



United States Patent and Trademark Office

Office of the Commissioner for Patents

MEMORANDUM

Date: April 21, 2016

To: All Patents Employees

From: *Andrew Faile*
Andrew Faile
Deputy Commissioner for Patent Operations

Subject: Extension of the Pendency Award and Count System Initiatives, and Other Issues

I am pleased to announce that the Joint Count System Initiatives/Docket Management Task Force, comprising representatives from the Patent Office Professional Association (POPA) and Patents Management, have reached agreement on renewal of the Pendency Award for an additional year, continuation of the Count System Initiatives (CSI), and other related items.

The agency's investment in the Pendency Award has produced gains by incentivizing examiners to complete actions at outstanding levels as set forth in the PAP. The pendency award requirements have been modified this year to include a minimum production level for each quarter in which a pendency award is earned to encourage examiners to maintain an acceptable level of production while earning a Pendency Award. Additionally, recognizing the outstanding efforts of examiners to sustain performance at award levels, the requirements for earning a Supplemental payment have been modified.

The Count System Initiatives were designed to move examiner work credit to the front end of prosecution to reinforce addressing issues as early in prosecution as possible. This complements our ongoing quality initiatives aimed at improving clarity of the prosecution record. The CSI also provided an overall increase in the amount of time available to each examiner for examination. To protect examiners from adverse impacts which might have resulted from the change in the count system, a "safety net" was provided. Under the Safety Net, production is calculated in PALM using both the old and new count systems allowing an examiner to rely on the old count system in instances where it is advantageous. The members of the Task Force have agreed to retirement of the "safety net" in FY 2019 which will reduce the load on our IT systems created by running both count systems.

The agency and POPA remain committed to the principles set forth in previous memoranda such as the memo dated November 27, 2012, entitled Fiscal Year [\(FY\) 2013 Timing of Patent Examiners' Work Credit](#), the PAP, and the PAP guidelines. Reviewers are reminded that returns should be timely and complete, avoiding "piecemeal" review by identifying all issues

and providing sufficient guidance as to what corrections are required in order to approve the action. Examiners are reminded that submission of work must be complete and correct consistent with each examiner's PAP grade level requirements and that any corrections needed to submitted work should be completed and returned promptly.

Supervisors and examiners are expected to work together to clarify and resolve issues when they arise. QAs are also available to provide assistance and training, and to assist with resolution of issues which may be preventing completion of a case. When a reviewer provides feedback orally, the examiner may prepare a written summary of the feedback; if requested by the examiner, the reviewer will review the written summary and provide further clarification, if necessary, of what corrections the reviewer requires in order to approve the action.

To assess the timeliness of reviews, we will be collecting information on the length of time taken to review submitted work. This information will help us assess whether further review process modifications are needed to ensure reviews are completed within a reasonable period of time.

This memorandum summarizes the agreements reached by the Joint CSI/DM Task Force on the following topics:

- I. Renewal and Modification of Pendency Award
- II. Extension and Renewal of the Count System Initiatives, including the modifications to the Gainsharing Award
- III. Clarification of New Case Docket Policy
- IV. Docket Management Pauses
 - DM Pause for Processing Terminal Disclaimers
- V. Other Related Initiatives
 - DM Adjustments for Appeal Conferences

I. Renewal and Modification of Pendency Award

[001] Renewed Award period: FY 2016 Quarter 3 through FY 2017 Quarter 2

[002] The existing Pendency Award will be renewed for an additional 4 quarter period, from the beginning of the third quarter of FY 2016 through the end of the second quarter of FY 2017.

[003] Of note are two significant changes to the Pendency Award. Starting with the 3rd quarter of FY 2016, a minimum level of productivity will be required to earn a pendency award. Any examiner who has either temporary or permanent full signatory authority on both the first and the last day of a quarter must achieve at least the Fully Successful level (95%) in the Productivity element of the PAP for the quarter in order to qualify for the Pendency Award. All other examiners must achieve at least the

Marginal level (88%) in the Productivity element of the PAP for the quarter in order to qualify for the Pendency Award.

