP)					880	
Net Overpayment					800	
Penalty Rate					50%	
Penalty Amount					400	

Example 3 – Repetitive misrepresentation

A Benefits period from October 3, 2004 to October 1, 2005

Investigation # 1 - June 7, 2005

Claimant failed to declare earnings for the period from November 8, 2004 to January 22, 2005.

On July 6, 2005, the claimant is notified that a penalty has been imposed for knowingly making false or misleading statements and that since there were no mitigating circumstances, the penalty was calculated at 50% of the net overpayment.

Investigation # 2 - November 16, 2005

The claimant failed to declare earnings for the period from August 8, 2005 to August 28, 2005.

Because the false or misleading statements were made after the claimant had been notified of a penalty (July 6, 2005) the misrepresentation is considered **repetitive misrepresentation** and the Commission may impose a penalty of up to 100% of the net overpayment amount.

Example 3 – Repetitive misrepresentation

B Benefit period from October 3, 2004 to October 1, 2005

Investigation # 1 - June 7, 2005

The claimant failed to declare earnings for the period between November 8, 2004 and January 22, 2005.

On July 6, 2005, the claimant was notified that a penalty had been imposed for knowingly making false or misleading statements and since there were no mitigating circumstances, the penalty had been calculated at 50% of the net overpayment amount.

Investigation # 2 - November 16, 2005

The claimant failed to declare earnings for the period between April 6, 2005 and May 10, 2005.

Because these false or misleading statements were made before the claimant received notice of the penalty (July 6, 2005), **the misrepresentation is not considered repetitive misrepresentation** and the Commission may impose a penalty of up to 50% of the net overpayment amount.

Penalties Imposed on Employers

Penalties may be imposed on employers when they have made any of the misrepresentations outlined in subsection 39(1) of the *Act*.

The *Employment Insurance Act* provides two methods for establishing the maximum penalty that can be imposed on employers, depending on whether the misrepresentation did or did not enable the claimant to meet the conditions required to qualify, or to be entitled to receive or to continue to receive benefits.

Under the revised policy, the penalty amount is calculated in consideration of:

- The maximum allowed under subsection 39(2) and 39(4) of the *Act*;
- The level of the misrepresentation (repetition); and
- All mitigating circumstances.

Penalties for Employers*

	<u>Method 1 (39(2) of the Act)</u>	<u>Method 2 (39(4) of the Act)</u>
Misrepresentation	<u>Not related</u> to fulfillment of conditions for qualification / entitlement.	<u>Related</u> to fulfillment of conditions for qualification /entitlement.
First	Three times the maximum weekly benefit rate	\$4,000
Second	Six times the maximum weekly benefit rate.	\$8,000
Third or more	Nine times the maximum weekly benefit rate.	\$12,000

* Minus mitigating circumstances in all cases.

Examples

The first method will be used when employers issue a Record of Employment (ROE) that includes more hours of insurable employment than were actually worked or insurable earnings greater than those actually earned, which would have the effect of increasing the benefit rate or the duration of the benefit period for the individual.

The second method will be used to determine the amount of the penalty when the misrepresentation involves issuing or selling false ROEs when no work or services have been rendered.

The second method will be used when employers issue a ROE that includes more hours of insurable employment than were actually worked, or insurable earnings greater than those actually earned, or who change the reason for termination, when this information enables an individual to meet the conditions required or to become entitled to benefits.