

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 13-03(CH)

February 15, 2013

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

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Reimbursement of Excess Income Taxes Paid and Reporting of Backpay
Allocation to the Social Security Administration

In *Latino Express, Inc.*, 359 NLRB No. 44 (2012), the Board adopted the Acting General Counsel's proposed remedies requiring reimbursement of excess income taxes paid as a result of a discriminatee's receipt of lump-sum backpay and reporting of the backpay allocation to the Social Security Administration (SSA). These new remedies are to better serve the remedial policies of the National Labor Relations Act by ensuring that discriminatees are truly made whole for the discrimination they have suffered. Henceforth, Regions should use the procedures set forth below when calculating the excess income taxes. Also discussed below is the need for Regions to immediately begin requiring charged party/respondents to file reports with SSA when the backpay period spans two or more years.

Reimbursement for Excess Tax Liability

In order to implement the Board's reimbursement of excess income tax liability, a program has been developed in Microsoft Excel that will quickly calculate the amount of Federal and State income taxes a discriminatee would be required to pay if s/he received backpay in a lump sum versus the amount of Federal and State income taxes s/he would have paid had s/he received the backpay in the appropriate years.¹ This program assumes:

- The excess tax liability remedy applies to both backpay and interest paid in a lump sum.
- The discriminatee filed his/her income tax for the appropriate years during the backpay period and claimed the correct number of dependents and exemptions. Based on this assumption, the calculation of excess income tax liability will not take into account dependents/exemptions a discriminatee may have claimed during the backpay period or in the year of the payout.

¹ This program is currently available as a stand alone program. The program will be incorporated in BackpayTec and should be available shortly.

- The filing status that will be used in the year the backpay is paid will be the actual filing status of the discriminatee in the year the backpay is paid. The program has been designed to reflect the actual filing status of the discriminatee in each year during the backpay period. The options for filing status are: Single Filer, Married Filing Jointly/Widower, Married Filing Separately and Head of Household.
- The amount of Federal income tax owed is what a discriminatee would have been obligated to pay in each respective year had the wages been earned in that tax year. The Federal income tax rates are based on the actual rate as announced by the Internal Revenue Service.
- The amount of State income tax is what a discriminatee would have been obligated to pay each respective year had the wages been earned in that tax year. The amount of State income tax owed is based on the average income rate for each state in which the discriminatee files his/her taxes. The program will calculate the tax rate for any state.²
- Incremental taxes will also be included in backpay. Incremental taxes are defined as all of the taxes that will be owing on the excess tax. This incremental tax is calculated using the federal tax rate and average state tax rate used for calculating taxes for the backpay award in the payout year.

As set forth in the decision, the Board will “henceforth routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year.” Regions should ensure that all complaints issued prior to December 18, 2012 in which backpay may be owed pled the request for reimbursement of the excess tax liability. Although it is not required to specifically plead remedial provisions such as these which are uniformly applicable, until further notice, we recommend that the Regions continue to plead the excess tax liability remedy in all complaints to highlight those cases in which the remedy is appropriate.

Finally, the Board order leaves to compliance respondents’ opportunity to fully litigate the propriety of the excess tax compensation. In order to assist Regions with this litigation, the language in Attachment A has been developed and should henceforth be inserted in all Compliance Specifications in which the backpay period spans two or more years.

Backpay Allocation to the Social Security Administration

Footnote 20 of the Board order required the Acting General Counsel to develop a standard form that will simply and efficiently elicit the information the SSA requires, thereby reducing the cost of compliance and minimizing error. Attachment B contains

² City and county taxes that a discriminatee may owe are not being included in this calculation.

the form that charged parties/respondents will be required to file with SSA. The Informal Settlement Agreement and "Solicit Compliance from Employer after Informal SA" templates have been updated to include this form or reference to the form.

Similar to the excess tax liability remedy, the Board will apply this new remedy retroactively. Regions should ensure that all complaints issued prior to December 18, 2012 in which backpay may be owed pled the request for the filing of the earnings report to SSA. Until further notice, Regions should continue to plead the requirement to file the SSA report in all appropriate complaints.

Training for Regional Office Staff

Training sessions on the new program that calculates the excess tax liability will be held via LiveMeeting on the following dates:

Wednesday, February 20, at 11:00 am ET

Wednesday, February 20, 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 session the office will participate in and the individuals in the Region who should participate in these training sessions, but at a minimum, every Compliance Officer, Compliance Assistant and supervisor of Compliance should participate. The training will be recorded and posted on the Compliance Website for individuals who are unable to participate in either of the above training sessions. This memorandum should be the subject of a professional staff training session.

Special recognition is due to Compliance Officers Rick Neuman, Region 30, Miguel Rodriguez, Region 28, Hokulani Valencia, Region 32, Compliance Assistant Katy Domagela, Region 3, and Assistant General Counsel Beth Tursell who developed the procedures for calculating the excess tax liability in light of *Latino Express* and to Miguel Rodriguez for creating a program that will calculate the excess tax liability as set forth above. If you have any questions regarding this matter, please feel free to contact Assistant General Counsel Beth Tursell.

/s/
L.S.

Attachment
cc: NLRBU
Release to the Public

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