



TRANSMITTAL

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

Number: 146

Date: May 29, 1990

FCCM Notice/CH 7

1. **SUBJECT:** Revision of Section 7F (Remedies) of Manual Chapter 7

2. **PURPOSE:** To incorporate into Manual Chapter 7 (a) revised policy on the calculation of interest on back pay and on union participation in conciliation, and (b) current policy on successor employers, on income tax and FICA withholding from settlement payments, and on the nondeductibility of workers' compensation payments as interim earnings.

3. **BACKGROUND:**
 - A. **Revision of Policy on Interest:** On November 17, 1989, the Assistant Secretary of Labor for Employment Standards issued a ruling in OFCCP v. Washington Metropolitan Area Transit Authority (WMATA), Case No. 84-OFC-8, indicating that only simple interest may be assessed on back pay awards under Section 503 of the Rehabilitation Act of 1973, as amended.

The Assistant Secretary based his ruling on the Department of Labor's regulations implementing the Debt Consolidation Act. Those regulations at 29 CFR 20.58(a) and (c) permit interest to be assessed at the IRS rate, but prohibit compounding that interest. The current OFCCP Manual Section 7F07(e) instruction to compound interest quarterly, therefore, conflict with those regulations. The Assistant Secretary determined that the referenced regulations, which have the force and effect of law, take precedence over the OFCCP Manual guidance.

Although technically only applicable to Section 503, the basic holding that Manual Section 7F07(e) is invalid, effectively precludes OFCCP from compounding interest in any case involving back pay relief. This Notice, therefore, revises Section 7F07(e) and related Appendix 7A to require only simple interest on back pay.

- B. Revision of Policy on Union Participation in Conciliation: In newly published Manual Chapter 8, Sections 8B03(c) and 8C indicate that whenever a proposed remedy would affect a collective bargaining agreement (CBA) between the contractor and a labor union, the union will be invited to participate in conciliation of the CBA issue. This expands the circumstances in which OFCCP will seek union participation beyond only the ones involving retroactive seniority governed by the CBA (see Section 7F06). Additionally, Section 8F01(b)(2) indicates that when a union declines to participate in conciliation or to sign the CA, that fact will be recorded in paragraph 1 of the CA's General Provisions. This Notice adds a new Section 7F06A referencing these changes.

- C. Incorporation of Current Policy on Remedy: When revised Manual Chapter 7 was published in December of 1988, a few directives concerning remedy were not fully incorporated. This included FCCM 85-3/CH 8 on income tax and FICA withholding and a portion of FCCM 87-5/CH 7 on workers' compensation. This Notice now incorporates this material, along with some elaboration on FICA and FUTA withholding, in the appropriate sections of Chapter 7.

4. INSTRUCTIONS:

A. In Chapter 7 as published 12/14/88:

- (1) Table of Contents. Remove and discard page i/ii and substitute the attached revision of that page. Note that i is unchanged.

- (2) Main Text. Remove and discard pages 7-23/7-24, 7-25/7-26 and 7-33 and substitute in their the attached revised pages 7-23/7-24, 7-25/7-26 and 7-33.
- (3) Appendices. Remove and discard Appendix 7A and substitute the attached revised Appendix 7A and, immediately following it, and the attached new Appendix 7A-1.

Revised pages show the date of revision and have right marginal lines indicating the portions changed. Where a whole page is new (e.g., in the Appendices, pages 7A-2, 7A-1-1 and 7A-1-2), it shows the date of issue.

- B. From the Chapter 8 tab of your Manual binder, remove and discard OFCCP Order Nos. FCCM 85-3/CH 8 and FCCM 85-4/Ch 8 (see "OBSOLETE DATA" section below.

5. OBSOLETE DATA:

- A. Directive: OFCCP Order No. FCCM 85-4/CH 8 (formerly 660c4), dated 7/4/85 and titled "Federal, State and Local Income Tax and FICA Withholding from Settlement Payments under Programs Administered by the Office of Federal Contract Compliance Programs (OFCCP)"

Reason for Deletion: This Directive indicates that contractors may withhold all applicable income and FICA taxes from settlement payments and distinguishes between the aspects of such payments that are and are not subject to such withholding. This policy is now incorporated in the attached revision of page 7-26 (Section 7F07(f)).

