

10576 Collection and Disbursement of Backpay and Interest

10576.1 Recording Receipt of Backpay or Remedial Reimbursement

In order for the Agency to meet its obligations under The Accountability of Tax Dollars Act of 2002, Regions are required to maintain uniform records describing the receipt and disbursement of checks involving backpay or remedial reimbursement. Each Region should have in place a system to record the receipt of backpay checks and any other reimbursement checks received on behalf of a charging party or discriminatee. Information must be submitted on a quarterly basis to the Finance Branch, with a copy to the Division of Operations-Management, using the form identified in Appendix 8.

The Region's spreadsheet should report the total amount of money and the number of checks delivered to the Region by a charged party or respondent, payable to individual discriminatees or any other entity. Treasury checks received from the Agency Finance Branch that are received by the Region for disbursement should also be recorded. Checks that are sent out and returned to the Region as a result of an incorrect address or other mistake should not be entered into the system a second time. The system should record the number of checks and the total amount of monies received in formal compliance cases, cases involving informal settlements and non-Board adjustments. Checks that are distributed directly from the charged party to the discriminatee or other claimant should not be recorded.

At the end of each quarter, Regions are required to do a physical review of the checks in its possession and report the number of checks, and the total value of checks in the Region on that date to the Finance Branch. For auditing purposes, photo copies of the checks that are present in the Region at the end of the each quarter should be maintained in a separate file.

The Accountability of Tax Dollars Act of 2002 makes it very important to retain an accurate and easily available record of checks that have been disbursed, and confirmation that the money has been properly disbursed. Accordingly, Regions are encouraged to maintain a separate file containing only duplicate copies of the backpay checks, transmittal letters and documents that reflect the amount to be paid for the items listed in the spreadsheet for verification purposes.

10576.2 Standard Procedures for Disbursement of Backpay and Interest Payments

Respondents should be requested to make payments of net backpay and interest due a discriminatee by delivering checks, made payable to the individual discriminatees, to the Region for transmission. (For the circumstances under which respondent may distribute payments directly to discriminatees, see Section 10576.3.) Respondent should be reminded that at the proper time, it should send a W-2, 1099-Misc, or other appropriate tax forms to the discriminatees.

Respondent should withhold FICA, Federal, state, and local income taxes from the wage portion of the backpay amounts. Respondent is solely responsible for the reporting and payment of Federal and state unemployment taxes that may be due on backpay.

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See Section 10578 regarding treatment of taxes and withholding from backpay and interest.

The Region should deliver backpay and interest checks personally or mail the checks to each discriminatee with a letter that includes a receipt for the discriminatee to sign, date, and return to the Region acknowledging receipt of the checks.¹²² In appropriate situations, the letter should also remind the discriminatee to determine whether he/she has to repay a Federal or state agency for amounts collected during the backpay period or to pay Federal and/or state taxes, as well as remind the discriminatee to contact the Social Security Administration to determine the proper quarterly crediting of backpay (Section 10578.4).

10576.3 Direct Distribution by Respondent

The respondent may distribute payments directly to discriminatees, but only on conditions prescribed by the Region. It must provide the Region with receipts or other suitable evidence of payment.

10576.4 Other Methods of Payment

Any other proposed method of payment not in accord with Sections 10576.1 and 10576.2, such as a request by a charging party union that backpay checks be sent to it for distribution to discriminatees, is left to the discretion of the Regional Director.

10576.5 Payment to Discriminatees Not Available to Receive Payment in Person

Appropriate arrangements may be made at the request of discriminatees who do not receive mail to have backpay checks sent to locations they designate. Discriminatees who anticipate being unavailable during the course of unfair labor practice proceedings should make such written arrangements in advance.

See Section 10580 regarding procedures for depositing backpay checks to hold in escrow through the Agency's Finance Branch.

