

**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM GC 17-03

June 30, 2017

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

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Additional Guidance Regarding Completion and Submission of Report of Backpay Paid Under the National Labor Relations Act to Social Security Administration Pursuant to GC 13-03(CH)

In a continuing effort to enhance our service to parties who are required to submit completed Reports of Backpay Paid Under the National Labor Relations Act to Social Security Administration (Report of Backpay Paid to SSA), this memorandum provides further guidance in that regard.

In *Latino Express, Inc.*, 359 NLRB 518 (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). The Board required the Acting General Counsel to develop a standard form that would simply and efficiently elicit the information the SSA requires. GC Memorandum 13-03 (CH) set forth the standard form and instructed Regions to provide it to charged parties/respondents when soliciting compliance.

In *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Board announced that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving lump-sum backpay awards covering periods longer than one year, as well as routinely require respondents to file a report with the SSA allocating backpay awards to the appropriate calendar quarters. This remedy had been previously ordered by the Board in *Latino Express, Inc.*, subsequently vacated by *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014).

In *AdvoServ of New Jersey, Inc.* 363 NLRB No. 143 (2016), the Board modified the Backpay Report requiring that completed reports be sent directly to the Region. This change was necessary because the SSA rejected completed forms submitted prematurely and directed charged parties/respondents to resubmit them at a later date.

Based thereon, we have revised the Report of Backpay Paid Under the National Labor Relations Act form, which is attached.¹ Specifically, Page 1 of the form changes the recipient of the submission to the Region, rather than the SSA. Parties should receive this form, when applicable, with the Regional information already entered. Pages 2 and 3 provide additional scenarios to assist in completing the form.

R.F.G.

Attachment:

Report on Backpay Paid Under the National Labor Relations Board

Release to the Public

cc: NLRBU
NLRPA

¹ The NxGen template will be updated.

Report of Backpay Paid Under the National Labor Relations Act

(See IRS Publication 957: Reporting Back Pay and Special Wage Payments to the Social Security Administration)

| Employer Name and Address | | | | | | |
|--|--------------------------------|---|-----------|------------------|-----------|-----------|
| Employer's EIN: | | Tax Year in Which Award Payment Was Paid: | | | 2016 | |
| (1) SSN and Employee Name | (2)*Award Amount and Period(s) | (3)**Other Soc. Sec./ Med. Wages Paid in Award Year | | (4)***Allocation | | |
| | | Soc. Sec. | Med./MQGE | Year | Soc. Sec. | Med./MQGE |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| <p>*Exclude amounts specifically designated as damages, penalties, etc.</p> <p>**Exclude the amount of backpay, if any, included in that amount.</p> <p>***For periods before January, 1978 (and for state and local government (Section 218) employees before January 1, 1981), show the wage amounts by calendar quarters. The social security and/or Medicare Qualified Government Employment (MQGE) wages (where applicable) must be shown separately FOR ALL YEARS. (Wages subject ONLY to MQGE would be shown in the Medicare/MQCE column; no wages would be shown in the Soc. Sec. column.) For tax years 1991 and later, the social security and Medicare wages must be listed separately.</p> | | | | | | |

I certify that the payments set forth above were made pursuant to the National Labor Relations Act.

_____ (Name)

_____ (Date)

Contact Person (for questions or additional information):

_____ (Name)

_____ (Telephone Number)

Send Form to: _____, Regional Director
 Region: _____
 Address: _____
 City/State/Zip: _____

Completion of the Backpay Report

Entries to Section 3 should correspond only to the year listed in the Section "Tax Year in Which Award Payment Was Paid" The point of section 3 is so SSA can distinguish between the actual wages and the backpay in the year the backpay was paid. The charged party/respondent will provide SSA with a W-2 for that year for the discriminatee. SSA will then match the W-2 with the Backpay Report to ensure it is properly recording wages. Section 3 and 4 should, if totaled, equal the W-2 submitted for that year. Prior years are not relevant because SSA knows those wages (reported on the W-2) were for the years reported. Only the wages in whichever year the backpay was paid should be included in Section 3.

