

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-02

November 12, 2019

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

FROM: Peter B. Robb, General Counsel

SUBJECT: Seeking Submission of W-2s to the Regional Director

In *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Board announced that it would 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 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, the Board noted that SSA had not accepted Backpay Reports that respondents had submitted prematurely. To correct this issue, the Board ordered that respondents send completed reports directly to the Region, which would transmit them to SSA at the appropriate time.

The Agency has recently been notified by the Social Security Administration (SSA) that the backpay awards in many situations could not be applied to the appropriate calendar year(s) because the information contained on the Backpay Report did not match the W-2 submitted by the employer or the employer failed to submit a W-2 for the individual in question. As a result, backpay is not being 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.

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. Requiring employers to submit copies of W-2s reflecting backpay paid which are filed with SSA to the Regional Director will rectify the problems being encountered by SSA. Having a copy of the W-2 will allow the Region to ensure the accuracy of the information on the Backpay Report. Accordingly, effective with the issuance of this memorandum, in cases involving backpay, Regions should require that employers submit to the Regional Director a copy of the W-2 reflecting backpay. The language requiring the remedy should read:

The General Counsel further seeks, as part of the remedy for the allegations in paragraph(s) _____, that Respondent be required to submit the W-2 reflecting backpay paid to the discriminatee(s) to the Regional Director.

If you have any questions regarding this matter, please contact the Compliance Unit.

/s/

P.B.R.