- B. Directive: OFCCP Order No. FCCM 85-3/CH 8 (formerly 660b21), dated 5/24/85 and titled "Successor Employer"

Reason for Deletion: This Directive provides that when an issue arises as to whether a successor employer is liable for employment discrimination by a predecessor employer, information should be gathered on certain factors (called the "MacMillan factors) and forwarded to NO Division of Policy for resolution.

This procedural instruction is now incorporated in the attached revision of page 7-33 (Section 7F14) and the factors are now described in the attached new Appendix 7A-1.

- C. Manual Pages. Pages i/ii, 7-23/7-24, 7-25/7-26, 7-33 and Appendix 7A of Manual Chapter 7 as published 12/14/88

- 6. ATTACHMENTS: Pages i/ii, 7-23/7-24, 7-25/7-26, 7-26a, 7-33 and Appendices 7A and 7A-1 of Manual Chapter 7

- 7. DISTRIBUTION: A, B, C

- 8. EXPIRATION DATE: This Notice expires when implemented and may be discarded or retained for reference, at your option.

(signed) Cari M. Dominguez
CARI M. DOMINGUEZ
Director

5-29-90
Date

CHAPTER 7
IDENTIFICATION AND REMEDY OF EMPLOYMENT DISCRIMINATION
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by having new people come into the workforce with established seniority credits. In other words, if a worker has five years seniority, and is laid off because his/her employer agrees as part of a Conciliation Agreement to hire a particular person and to credit that person with six years seniority as a remedy for discrimination, that worker can complain to the union that he/she has been harmed, laid off without the union's consent. The union can then sue the employer for violating the collective bargaining agreement by unilaterally awarding retroactive seniority to this identified victim. The union can seek damages for the worker to compensate him/her for the time laid off. Because of this threat of suit, contractors are reluctant to agree to retroactive seniority relief without the union's consent.

- (d) Noncompetitive Seniority: Some types of seniority are not used in a competitive situation and no one is harmed when the employer grants retroactive seniority. For example, in the Federal service, after three (3) years of seniority one begins to earn six (6) hours of annual leave per pay period. Seniority for the purpose of benefit accrual or "benefits seniority," as it is sometimes called, is not competitive, even when it is the result of a CBA. In such cases, the contractor should award the victim(s) of discrimination retroactive benefits of seniority. Similarly, seniority may be used for the purpose of determining when someone is eligible to retire. Again, this kind of seniority credit is not competitive and should not pose a problem when identified as a remedy.
- (e) Nonunion Seniority: Some nonunion contractors operate under a system in which seniority is used in both the benefits and competitive context. In other words, even without a union contract, promotions and layoffs are decided on the basis of seniority. Because competitive seniority in this situation is conferred by the employer alone, OFCCP is clearly entitled to obtain retroactive seniority for the victims of discrimination. OFCCP may always seek retroactive seniority where there is no union contract. While the employer may have other reasons for opposing a seniority award in the absence of the union, those reasons do not threaten the enforceability of the Conciliation Agreement.
- (f) Procedures Where Union Involved:
 - (1) Union Participates: OFCCP will invite the union to participate in conciliation of a violation which requires a retroactive seniority remedy (see Sections 8B03(c) and 8C). The EOS will make every effort to

involve the union in the conciliation process and get its consent to the award of retroactive seniority. While OFCCP usually cannot compel the union to participate, if the union does so voluntarily and agrees to the seniority remedy, that remedy may be enforced. Where the union is invited to participate in the conciliation of seniority issues, its role may be limited to those issues. The contractor may object to having the union present during the discussion of back pay, which may involve disclosure of confidential salary information. There is no basis for requiring the contractor to accept the union's participation in the resolution of such an issue. If the union agrees to the award of retroactive seniority and an authorized representative of the union signs the Conciliation Agreement, the nonadmissions clause may be included in the Conciliation Agreement.