Scenarios

First is Helen Smith. While she continued to work for the Employer until June 2016 and earned \$20,000 for this year as part of her normal salary, she is owed \$100,000 in backpay for the period between January 2013 and June 2016. Helen earned \$38,000 in 2013, \$39,000 in 2014, and \$39,500 in 2015 in wages from the Employer. She received the backpay check for \$100,000 in July 2016. Below is a table of what Helen earned and how much backpay she is owed per year:

| Year | Wages Earned | Backpay Owed |
|-------------|---------------------|---------------------|
| 2013 | \$38,000 | \$20,000 |
| 2014 | \$39,000 | \$25,000 |
| 2015 | \$39,500 | \$27,000 |
| 2016 | \$20,000 | \$28,000 |

Second is Terry Brounty. Terry also continues to work for his employer. He was unlawfully denied his March 2015 bonus of \$8,623, which was paid in 2016. He earned an additional \$50,000 in 2015 as part of his salary and he is projected to earn \$60,000 in 2016.

Third is Julie Santiago. Unlike Helen and Terry, Julie was unlawfully discharged and therefore did not work for the Employer during the Award Periods. She is owed backpay for the period between June 2014 and June 2015.

Below is a table that includes the appropriate entries using the information provided above for the three individuals:

| Employer Name and Address | | Employer's EIN: | | Tax Year in Which Award Payment Was Paid: | | 2016 |
|--|--------------------------------|---|-----------|---|--|--|
| (1) SSN and Employee Name | (2)*Award Amount and Period(s) | (3)**Other Soc. Sec./ Med. Wages Paid in Award Year | | (4)***Allocation | | |
| | | Soc. Sec. | Med./MQGE | Year | Soc. Sec. | Med./MQGE |
| xxx-xx-xxxx HELEN T SMITH | \$100,000 1/13 – 06/16 | \$20,000 | \$20,000 | 2013 2014 2015 2016 | \$20,000 \$25,000 \$27,000 \$28,000 | \$20,000 \$25,000 \$27,000 \$28,000 |
| xxx-xx-xxxx TERRY BROUNTY | \$8,623 03/15 | \$60,000 | \$60,000 | 2015 | \$8,623 | \$8,623 |
| xxx-xx-xxxx JULIE SANTIAGO | \$30,000 06/14 – 06/15 | -0- | -0- | 2014 2015 | \$15,000 \$15,000 | \$15,000 \$15,000 |
| *Exclude amounts specifically designated as damages, penalties, etc. | | | | | | |
| **Exclude the amount of backpay, if any, included in that amount. | | | | | | |
| ***For periods before January, 1978 (and for state and local government (Section 218) employees before January 1, 1981), show the wage amounts by calendar quarters. The social security and/or Medicare Qualified Government Employment (MQGE) wages (where applicable) must be shown separately FOR ALL YEARS. (Wages subject ONLY to MQGE would be shown in the Medicare/MQCE column; no wages would be shown in the Soc. Sec. column.) For tax years 1991 and later, the social security and Medicare wages must be listed separately. | | | | | | |

Helen earned "Other" wages during the Award Period for 2013 through 2015. However, those wages are not entered in Section 3 because they have already been reported to the IRS by the charged party/respondent via IRS W-2 form. Similarly with Terry, his "Other" wages for 2015 are not included in Section 3 because those earnings have already been reported by the charged party/respondent via IRS W-2 form. The "Other" wages for Julie for 2014 such as from January 2014 through May 2014 (which were not earned during the Award Period but fall within the same year) are not included because those wages were reported to the IRS by the charged party/respondent via IRS W-2 form already. Because Julie did not work for the charged party/respondent during the award year, Section 3 remains at \$0.