



TRANSMITTAL

**U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Federal Contract
Compliance Programs**

Number: 198

Date: January 26, 1995

FCCM Notice/CH 7

1. **SUBJECT**: Deductibility of FUTA (unemployment insurance taxes) from back pay awards.
2. **PURPOSE**: To clarify policy related to elements of back pay.
3. **POLICY**: This Notice amends Chapter 7 Section 7F07 to clarify that FUTA (unemployment insurance taxes), in almost all cases, are not deductible from back pay awards.
4. **INSTRUCTION**: Discard pages 7-25, 7-26 and 7-27 and replace with revised attached pages 7-25, 7-26 and 7-27. Note that the revised pages reflect changes to Section 7F07.
5. **OBSOLETE DATA**: Page 7-25, 7-26 and 7-27 of Chapter 7 as issued May 1993.
6. **DISTRIBUTION**: A, B, C
7. **EXPIRATION**: This Notice expires upon implementation and may be discarded or retained for reference at your option.

(signed) Shirley Wilcher

January 26, 1995

SHIRLEY J. WILCHER
Deputy Assistant Secretary for
Federal Contract Compliance

DATE

Attachment

- (4) Novel Issue: The refusal of a contractor to provide retroactive seniority relief where it is appropriate has been determined by OFCCP to be a novel issue. Any case which presents such an issue should be referred to the National Office. Enforcement actions in such cases will be referred to the National Office of the Solicitor (NSOL).

7F06A OTHER REMEDIES AFFECTING A UNION AGREEMENT

The procedures described in Section 7F06 immediately above are equally applicable to remedies other than retroactive seniority which require a change in or otherwise affect a union agreement (see Section 8C).

7F07 BACK PAY

- (a) Back Pay Required: Back pay is normally part of any make whole remedy. The U.S. Supreme Court stated in Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975), that "...given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Given this stringent standard, it will be a rare situation where back pay will not be awarded.
- (b) Elements of Back Pay: Back pay should reflect total earnings lost by the victim due to the discriminatory act. Many elements of compensation, in addition to salary and straight hourly wages, will normally be included in a back pay award; e.g., raises, bonuses, lost sales commissions, cost-of-living increases, tips, medical and life insurance, pensions, overtime pay, etc.
- (c) Deductions and Offsets:
- (1) Interim Earnings: Amounts earned from employment that is in substitution for employment with the contractor are deductible from total back pay. Not all financial compensation received by the victim during the back pay period, however, constitutes "interim earnings." If an employee had both earnings from a full-time job and a part-time job and could have continued in the part-time job even absent the discrimination, the earnings from the part-time job are not deemed interim earnings and are not subtracted from back pay. Further, unemployment and workers' compensation payments do not constitute interim earnings.

- (2) Mitigation: Mitigation refers to the duty of the victim to use reasonable diligence in seeking alternative employment during the back pay period. Back pay awards may be reduced by the amount the victim could have earned with reasonable diligence, less expenses reasonably incurred in looking for alternative employment. Reasonable diligence does not mean that the person had to be successful in obtaining other employment, only that he/she is required to make reasonable effort. The victim is required only to accept employment that is substantially equivalent to or the same as that sought or held with the employer. The victim is not required to relocate to accept alternative employment.
- (3) Burden of Proof: The contractor bears the burden of proving the amount of actual interim earnings or the failure of the victim to take reasonable steps to mitigate back pay loss.
- (d) Periods of Unavailability: Periods when the victim would not have been employed even absent discrimination are excluded from back pay awards; e.g., during periods of illness or disability.
- (e) Interest on Back Pay:
- (1) Purpose and Rate of Interest: The purpose of payment of interest on back pay awards is to compensate the discriminatee for the loss of the use of his/her money. OFCCP's policy is that interest on back pay be calculated at the same percentage rate as the Internal Revenue Service's underpayment formula. Simple interest is to be calculated from the first date that is covered by the back pay award.
- (2) Rate Adjustments: The Internal Revenue Service (IRS) may adjust its rate quarterly. The interest rates applicable to various periods are set out in Appendix A of this Chapter.
- (f) Withholding of Taxes: Contractors may withhold all applicable Federal, State, and local income and FICA (social security) taxes from payments made in settlement of employment discrimination. Back pay, front pay, and lump-sum payments made in place of lost fringe benefits are considered "wages" subject to such withholding. The contractor must supply the discriminatee with a Form W-2 showing the wage component of the settlement and the amount of taxes withheld. Note, however:
- (1) FICA: FICA requires an employer as well as an employee contribution. The employer's FICA obligation should not be paid out of a settlement unless the settlement has been negotiated to include money for that purpose.

- (2) FUTA: In almost all states, FUTA (unemployment insurance) taxes are an expense paid only by the employer; i.e., there is no matching employee contribution. Thus, when computing back-pay awards, no offset or deduction for FUTA should be taken unless the particular state where the affected party was or would have been employed required employers to withhold FUTA taxes from employees' wages or salaries during the time period for which a back-pay award is being computed.
- (3) Interest: Interest included in a settlement (if separately stated) is not subject to FICA while it is taxable as income to the recipient (just as would be interest on a bank savings account), it is not subject to withholding by the employer. The contractor, however, must supply the discriminatee with a Form 1099 stating the interest component of the settlement.
- (4) Benefits: Since employer contributions to most fringe benefits--such as the employer paid portion of health insurance premiums or pension funds--are not even taxable (whether retroactive or not), they are not subject to withholding.

7F08 TIME LIMITS FOR RELIEF

- (a) Two-Year Limit: Back pay may be obtained for a period beginning two years prior to the date of receipt by the contractor of the Scheduling Letter (or for a complaint, two years before the date it was filed). Where the discriminatory act(s) took place less than two years before the Scheduling Letter or the filing of the complaint, back pay is due from the date of violation forward. Back pay continues from these events until the discriminatory actions are stopped by a CA or other voluntary correction, or until the contractor makes a bona fide offer of the position denied. Total back pay may, therefore, be for more than two years.
- (b) Bona Fide Offer: Under appropriate circumstances, the rejection of a bona fide offer of the position previously denied by the contractor terminates the further accrual of back pay liability. (However, interest continues to accrue until settlement on the back pay losses prior to the bona fide offer.) A bona fide offer does not require the claimant to waive any rights or remedies to which he/she is entitled. For example, the parties may disagree on whether retroactive seniority is appropriate, but as long as the contractor offers to place the claimant in the same job (including shift and location) which he/she was denied.

Revised January 26, 1995