

Draft Excess Tax Liability Language for Compliance Specification

Immediately following the paragraph regarding total backpay owed

Excess Taxes

1. In accordance with *Latino Express, Inc.*¹, Discriminatee X is entitled to be compensated for the adverse tax consequences of receiving the lump-sum backpay for a period over 1-year. If not for the unfair labor practice committed by Respondent the backpay award for Discriminatee X would have been paid over more than one year rather than paid in the year Respondent makes final payment in this case. The backpay for this case should have been earned in 20XX, 20XX and 20XX (add in the appropriate years) rather than exclusively in 20XX (current year).²
2. In order to determinate what the appropriate excess tax award should be, the amount of federal and state taxes need to be determined for the backpay as if the monies were paid when they were earned throughout the backpay period, as described below in paragraph ___. Also, the amount of federal and state taxes need to be calculated for the lump sum payment if the payment was made this year, as described below in paragraph ___. The excess tax liability was calculated as the difference between these two amounts.
3. The amount of Taxable Income for each year is based on the calculations for backpay in this compliance specification for each of 20XX, 20XX, and 20XX (add additional years if necessary) and is summarized in Exhibit X. Using this Taxable Income for the various years, federal and state taxes were calculated using the federal and state tax rates for the appropriate years.³ The federal rates are based on Discriminatee X's filing taxes as [Single, Married Filing Joint-Widow, Married Filing Separately, or Head of Household filing status] (if status changed during backpay period reflect what status discriminatee actually filed his/her taxes).
4. The amount of taxes owed for 20XX, 20XX and 20XX (add in the appropriate years) would have been the amounts set forth in Exhibit X. The total of these amounts are \$ _____ for federal taxes and \$ _____ for state taxes.
5. The total amount of the lump sum award that is subject to this excess tax award is \$ _____ and is set forth in Exhibit X⁴. The lump sum amount is based on the backpay calculations described in this specification.⁵ The amount of taxes owed in 20XX

¹ 359 NLRB No. 44 (December 18, 2012)

² All information, including the amounts owed will need to be updated to reflect the actual year of payment.

³ The actual federal tax rates were used, while the state's average tax rate was used for these previous years.

⁴ The lump sum amount does not include interest on the amount of backpay owed. Interest should be included in the lump sum amount; however interest continues to accrue until the payment is made. The lump sum amount will need to be adjusted when backpay is paid to the discriminatee to include interest.

⁵ Although the backpay period continues to accrue to the present date, there is no excess tax liability for backpay that would have been earned in the year a lump sum award is made.

(current year) is based on the current federal and state tax rates⁶ and on the fact that Discriminatee X will be filing her/his income taxes as [Single, Married Filing Jointly,- Widow, Married Filing Separately, or Head of Household]. The amount of taxes owed on the lump sum is calculated as \$ _____ for federal taxes and \$ _____ for state taxes and shown in Exhibit X.

6. The adverse tax consequence is the difference between the amount of taxes on the lump sum amount being paid in 20XX (current year) \$ _____ for federal taxes and \$ _____ for state taxes and the amount of taxes that would have been charged if these amounts were paid when the backpay was earned in 20XX, 20XX \$ _____ for federal taxes and \$ _____ for state taxes. Thus the excess tax liability is \$ _____ for federal taxes and \$ _____ for state taxes.
7. The excess tax liability payment that is to be made to Discriminatee X is also taxable income and causes additional tax liabilities. Exhibit X also includes a calculation for these supplemental taxes. This amount is called the incremental tax liability. The incremental tax includes all of the taxes that Discriminatee X will owe on the excess tax payment. This incremental tax is calculated using the federal tax rate used for calculating taxes for the backpay award and that average state tax rate for 20XXX (current year). This amount is \$ _____ and shown in Exhibit X.
8. The Total Excess Taxes is the total tax consequence for Discriminatee X receiving a lump-sum award covering a backpay period longer than 1-year. The total Excess Taxes owed to Discriminatee X is \$ _____ which is determined by adding the Excess Taxes and Incremental Taxes as shown in Exhibit X.

(customarily the last numbered paragraph in a specification)

9. Summarizing the facts and calculations specified above, and in the Appendices, Respondent is liable for the backpay due Discriminatee X as described above. The obligation of Respondent to make Discriminatee X whole under the Board Order will be discharged by payment to Discriminatee X of _____, plus interest accrued to the date of payment and excess tax liability as described above in paragraphs _____⁷, pursuant to such Orders and judgment, minus tax withholding by Federal and State laws.

⁶ The actual federal tax rates were used for the current year, while an average state tax rate for the current year was used.

⁷ The amount of excess tax liability would need to be updated to reflect the actual date of payment.