10576.6 Power of Attorney

When checks cannot be successfully transmitted or readily cashed, such as may occur when the discriminatee is in the Armed Forces, payment of backpay may be facilitated by having the discriminatee execute a power of attorney, preferably in advance. In the power of attorney the discriminatee should designate a representative, usually a close relative, to accept payment on his or her behalf. See Appendix 9 for a sample power of attorney form.

The power of attorney should be in duplicate and a copy of the power of attorney should be given to the Region and kept in the case file. The backpay check should be payable to the discriminatee and not the designated agent. The discriminatee should be warned that giving a power of attorney is like delivering cash and the discriminatee may have little or no recourse through the Region if the designated agent absconds or embezzles the money. As a safeguard measure, the discriminatee could strike paragraph (b) from the sample power of attorney form (Appendix 9) and then the designated agent

¹²² Depending on the amount of the check(s), the Region, for tracing purposes, may wish to consider sending the check(s) by certified mail, return receipt requested.

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could do little more than hold the check for safekeeping or deposit it in the discriminatee's bank account.

Because of the circumstances under which a power of attorney to collect backpay may be executed and to avoid later contests over its validity, the power referred to in this section should be acknowledged. "Acknowledgment" is a formal declaration by the person executing the power before a proper official that the instrument is the former's act. See Appendix 10 for samples of two forms of acknowledgment, the first being for general use and the alternate form being used only for persons in the military.

10576.7 Amount Due Deceased Discriminatees

The backpay due a deceased discriminatee should be paid to the legal administrator of the estate or to any person authorized to receive such payments under applicable state law.

Before disbursing backpay due the estate of a deceased discriminatee to any individual, the Compliance Officer should obtain a copy of the deceased discriminatee's death certificate and either a copy of the court document appointing the individual as administrator/executor of the estate or, in the event no administrator or executor was appointed, Form 1055, Claim Against the United States for Amounts Due in the Case of a Deceased Creditor, completed by the deceased discriminatee's heir.

10576.8 Lump-Sum Payments, When Net Backpay Due Individual Discriminatees is Not Determined

When backpay has been settled on the basis of respondent's payment of a lump sum and the amount due each individual discriminatee has not been determined at the time of the agreement, the agreement should give broad discretion to the Regional Director to make payment decisions. The following procedure for collection and disbursement may be used.

The settlement should provide for the deposit of the agreed lump sum in an escrow account, preferably one opened through the Agency's Finance Branch. See Section 10580 regarding procedures for establishing and using escrow accounts through the Finance Branch.

The Compliance Officer should determine the proportionate share due each discriminatee. To avoid disputes, it is good practice to obtain an agreement from the charging party and discriminatees concerning shares. The settlement should provide for the full distribution of the agreed-on amount. The Region should try to ascertain an agreement by which the final distribution is at the sole discretion of the Regional Director, thereby avoiding any later disputes regarding distribution amounts. In the event the amount due missing discriminatees cannot be determined or distributed, the settlement should provide for redistribution of unclaimed amounts to discriminatees who have been located and who have not received 100 percent of backpay due.

10576.9 Undistributed Funds Generally Not Subject to Setoff, Liens, Garnishment, Except IRS Levies on Backpay Awards; Washington Notice of Attachment Required

Because a backpay award is made in effectuation of a public policy and has no private character whatsoever until distributed, neither the Agency nor the respondent can be held subject to assignments, liens, garnishments, or other processes before the funds have been distributed.¹²³ For the same reason, a respondent cannot set off debts owed it by the claimant against its backpay liability¹²⁴ and the execution of a release by the claimant to the respondent cannot be binding on the Agency. If a Regional Director or other Region staff member or a respondent is served with notice of a lien or levy or a restraining order of the nature indicated above other than an IRS levy, the Region should advise the initiator of the process of the Agency's policy. If the initiator does not agree to withdraw the process, the Region should inform the Special Litigation Branch and provide details that will enable the Branch to take immediate steps to enjoin the proceeding or otherwise resolve the issue.