[004] In addition, the requirements for a Supplemental payment have been modified to provide payments for sustained performance at either the Tier 1 or Tier 2 Level for 3 of the 4 award quarters, as long as the low quarter is not more than one level below the award level earned. The chart in Appendix A illustrates all the scenarios in which the Supplemental Payment is earned.

[005] The complete award criteria and terms are found in the Agreement, and are set forth in their entirety below.

[006] Pendency Award

[007] To be eligible for the Pendency Award in any given quarter, an examiner must

- (a) have a most recent rating of record of Fully Successful or better;
- (b) have completed one full year of employment with the USPTO before the first day of the quarter under consideration;
- (c) have a returns category score in the Docket Management element of at least 100%;
- (d) meet the following productivity requirement:**
 - i. for any examiner who has either temporary or permanent full signatory authority on both the first and the last day of the quarter, performance at least at the Fully Successful level (95%) in the Productivity element of the PAP for the quarter is required,**
 - ii. for all other examiners, performance at least at the Marginal level (88%) in the Productivity element of the PAP for the quarter is required; and**
- (e) meet the award criteria as outlined below in paragraphs [008]- [031].

[008] The Pendency Award Program has three tiers of performance award criteria. Quarterly award payments will be made based on performance achieved during that quarter.

[009] Entry-level Tier: 0.25% of current annual salary, excluding overtime and awards, paid following a quarter in which an examiner meets each of the following criteria:

- At least 110% overall Docket Management score (excluding the Returns category); and
- No ceiling exceeded applications in any category during the period.

[010] Tier 1: 0.5% of current annual salary, excluding overtime and awards, paid following a quarter in which an examiner meets each of the following criteria:

- At least 120% overall Docket Management score (excluding the Returns category); and
- No single category score under 100%; and

- Completion of a number of oldest new or other applications for which asterisk credit is received as set out in Section E. below, which depends on the number of biweeks in the quarter, part-time status and expectancy (hrs/BD); and
- No more than one application exceeds the ceiling in the quarter.

[011] Tier 2: 0.75% of current annual salary, excluding overtime and awards, paid following a quarter in which an examiner meets each of the following criteria:

- At least 140% overall Docket Management score (excluding the Returns category); and
- No single category score under 120% (excluding the Returns category); and
- Returns category must be at least 100%; and
- Completion of a number of oldest new or other applications for which asterisk credit is received as set out in Section E. below, which depends on the number of biweeks in the quarter, part-time status and expectancy (hrs/BD); and
- No more than one application exceeds the ceiling in the quarter.

[012] Miscellaneous Criteria and Exceptions Applicable to all Tiers

[013] As noted in the Tier 1 and Tier 2 descriptions above, completion of a minimum number of oldest new asterisk or other applications for which asterisk credit is received in the quarter is required. The following types of applications count towards the criteria:

- Regular and Continuing New applications which are either marked as oldest or for which asterisk credit is received.
- RCE applications which are either marked as oldest or for which asterisk credit is received.
- All Special New.

[014] The number of oldest new or asterisk credited applications which must be completed in a quarter to meet the Tier 1 or Tier 2 award criteria depends upon the length of the quarter, the examiner's work schedule (full-time vs. part-time), and expectancy (if over 28 hours/BD, based upon the examiner's average hours/BD for the previous quarter), as follows:

5 Biweek Quarter Scenario:

5 Biweek Quarter	Tier 1	Tier 2
Full Time Examiner	5 applications	7 applications
Part time or over 28 hours/BD	4 applications	5 applications

6 Biweek Quarter Scenario:

6 Biweek Quarter	Tier 1	Tier 2
Full Time Examiner	6 applications	9 applications
Part time or over 28 hours/BD	4 applications	6 applications

7 Biweek Quarter Scenario:

7 Biweek Quarter	Tier 1	Tier 2
Full Time Examiner	7 applications	10 applications
Part time or over 28 hours/BD	5 applications	7 applications