- (2) Union Refuses to Participate: If the union declines to participate in conciliation, OFCCP should seek to lay the groundwork to defend its insistence upon seniority relief. In other words, OFCCP should not agree to the usual boilerplate language which says that the contractor does not admit to violating the Executive order (Section 503, 38 U.S.C. 4212). Instead, the CA should recite the factual bases for OFCCP's findings of violation. Under these circumstances:
- (i) The nonadmissions clause is not included in the CA, and
 - (ii) Paragraph 1 of the General Provisions of the CA will note that the union was invited to participate, but declined to do so or to sign the CA, as applicable (see Sections 8F01(b)(2) and (e)).
- (3) Contractor Refuses to Sign: If a contractor refuses to sign a CA which does not contain the nonadmission language, it should be informed that OFCCP deems this a failure to conciliate, and the case will be referred for enforcement. Some contractors propose a cash buy-out of employee seniority rights. In other words, the contractor offers a lump sum payment to each identified victim of discrimination in exchange for a waiver of his/ her entitlement to seniority. Seniority buy-outs are technically possible, but such proposals must be carefully crafted and reviewed very carefully for fairness; many may not be acceptable. Offers of seniority buy-outs must be approved by the National Office of the Solicitor.

- (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.

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- (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. Appendix A also provides an example of interest calculation.
- (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) 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.
- (3) 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

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priate. With a rejected applicant class, the EOS might decide that a simple per capita distribution makes more sense.

- (5) Nonmonetary Relief: In addition to the monetary relief provided for class members, the EOS should also consider requiring nonmonetary remedies such as: preferential hiring, promotion goals, red circling, special training programs, and EEO counselling for supervisors. With formula relief, it is difficult to provide for reinstatement or retroactive promotion because, by using the formula, you have not tied any individual to any particular opportunity. However, the EOS may create a preferential hiring or promotion list consisting of the members of the class and from which the contractor must make all or a proportion of selections; e.g., one minority for each non-minority selected, to fill vacancies until it has achieved a nondiscriminatory distribution in its workforce.

7F13 NOTIFICATION TO CLASS MEMBERS

The CA or other settlement document must guarantee that all class members are aware of their rights under the agreement and specify the procedures through which those rights will be effected, including counseling where appropriate. Normally, the contractor will be required to notify all class members of their rights. That notice must include the terms and conditions under which an employment offer is tendered, including the specific amount of back pay and the retroactive seniority as well as all other appropriate benefits.

7F14 LIABILITY OF A SUCCESSOR EMPLOYER

- (a) In determining whether a successor employer is liable for the discriminatory acts of its predecessor, OFCCP follows Title VII case law. The Federal courts have held that such liability must be judged on a case-by-case basis considering the "Macmillan" factors (EEOC v. Macmillan Bloedel Containers, Inc., 8 FEP Cases 897 (6th Cir. 1974)).
- (b) Requests for a determination of successor liability should be directed to the NO Division of Policy, Planning, and Review and should include responses (with supporting documentation) to the "Macmillan" factors described in Appendix A-1 to this Chapter.

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APPENDIX A: INTEREST RATES FOR BACK PAY

OFCCP's policy is that simple interest on back pay is calculated at the same percent-age rate as the IRS' underpayment formula on interest--from the first date that is covered by the back-pay award.

Interest rates for back-pay calculations based on IRS calculations since 1983 are as follows:

January 1, 1983 - June 30, 1983	16.00%
July 1, 1983 - December 31, 1984	11.00%
January 1, 1985 - June 30, 1985	13.00%
July 1, 1985 - December 31, 1985	11.00%
January 1, 1986 - June 30, 1986	10.00%
July 1, 1986 - September 30, 1987	9.00%
October 1, 1987 - December 31, 1987	10.00%
January 1, 1988 - March 31, 1988	11.00%
April 1, 1988 - September 30, 1988	10.00%
October 1, 1988 - March 31, 1989	11.00%
April 1, 1989 - September 30, 1989	12.00%
October 1, 1989 - present*	11.00%

Updates on the underpayment rates are available from the IRS at (202) 488-3100 (FTS 8/488-3100).

(over)

*To at least the date of this revision (below).