10576.10 IRS Levies; Notice of Levy Served on Regional Offices

Based upon Congressional intent underlying the Federal tax law, interpretative IRS case law and the different policy concerns involved when the IRS issues a notice of levy, the Board will honor IRS levies served on a Region where a delinquent taxpayer/claimant is eligible to receive a backpay award.¹²⁵ In practice, honoring IRS levies still allows the Agency to effectuate the public policies of the Act, while at the same time furthers the IRS' interest in ensuring efficient tax collection.

1. If a Regional Director or other Region staff member is served with an IRS notice of levy, the Region should advise the Division of Operations-Management of its receipt of the notice of levy and proceed to take the appropriate following action, depending upon the circumstances of the particular case:

(a) In cases where there is a final, nonappealable determination of liability,¹²⁶ that is, a final adjudicated order or approved settlement agreement and the backpay award has been liquidated,¹²⁷ the Region should contact the Special Litigation Branch for assistance in completing the forms, which involve filling out the back of the notice of levy form and following the directions in paragraph 1(e) below for submitting the check to the IRS. The Region should also send Part 2 of the notice of levy to the taxpayer/claimant. The Region should keep a copy of the notice of levy and backpay check for the Region file. Copies of the notice of levy should also be submitted to the Division of Operations-Management and to Finance.¹²⁸

¹²³ See, for example, *NLRB v. Sunshine Mining Co.*, 125 F.2d 757, 762 (9th Cir. 1942); *NLRB v. State of Illinois Department of Employment Security*, 777 F. Supp. 1416 (N.D. Ill. 1991), *affd.* 988 F.2d 735 (7th Cir. 1993); and *Lenz v. NLRB*, 915 F.2d 388 (8th Cir. 1990).

¹²⁴ See, for example, *NLRB v. Mooney Aircraft*, 366 F.2d 809, 811 (5th Cir. 1966).

¹²⁵ Any money owed to the taxpayer/claimant, including backpay, interest, or other reimbursements, is subject to the notice of levy.

¹²⁶ In determining what constitutes a "final, nonappealable determination of liability," the Region should follow its usual practice for determining whether liability is no longer being contested. If the Region is uncertain as to whether a particular Board order or Court judgment is "final" and therefore subject to the notice of levy, contact the Special Litigation Branch for assistance.

¹²⁷ For purposes of this section, a "liquidated" backpay award includes not only a backpay award determined by a final adjudicated order, but also includes backpay amounts due under a settlement agreement and/or backpay amounts that the parties agree are due.

¹²⁸ The Division of Operations-Management will retain a file with copies of levies submitted by Regional Offices.

(b) In cases where there is a final, nonappealable determination of liability, that is, a final adjudicated order or approved settlement agreement, but the backpay award has not yet been liquidated, the Region should contact the Special Litigation Branch for assistance in completing these forms, which involve notifying the contact person listed on the notice of levy, by completing the back of the notice of levy form and indicating that the amount of the backpay award and date of distribution are currently unknown. The Region should also provide an estimated date of distribution, if available. The Region should also send Part 2 of the notice of levy to the taxpayer/claimant as well. The Region should also make a copy of the notice of levy and place a notation in the ROF to alert the Compliance Officer that an IRS levy on the backpay award is pending and that once the award is liquidated and payment is received, the IRS should be paid in satisfaction of the levy. See paragraph 1(e) below for directions regarding submitting the check to the IRS. Copies of the notice of levy should also be submitted to the Division of Operations-Management and to Finance.