- [015] If an examiner has a small number of cases in categories 1 through 4 (a small number means less than or equal to 5% of the total number of cases included in the total composite score for award purposes) and the score in that category would prevent the examiner from qualifying for an award or higher award level, the category score will not be considered for award purposes.
- [016] Pendency Award payments for part-time examiners will be prorated based on the examiner's part-time work schedule. For example, if an examiner is scheduled to work 40 hours per biweek, the examiner earning an award will receive a payment of 50% of the award payment of a full time examiner at the same grade and step.
- [017] Examiners who change their work schedule from full-time to part-time any time during a quarter, must meet the oldest new /asterisk application award criteria by completing the part-time requirement. The award payment will be based on a full-time schedule. For subsequent quarters, the examiner award requirement and award payment are both based on the examiner's part-time schedule.
- [018] Examiners who change from a part-time to a full-time work schedule any time during a quarter, must meet the oldest new/asterisk application award criteria by completing the full-time requirement. The award payment will be based on a full-time work schedule.
- [019] Supplemental Payments
- [020] In addition to the quarterly Pendency Award payments, supplemental payments will be available to examiners who achieve sustained performance at the Tier 1 or Tier 2 level. The supplemental payments will be available at the end of the second quarter of FY 2017, based on performance in the third and fourth quarters of FY 2016 and the first and second quarters of FY 2017.
- [021] Supplemental payments for part-time examiners will be based on the work schedule used to determine the Pendency Award payment in the majority of the quarters. For example, an examiner working part time in the third quarter of FY 2016, but

converting to full-time for the fourth quarter of FY 2016 and continuing to work full-time through the second quarter of FY 2017 will be eligible for a supplemental award based on his or her full-time salary if the employee meets the other criteria for the supplemental payment.

[022] The supplemental payments will be as follows:

[023] **Tier 1:** 0.5% of current annual salary, excluding overtime and awards, to any examiner who has performed at the Tier 1 level or better in **a) each of FY 2016 quarter 3 and quarter 4 and FY 2017 quarter 1 and quarter 2; or b) 3 of those quarters only if the examiner meets the requirements for the Entry-level Tier award for the remaining quarter.**

[024] **Tier 2:** 1.0% of current annual salary, excluding overtime and awards, to any examiner who has performed at the Tier 2 level in **a) each of FY 2016 quarter 3 and quarter 4 and FY 2017 quarter 1 and quarter 2; or b) 3 of those quarters only if the examiner meets the requirements for the Tier 1 award for the remaining quarter.**

[025] There is no supplemental payment for sustained performance at the Entry-level Tier. The attached chart shows scenarios in which supplemental payments are available and the payment level.

[026] There is no minimum quarterly hour requirement for payment of the Pendency Award except as provided below. Approved absences from the office will affect award determinations as follows.

[027] 1. Examiners who are on approved absence for twenty one (21) consecutive days or more for reasons that would qualify under FMLA or sick leave (excludes vacations) may elect to receive a prorated Pendency Award. In this instance, the new application requirement is prorated to the nearest whole application based on the proportion of the days missed from the quarter. The prorated award will be calculated by considering the examiner's performance in the Docket Management element only during the duty hours in which the examiner worked. If the examiner meets the criteria for any tier based upon performance in the duty hours worked and has at least 150 duty hours worked during the quarter (but fewer than 300 duty hours worked), he/she will receive an award payment X calculated as follows:

$$X = (\text{payout for highest Tier attained}) \times \frac{\text{duty hours worked}}{300 \text{ hours}}$$

where the duty hours worked is between 150 and 299 hours.

[028] The 21 day period may span quarters. An examiner who maintains the required award levels during the quarter may opt to maintain eligibility for the full Pendency Award.

[029] 2. Examiners who receive a pro-rated award for any quarter as set forth in 1) above may be eligible for a prorated supplemental payment. All Pendency Award criteria must be achieved for the time worked in each quarter. The supplemental payment will be prorated based on the total duty hours worked for all eligible quarters, using the following formula:

$$\frac{\text{total duty hours worked for all eligible quarters} *}{(\text{total number of eligible quarters}) \times 300 \text{ hours}}$$

*For purposes of this calculation, each quarter is capped at 300 duty hours.