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WORK AID

Time Period	(a) <u>Annual</u> <u>% Rate</u>	(b) <u>Daily</u> <u>% Rate</u> (a/365)	(c) <u># Days</u> <u>in Period</u>	(d) <u>% Rate for</u> <u>Full Period</u> (b X c)
1/1/83 - 6/30/83	16%	.044%	181	7.9%
7/1/83 - 12/31/84	11%	.030%	550	16.6%
1/1/85 - 6/30/85	13%	.036%	181	6.5%
7/1/85 - 12/31/85	11%	.030%	184	5.6%
1/1/86 - 6/30/86	10%	.027%	181	5.0%
7/1/86 - 6/30/87	9%	.025%	365	9.0%
7-1-87 - 12/31/87	10%	.027%	184	5.0%
1/1/88 - 3/31/88	11%	.030%	91	2.7%
4/1/88 - 9/30/88	10%	.027%	183	5.0%
10/1/88 - 3/31/89	11%	.030%	182	5.5%
4/1/89 - 9/30/89	12%	.033%	183	6.0%
10/1/89 - present	11%	.030%	---	---

EXAMPLE

The back pay period (per.) is determined to be 9/1/88 through 12/15/89.

<u>Time Period</u>	<u># Days</u>	<u>Daily % Rate*</u>	<u>Back Pay</u>	<u>Cumulat. Interest</u>	<u>for Per. Back Pay</u>	<u>for Per.</u>
9/1/88-9/30/88	30	.027%	0.8%	\$ 2,000.	- - -	\$ 16.00
10/1/88-3/31/89	-FULL PERIOD-	5.5%	12,000.	\$14,000.		770.00
4/1/89-9/30/89	-FULL PERIOD-	6.0%	15,000	29,000.		1,740.00
10/1/89-12/15/89	76	.030%	2.3%	7,000	<u>36,000.</u>	<u>828.00</u>
					\$36,000	\$3,354.00

TOTAL DUE (Back Pay plus Simple Interest): **\$39,354.00**

*If partial period, multiply "#days" times the "Daily % Rate" in (b) above. If full period, use rate in (d) above. If not using percentage key on calculator, first convert rate used to decimal.

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"MACMILLAN" FACTORS
 CONCERNING SUCCESSOR EMPLOYER LIABILITY
 (Reference Section 7F14)

Requests for a determination of successor liability should include responses to the factors listed below. Responses should cite the source of the information and, where the source is written material, a copy of the relevant page(s) should be attached. Information on these factors may be obtained from a number of sources including Standard and Poor's and other corporate guides, trade magazines, annual reports, collective bargaining agreements, and the business section of local newspapers.

1. WHETHER THE SUCCESSOR COMPANY HAD NOTICE OF THE CHARGE

The date the alleged discriminatory act occurred, the date the complaint was filed, and the dates concerning the transfer (announcement date, effective date of merger, acquisition, etc.).

2. THE ABILITY OF THE PREDECESSOR TO PROVIDE RELIEF

Whether the predecessor continues to operate and the extent and location of its new operations, whether the predecessor maintained any of its assets (what percentage and type), whether the transfer resulted from a bankruptcy action, whether the predecessor could provide seniority, reinstatement, hiring, back pay, etc.

3. WHETHER THERE HAS BEEN A SUBSTANTIAL CONTINUITY OF BUSINESS OPERATIONS

The percentage of operating assets that were transferred to the successor, the status of the predecessor's patents, trademarks and operating name, whether there are corporate officers and members of the board of directors who are common to both the predecessor and the successor, etc.

4. WHETHER THE SUCCESSOR USES THE SAME PLANT

5. WHETHER THE SUCCESSOR USES THE SAME OR SUBSTANTIALLY THE SAME WORK FORCE

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6. WHETHER THE SUCCESSOR USES THE SAME OR SUBSTANTIALLY THE SAME SUPERVISORY PERSONNEL

7. WHETHER THE SAME JOBS EXIST UNDER SUBSTANTIALLY THE SAME WORKING CONDITIONS

Whether the organization of the departments, sections, etc., remain substantially the same, the percentage of old jobs maintained, whether personnel practices are substantially the same, and the status of any collective bargaining agreements, etc.

8. WHETHER THE SUCCESSOR USES THE SAME MACHINERY, EQUIPMENT, AND METHODS OF PRODUCTION

9. WHETHER THE SUCCESSOR PRODUCES THE SAME PRODUCT

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