(c) In cases where a charge has been filed and/or complaint has issued and there is not a final nonappealable determination of IRS liability, the Region should contact the Special Litigation Branch for assistance in completing the back of the notice of levy form, which involves filling out the back of the notice of levy form, indicating that no backpay award is owed to the taxpayer/claimant yet because there is no final nonappealable determination of liability, and sending the notice of levy form back to the IRS. The details regarding the status of the case, e.g., whether the Region has scheduled a hearing and/or is awaiting an Administrative Law Judge Decision also should be noted. The Region should also make a copy of the notice of levy and place a notation in the ROF to alert the Compliance Officer that if and when liability is determined, and the taxpayer becomes eligible for an award, the Region will advise the IRS office so that another notice of levy can be served on the Region at that time. Copies of the notice of levy should also be submitted to the Division of Operations-Management and to Finance.

(d) In all cases where there is a final nonappealable determination of liability, the Region may advise a respondent employer or union that an IRS notice of levy has been served on the Board to satisfy all or part of the outstanding tax liability of a named taxpayer/claimant. Consistent with Sections 10576.1 and 10576.2, a respondent should be requested to make payment of the backpay award due a taxpayer/claimant by delivering checks made payable to individual discriminatees to the Region. See paragraph 1(e) below for disbursement procedures.

(e) In cases where the backpay amount is less than the amount of the levy, the Region should encourage the respondent to make the backpay check payable to the taxpayer/claimant. The Region should send the backpay check made out to the taxpayer/claimant directly to the IRS office

listed on the notice of levy in satisfaction of the levy. In cases *where the backpay check is for an amount more than the taxpayer/claimant owes the IRS*, the Region should encourage the respondent to issue and remit two separate checks to the Board—one made payable to the IRS for the amount of the levy and one made payable to the taxpayer/claimant for the remainder. The Region should send the backpay check made out to the taxpayer/claimant to the taxpayer/claimant and the backpay check made out to the IRS directly to the IRS office listed on the notice of levy in satisfaction of the levy. Alternatively, the Region should encourage the respondent to issue one check payable to the Board for the Agency to handle the distribution. The Board (through Finance) will then send one check to the IRS for the levy amount and one check to the taxpayer/claimant for the remainder.

2. If a Regional Director or other Region staff member learns that a respondent employer or union has been served with an IRS notice of levy to collect a Board backpay award or if a Regional Director receives an IRS notice of levy or a telephone inquiry from the IRS regarding the service of a notice of levy in a Board case that is not pending in that Region or if there are any other problems or questions that arise in complying with or otherwise handling an IRS notice of levy, the Region should contact the Special Litigation Branch for assistance.

10578 Taxes and Withholding

10578.1 Income Tax Withholding by Respondent Employers

A respondent should treat backpay as wages and make appropriate withholding of payroll taxes. Respondent is responsible for determining proper tax withholding and for submitting proper tax payments and reports to tax authorities as well as for providing tax reports to discriminatees to use in filing their income tax returns. Both parties should be apprised that nonwage elements of backpay, such as interest and reimbursement for medical expenses, are not subject to withholding of payroll taxes. In no instance, however, should the Compliance Officer provide advice to the parties regarding tax matters. Rather, the parties should be referred to the Internal Revenue Service.

10578.2 Social Security Taxes and Withholding by Respondent Employers

The taxes enacted by the Federal Insurance Contributions Act, commonly referred to as the social security or FICA tax, are deducted from employee wages.¹²⁹ Employers pay an equal amount in addition. The FICA tax rate has increased over the years, as has the amount of annual wages subject to the tax. If questions arise, the employer should be advised that FICA should be withheld and employer contributions made, at rates and earnings limits in effect at the time backpay is paid. FICA taxes should not be withheld on the basis of former FICA rates in effect during the backpay period. The employer is responsible for withholding correct amounts for taxes due under FICA. Nonwage components of backpay, such as interest, insurance, payments made through retirement

¹²⁹ *Social Security Board v. Joseph Nierotko*, 327 U.S. 358 (1946) (the Court held that backpay is considered wages for purposes of social security tax contributions).

plans or medical benefits are not subject to social security tax. However, the Compliance Officer should not advise the parties in these areas. Rather, they should be referred to the Internal Revenue Service.