[030] 3. For all other planned absences, defined as any absence for which an examiner has at least one working day advance knowledge, the examiner should plan ahead and position his/her docket in anticipation of the absence. An examiner who is on approved absence will receive the Docket Management adjustments as detailed in their current PAP and the current PAP Guidelines.

[031] If an examiner leaves his or her position after having two qualifying full quarters (Tier 1 or Tier 2), a supplemental award will be paid, but will be prorated to 50% of the full amount. If the examiner has three qualifying full quarters the supplemental award will be 75%. In these instances all of the quarters must be at the award level.

II. Extension and Renewal of the Count System Initiatives

[032] Effective Date: October 1, 2016

[033] The Count System Initiatives, including the modification to the Gainsharing Award, are extended until September 30, 2017. Because no changes have been made to the CSI, the policies described in the memorandum of September 30, 2013, entitled [FY 2014 Examiner Production Credits and Examiner Expectancies](#) remain in effect.

III. Clarification of New Case Docket Policy

[034] The June 18, 2015, memorandum entitled *Extension of the Pendency Award and Count System Initiatives, Changes to the Patent Examiner Performance Appraisal Plan, and Other Issues*, describes a number of policies in paragraphs [005]-[030] related to the order of examination of applications and constitution of examiners' new case dockets.

Those policies remain unchanged and in effect, with the exception of paragraphs [018] and [019], which for the purpose of clarification are superseded by the following two paragraphs:

[035] Replacement paragraph [018]:

If at selection time, the number of clocks and asterisks designated in the inventory levels are not selected, a manual correction will be made to give the examiner the number of clocks and asterisks required for the inventory levels in oldest filing date order as shown on the DM 3105. Contact your SPE for this correction.

[036] Replacement paragraph [019]:

If there is not an oldest RCE with a corresponding clock in the new category at the time of selection and an RCE is placed on an examiner's docket after selection, then the examiner may post the newly docketed RCE for credit in that biweek and get a zero day clock score. At selection, if an examiner has an RCE clock with less than 3 associated asterisks, then the examiner may ask the SPE to swap out regular new asterisks with a corresponding number of newly docketed RCEs before beginning work on the newly docketed RCEs. The asterisk credit for these applications can only be received if the oldest RCE is also posted for credit in the same biweek. These clock and swapped asterisks changes will need to be done manually. The examiner will be given new case credit for purposes of the pendency award after completing these clocks and any swapped asterisks. Note: an examiner cannot receive asterisk and DM clock credit for more than 2 new clocks and 6 associated asterisk applications in the new case category in a given biweek.

IV. Docket Management Pauses

[037] Docket management pauses will remain unchanged from last year. However to provided consistency in the treatment of employees returning to work after an extended absence for a FMLA-type pause, Combined pause, or Military pause, the following guidance is provided.

[038] Before, during and/or following a FMLA-type pause, Combined pause, and Military pause, the SPE will meet with the DM POC and if possible, the examiner, to discuss the examiner's docket. When an examiner returns, the amount of work should be reasonable with respect to the individual's situation, considering factors such as health and the number of working hours. After the meeting a reintegration plan that was discussed at the meeting will be recorded and shared with the parties. The DM POC and SPE will offer to meet with the examiner to answer any questions. When an examiner returns to work from an extended absence as referenced above, the SPE and the DM POC should work closely with the examiner to ensure that the pipeline is replenished at a reasonable rate.

DM Pause for Processing Terminal Disclaimers

- [039] Terminal Disclaimers (TDs), Transfer Inquiries, and Board Decisions are subject to a pause in the DM clock. For TDs, the DM clock should be paused when the TD paper is entered in PALM (and forwarded to the examiner) and restarted when the TD is approved or disapproved. While a case is in a pause status, it will still appear on an examiner's docket.
- [040] When an examiner sees an undecided TD (no DISQ) in an application and the application has not been paused, the examiner should send an e-mail to the Patent Legal Research Center (PLRC) box to notify them that there is a TD that needs processing. In that email, the examiner should cc their SPE and their TSB PALM Troubleshooter (troubleshooter). The troubleshooter will pause the application.
- [041] Once an examiner notifies PLRC of the TD, the examiner is not responsible for days accrued between the date of the email and the date that the decision on the TD is entered. If there is an issue getting the application paused after the email has been sent to PLRC with the troubleshooter cc'd, then once the decision is entered (DISQ in PALM), the examiner should email their DM POC with the email that was sent to PLRC and the date of the TD decision. The DM POC and troubleshooter will adjust the DM clock to remove the days between the email to PLRC and the TD decision.

