

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-08

March 11, 2011

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Changes to the Methods Used to Calculate Backpay in Light of
Kentucky River Medical Center and to Better Effectuate the Remedial
Purposes of the Act

In *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*, 356 NLRB No. 8 (2010), the Board changed its policy with regard to the assessment of interest on make whole orders. Under the new policy, interest on make-whole awards is to be compounded on a daily basis, using the established methods for computing backpay and for determining the applicable rate of interest. This change was made in order to bring the National Labor Relations Board in line with other comparable legal regimes (including the Internal Revenue Code) and to better serve the remedial policies of the Act. In order to effectuate the change to daily compound interest, it is necessary to make changes to the manner in which backpay and other monetary awards are calculated. Henceforth, Regions should use the procedures set forth below when performing backpay calculations. In addition, consideration of the methods used in backpay calculations have prompted a reconsideration of the treatment of search-for-work and work-related expenses. A revision in our current approach to those expenses is also set forth below. Finally, a revisiting of the tax treatment of backpay awards and the reporting of backpay received to the Social Security Administration is required to avoid penalizing discriminatees. These issues also are addressed below.

Changes to Procedures to Enable the Computation of Compound Interest

In order to implement the Board's new daily compound interest rule announced in *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*, it will be necessary to adjust the methods used by Agency personnel in performing their backpay calculations. Consistent with the Board's decision, backpay will continue to be calculated on a quarterly basis as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950). However, in order to calculate daily compound interest, it is necessary to determine the earliest date on which backpay is first owed. Typically, backpay begins to accrue on the date of discrimination and is first owed at the end of the pay period in which the discrimination occurred. For example, if a respondent had a weekly pay period that runs Monday through Sunday and the discriminatee was fired on Thursday, s/he would be entitled to backpay for Thursday and subsequent days in the pay period on the first day of the next pay period, i.e., Monday. Backpay for succeeding pay

periods would likewise be due and owing on the day following the end of the pay period. Interest will now begin to accrue on pay period net backpay amounts when they are due and owing.

In addition, as interest will now be assessed on a pay period basis and compounded daily thereafter, it is necessary to reevaluate the treatment of interim earnings. If interim earnings were to continue to be deducted from gross backpay and interest only on a quarterly basis, respondents would be prejudiced. To avoid this result and to avoid also the difficult and uncertain task of attempting to calculate an exact net backpay amount on a pay period basis, interim earnings will continue to be collected and applied in backpay calculations on a quarterly basis in the following manner:

1. Gross backpay will be calculated on a pay period basis in each quarter.
2. Interim earnings will initially be calculated on a quarterly basis.¹
3. Quarterly interim earnings will be allocated to pay periods that contain gross backpay on a proportional basis determined by the proportional distribution of pay period gross backpay in the quarter. (See attachment for an illustration of this calculation.)
4. Pay period net backpay will be calculated by subtracting the proportional interim earnings from the pay period gross backpay.

Daily compounded interest will begin accruing on each pay period net backpay amount on the day following the end of the pay period, and will continue to accrue until the date the backpay is paid.

Treatment of Search-for-Work and Interim Work-Related Expenses

Discriminatees are entitled to reimbursement for expenses incurred when searching for work and for work-related expenses that would not have been incurred had the discriminatee continued to work at respondent.² Historically, these expenses are payable only to the extent they do not exceed interim earnings. Under current Board law, in quarters where discriminatees had expenses but no earnings, they were not reimbursed for these expenses.³ Unfortunately, this approach runs contrary to the goal of the Act, which is to make discriminatees whole for any losses suffered as a result of the discrimination against them. This is especially so when, in order to be eligible for backpay, discriminatees must immediately make reasonable efforts to secure employment.⁴ It does not advance the purposes of the Act to require discriminatees to search for work and often incur expenses in their search and yet not reimburse them for

¹ In the new backpay program, interim earnings can be entered as either one quarterly amount or broken down on a pay period basis.

² Such expenses include: increased transportation costs in seeking or commuting to interim employment the cost of tools or uniforms required by an interim employer, room and board when working away from home, contractually required union dues and/or initiation fees, if not previously required while working for respondent, and/or the cost of moving if required to assume interim employment. (CHM sec. 10556)

³ *English Mica Company*, 101 NLRB 1061 (1952), *West Texas Utilities Company, Inc.*, 109 NLRB 936 (1954), *Mastro Plastics Corporation*, 136 NLRB 1342, (1962).

⁴ See for example, *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1598 fn. 7 (1957).

those expenses because their search was unsuccessful. In order for employees truly to be made whole for their losses, it is therefore appropriate for them to receive full reimbursement for these expenses, consistent with the treatment of medical expenses and fund contributions,⁵ and to not limit the payment of such expenses by the amount of interim earnings received.

Accordingly, effective with the issuance of this memorandum, search-for-work and work-related expenses will be calculated separately from backpay and will be charged to Respondent regardless of whether the discriminatee received interim earnings during the period. The reimbursement of these expenses is not limited to the amount of gross backpay a discriminatee may be entitled to. These expenses will be added to net backpay in the payroll period when incurred and daily compounded interest will be charged on these amounts also. This method will bring the Agency in line with the approach of the Equal Employment Opportunity Commission⁶ and the United States Department of Labor⁷ when calculating backpay due under their statutory schemes.

