

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-07

May 2, 2007

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

FROM: Ronald Meisburg, General Counsel

SUBJECT: Seeking Compound Interest on Board Monetary Remedies

The Board's current remedial policy includes requiring respondents to pay simple interest on the backpay and other monetary awards they must satisfy due to their unfair labor practices. In light of the fact that the Act's remedial provisions are designed to provide "make whole" relief, that policy is inadequate. This memorandum sets forth the new procedure Regions should follow in all future cases where a monetary award is being sought, which includes pleading a remedy of quarterly compounded interest in all complaints and incorporating certain model arguments into the briefs submitted to administrative law judges.

BACKGROUND

In Isis Plumbing & Heating Co., the Board first adopted a policy of charging interest on backpay awards to "bring[] its practice into conformity with general principles of law, . . . [and] achiev[e] a more equitable result."<sup>1</sup> The Board reasoned in part that such a policy served the equitable purpose of compensating a discriminatee for the lost use of his or her money.<sup>2</sup> Thus, the Board began to assess simple interest on backpay awards at an annual rate of six percent.<sup>3</sup>

Fifteen years later, in Florida Steel Corp., the Board decided that a flat, six percent rate of interest "no longer effectuate[d] the policies of the Act."<sup>4</sup> The

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<sup>1</sup> 138 NLRB 716, 720 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963).

<sup>2</sup> Id. at 718 (quoting United States v. United Drill & Tool Corp., 183 F.2d 998, 999 (D.C. Cir. 1950)).

<sup>3</sup> Id. at 720-721. See also Seafarers Intl. Union, 138 NLRB 1142, 1142 fn.3 (1962) (Board extended policy of assessing interest at six percent per annum to other monetary remedies, which in this case involved employer-dominated union unlawfully exacting dues).

<sup>4</sup> 231 NLRB 651, 651 (1977), enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978).

Board noted that the six percent rate was below that charged by private lending institutions at the time and, therefore, a change was needed to “more fully compensat[e] discriminatees for their economic losses.”<sup>5</sup> To accomplish this goal, the Board adopted the sliding interest scale used by the Internal Revenue Service (IRS) on a taxpayer's overpayment or underpayment of Federal taxes.<sup>6</sup> Because this new flexible interest rate more closely mirrored the private sector money market, it more suitably compensated discriminatees for the lost use of their money.<sup>7</sup>

Ten years later, in New Horizons for the Retarded, Inc., the Board changed its interest rate policy due to a change in IRS policy mandated by the Tax Reform Act of 1986.<sup>8</sup> That Act uses the short-term Federal rate to calculate interest on the overpayment or underpayment of Federal taxes.<sup>9</sup> The Board adopted the interest rate applicable to the underpayment of Federal taxes, i.e., the short-term Federal rate plus three percent.<sup>10</sup> In doing so, it noted that this new rate had the same characteristics as the sliding interest scale adopted in Florida Steel, including the fact that it reflected, at least indirectly, the forces of the private money market.<sup>11</sup>

In March 1992, the Board published a notice of proposed rulemaking that, among other things, sought to establish a policy of compounding interest on a daily basis for monetary remedies.<sup>12</sup> After receiving comments on the proposed rule, the Board declined to implement it.<sup>13</sup>

Since New Horizons, several General Counsels have recommended that the Board adopt a policy of awarding daily compounded interest. The Board

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<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> 283 NLRB 1173, 1173 (1987).

<sup>9</sup> See 26 U.S.C. § 6621(a) (2000).

<sup>10</sup> 283 NLRB at 1173.

<sup>11</sup> Id.

<sup>12</sup> See 57 Fed. Reg. 7897-7900.

<sup>13</sup> See 63 Fed. Reg. 8890-8891 (1998) (officially withdrawing March 1992 notice of proposed rulemaking).

consistently has refused to change its policy, stating only that it is “not prepared at this time to deviate from our current practice of assessing simple interest.”<sup>14</sup>

### THE GENERAL COUNSEL’S NEW POLICY

As one of my initiatives upon becoming General Counsel, I have taken a fresh look at Board remedies and considered whether they remain appropriate in the contemporary workplace. With specific regard to interest on judgments, I have examined the current practice of other agencies and courts that award monetary judgments for employment-related discrimination and have learned that, among other examples, the U.S. Department of Labor compounds interest on whistleblower protection claims, including those under the recently implemented Sarbanes-Oxley Act.<sup>15</sup> Thus, I have concluded that the Board should also adopt a policy of compounding interest on all monetary awards. Such a policy is necessary to ensure that employees are properly compensated for the lost use of their money; since the common practice in private markets today is to assess compound interest on loaned funds,<sup>16</sup> a Board order that includes only simple interest on a backpay award does not adequately compensate a discriminatee who borrowed funds from a private lending institution as a result of an unfair labor practice. A policy of compounding interest will bring the Board into line with the practice of other agencies and courts that enforce employment discrimination laws, including the recently implemented Sarbanes-Oxley whistleblower protection law.

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<sup>14</sup> Rogers Corp., 344 NLRB No. 60, slip op. at 1 (2005). See also Commercial Erectors, Inc., 342 NLRB 940, 940 fn.1 (2004); Accurate Wire Harness, 335 NLRB 1096, 1096 fn.1 (2001), enfd. sub nom. NLRB v. Accurate Tool & Mfg., Inc., 86 Fed. Appx. 815 (6th Cir. 2003) (unpublished decision); Alaska Pulp Corp., 300 NLRB 232, 232 fn.4 (1990), enfd. 944 F.2d 909 (9th Cir. 1991).

<sup>15</sup> See Doyle v. Hydro Nuclear Services, 2000 WL 694384, at \*15-16 (DOL Admin. Rev. Bd. May 17, 2000) (holding that quarterly compound interest is to be assessed on backpay awards due under whistleblower protection provisions of federal statutes administered by the Department of Labor), revd. on other grounds sub nom. Doyle v. U.S. Secretary of Labor, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002). See also ALJD in Welch v. Cardinal Bankshares Corp., 2005 WL 4889000, at \*20 (Dept. of Labor Feb. 15, 2005) (applying Doyle and requiring that interest be compounded quarterly on backpay owed to Sarbanes-Oxley discriminatee).

<sup>16</sup> See S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047 (“ . . . all interest payable under the internal revenue laws will be compounded daily. This adjustment will conform computation of interest under the internal revenue laws to commercial practice.”).

Therefore, Regions should begin seeking quarterly compound interest in all future unfair labor practice cases where a monetary award is available.<sup>17</sup> Regions should plead this remedy in their complaints and should include in their briefs to administrative law judges a model brief section containing standard arguments in support of this new position. The model brief section will be supplied to Regions under separate cover. If a Region has any questions or concerns about this new policy, it should contact the Division of Advice.

/s/  
R.M.

cc: NLRBU  
Release to the Public

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<sup>17</sup> This policy is not to be applied retroactively. Furthermore, if a Region obtains an otherwise acceptable settlement offer but for the absence of quarterly compound interest, it may accept the settlement offer.