V. Other Related Initiatives

DM Adjustments for Appeal Conferences

- [042] Examiners should request appeal conferences in writing following their TC procedures early enough to allow scheduling and completion of the conference, as well as completion of the answer or other action to achieve the desired DM score. When the examiner makes the request, he or she should include in the message the number of days the case has accrued.
- [043] TC managers should make every effort to schedule and conduct appeal conferences promptly, generally within 14 days of the request from the examiner.
- [044] Clocks are generally not adjusted to wait for an appeal conference to take place. However, DM adjustments will be made in situations when the conference is not scheduled and conducted within 14 days after the examiner's request for a conference. Clocks will not be paused. Instead, a manual adjustment will be made after the action is counted equivalent to the number of days in excess of 14 days from the request. A written request establishes the date for the purpose of this adjustment. Examiners should contact their SPEs to get this adjustment.

- [045] If a delay occurs (i.e. more than 14 days elapses after the request) which results in the case exceeding the ceiling, the ceiling exceeded score will be removed, and asterisk cases will be manually identified until the correction is made.
- [046] If an examiner requests a specific date for the conference that is more than 14 days from the date the request is made, there will be no adjustment to the DM score as long as the conference occurs within 5 days of that requested date. The date that the examiner requested for the conference is day 1.
- [047] When requesting in advance (more than 14 days before the desired date) it is suggested the examiner request the earliest date they are ready and available.
- [048] Examples:
- An examiner requests to schedule a conference, and the conference is held 17 days later. The clock will be adjusted by 3 days when the action is counted.
 - An examiner requests to schedule an appeal conference 21 days from today. The conference is not conducted until 42 days after the date of the request (17 days beyond the 5-day period, which includes the requested date). The clock will be adjusted by 17 days when the action is counted.
 - An examiner requests to schedule an appeal conference 21 days from today. The conference is held on the requested date. No adjustment will be given.
 - An examiner requests to schedule an appeal conference 21 days from today. The conference is not conducted until 24 days after the date of the request (3 days after the requested date). No adjustment will be given.

Appendix A

Supplemental Payment Chart:

2016		2017		Supplemental Payment at end of 2017 Q2
Q3	Q4	Q1	Q2	
Tier 2	Tier 2	Tier 2	Tier 2	1.00%
Tier 2	Tier 2	Tier 2	Tier 1	1.00%
Tier 2	Tier 2	Tier 1	Tier 2	1.00%
Tier 2	Tier 1	Tier 2	Tier 2	1.00%
Tier 1	Tier 2	Tier 2	Tier 2	1.00%
Tier 1 or 2	Tier 1 or 2	Tier 1 or 2	Entry	0.50%
Tier 1 or 2	Tier 1 or 2	Entry	Tier 1 or 2	0.50%
Tier 1 or 2	Entry	Tier 1 or 2	Tier 1 or 2	0.50%
Entry	Tier 1 or 2	Tier 1 or 2	Tier 1 or 2	0.50%
Tier 1 or 2	Tier 1 or 2	Tier 1	Tier 1	0.50%
Tier 1 or 2	Tier 1	Tier 1	Tier 1 or 2	0.50%
Tier 1	Tier 1	Tier 1 or 2	Tier 1 or 2	0.50%
Tier 1	Tier 1 or 2	Tier 1 or 2	Tier 1	0.50%
Tier 1 or 2	Tier 1	Tier 1 or 2	Tier 1	0.50%
Tier 1	Tier 1 or 2	Tier 1	Tier 1 or 2	0.50%
Tier 1	Tier 1	Tier 1	Tier 1	0.50%

Any other scenario will result in no supplemental payment.