Reimbursement for excess taxes owed

Under current tax laws, discriminatees who receive lump-sum backpay awards covering a multi-year backpay period are likely to incur federal and state income taxes at a higher rate than they would have had they received their wages in due course. [GC 00-07](#) entitled "Taxes which Discriminatees Owe as a Result of Receiving a Lump-Sum Backpay Award," discussed the need to seek a tax component in all cases to reimburse discriminatees for the excess federal and state income taxes they would owe from receiving a lump-sum backpay award covering more than one year of backpay. The goal of the Act is to make whole the person who has suffered a loss of earnings and other compensation as a result of the discrimination. In order for employees to be made whole, it is appropriate to seek reimbursement for amounts equal to the difference in taxes discriminatees owe upon receipt of a lump-sum payment and the taxes they would have owed had they not been the subject of discrimination.

Accordingly, effective with the issuance of this memorandum, Regions should seek a tax component in all future cases to reimburse discriminatees for the excess federal and state income taxes owed as a result of receiving a lump-sum backpay award covering more than one year of backpay.⁸ Therefore, Regions should plead the following remedy requesting this tax component in all future complaints in cases where a monetary award is available:

⁵ *Knickerbocker Plastic Co., Inc.*, 104 NLRB 514 (1953).

⁶ Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992).

⁷ See generally, *Hobby v. Georgia Power Co.*, ARB Nos. 98-166/169, 2001 WL 168898 (Feb. 2001), *aff'd Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916 (11th Cir. 2002).

⁸ See *WEBCO Industries, Inc.*, 340 NLRB 10 (2003) wherein the Board determined this issue has to be fully litigated in the underlying unfair labor practice proceeding. Regions are free to seek this remedy in pending cases if it feels it is appropriate to do so.

As part of the remedy for the unfair labor practices alleged above in paragraph(s) _____, the General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.

Reporting Backpay to the Social Security Administration

The Internal Revenue Service (IRS) and the Social Security Administration (SSA) consider backpay awards to be wages. As explained above, for income tax purposes, the IRS treats all backpay as wages in the year paid. Likewise, SSA credits backpay awarded to an individual's earnings record in the year reported by the employer. Accordingly, backpay is not credited to the proper year in which it would have been earned in the absence of a violation of the Act. This may result in lower social security benefits or a failure to meet the requirements for benefits. Upon notification of the employer or employee, SSA will allocate the backpay to the appropriate periods. (See [IRS Publication 975 Reporting Back Pay and Special Wage Payment to the Social Security Administration](#) for more details.)

The goal of the Act is to put the discriminatee back into the same situation s/he would have been in had it not been for the discrimination against her/him. Applying backpay paid for multiple years to a single year for Social Security purposes may have a dramatic effect on a discriminatee's ability to secure benefits and/or may lower benefits. For this reason, employers should be required to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the SSA what periods to which the backpay should be allocated. Accordingly, effective with the issuance of this memorandum, in cases involving backpay, Regions should seek the following remedy in all future cases requiring the employer to notify the SSA of the appropriate periods to which the backpay should be allocated:⁹

The General Counsel further seeks, as part of the remedy for the allegations in paragraph(s) _____, that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

Request for Electronic Records

For some time now, the Board has required respondents to provide electronic copies of records needed to analyze the amount of backpay due. Obtaining records in electronic form eliminates the need for keying in data into a spreadsheet for analysis and potentially shortening the amount of time taken to calculate backpay. Regions should continue to encourage respondents to submit documents in whatever electronic

⁹ Regions are free to seek this remedy in pending cases if it feels it is appropriate to do so.

form it is normally kept. Please contact DAGC Beth Tursell if your Region receives electronic documents in some form other than Microsoft Excel. Resources are available in Headquarters to assist the Regions with converting the documents to Microsoft Excel.

Training for Regional Office staff:

A new backpay program (BackpayTEC) has been created to take into account the above-mentioned changes in the calculation of backpay. Training sessions on this new tool will be held via LiveMeeting on the following dates:

| | |
|----------------|------------------------------------|
| District 1 & 2 | Thursday, March 17, at 10:30 am ET |
| District 3 & 4 | Thursday, March 17, at 2:30 pm ET |

Since the Agency is charged for each individual logging into the meeting, Regions should set up its projector and hold this training in an area where all participants can gather together. Additional information concerning these training sessions will be posted on the Compliance Training section of the Intranet. Each Regional Director should determine which individuals in the Region should participate in these training sessions, but at a minimum, every Compliance Officer, Compliance Assistant and supervisor of Compliance should participate. This memorandum should be the subject of a professional staff training session

Special recognition is due to Deputy to the Assistant General Counsel Beth Tursell and Deputy Regional Director Bill Yarbrough Region 26 who developed the procedures for calculating backpay in light of *Jackson Hospital Corporation d/b/a Kentucky River Medical Center* and to Bill Yarborough for creating the BackPayTEC program so that it will calculate backpay as set forth above. If you have any questions regarding this matter, please feel free to contact Deputy to the Assistant General Counsel Beth Tursell.

/s/
L.S.

Attachment

cc: NLRBU
Release to the Public

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