10578.3 Discriminatees' Obligations Regarding Taxes

Discriminatees should be informed that they are responsible for proper filing of income tax returns and proper payment of taxes resulting from receipt of backpay and interest. It should be emphasized that backpay and interest received, whether from an employer, a union or both, are taxable as income.

The discriminatee should receive an itemization of payroll taxes withheld from backpay and, at the proper time, should receive a W-2, 1099-MISC, or other appropriate tax forms from the respondent.

If the backpay award is large, or covers a long backpay period, special tax considerations may apply. A large backpay award may exceed the annual earnings limit for FICA tax and the discriminatee may be entitled to a refund of FICA taxes withheld for amounts in excess of that limit.

The Compliance Officer should advise the discriminatee to contact the Internal Revenue Service for information concerning payment of taxes resulting from receipt of backpay.

10578.4 Allocation of Social Security Credit

The Social Security Administration credits employee earnings by calendar years for purposes of determining benefit entitlements and amounts. A backpay award will be credited as earnings by Social Security for the year in which it was paid. There are situations where it may be advantageous for a discriminatee to have the Social Security Administration allocate earnings from a backpay award to the years of the backpay period.

For example, if a backpay award exceeds the earnings limit for FICA taxes for the year in which it was paid, allocation of the surplus could result in higher future benefits. Also, if a discriminatee had no earnings during a year of the backpay period, allocation of the backpay award to that year could affect the discriminatee's entitlement to social security benefits.

Discriminatees should be advised to consult with the Social Security Administration concerning whether it would be advantageous to seek an allocation of backpay to previous years, and the procedures for doing so. In the event that such an allocation is pursued, the Compliance Officer should cooperate by providing documentation of the allocation of net backpay by calendar quarter throughout the backpay period.

10578.5 Joint Employer-Union Liability for Income and Social Security Taxes and Withholding

A union cannot deduct or withhold Federal, state, or local income taxes except when the union is the discriminatee's actual employer.¹³⁰ Therefore, when the employer

¹³⁰ *Teamsters Local 249 (Lancaster Transportation)*, 116 NLRB 399 (1956).

and union are jointly liable for backpay, the employer shall deduct income and FICA taxes from its share of the backpay award sufficient to cover the entire backpay award, including the union's share, and remit such amounts to the appropriate Federal, state, and local revenue agencies. The employer respondent is also responsible for paying the employer FICA tax on the entire backpay award, including the union's share.

In order to compensate for the additional contributions to be paid by the employer, it may be appropriate to adjust the respective shares of backpay paid by the employer and the union.

10578.6 Union Solely Liable for Payment of Backpay

When a union alone is liable for backpay, the payment is not treated as wages for purposes of income tax withholding. Therefore, no income tax and no FICA tax withholding should be made.¹³¹ The union is responsible for proper reporting of backpay to tax authorities. In this situation, the discriminatee should be advised that it is his/her responsibility to make the necessary payments to the tax authorities.

When a union is an employer in an unfair labor practice proceeding, backpay should be treated as wages for withholding of taxes. The discriminatees are responsible for reporting to tax authorities and paying proper taxes on backpay, whether it is in the form of backpay, interest, or other reimbursements.

10578.7 Lump-Sum Payments and Payments for Missing Discriminatees

When an employer respondent transmits backpay to the Region in a lump sum or for a missing discriminatee to be paid out through the Agency's Finance Branch, it should also include the amount of the employer FICA tax at the rate current at the time of payment. When the lump sum is divided or discriminatees are located, appropriate tax withholding and payments are then made by the Agency to the IRS for both income and social security taxes. Where a lump sum payment constitutes less than 100 percent of the backpay and interest owed, unless the settlement specifically provides that the sum paid includes the employer's share of FICA, such amounts remain the responsibility of the employer and should not be withheld from the distributions made to discriminatees.

See the following sections regarding procedures for holding and disbursing backpay through the Agency's Finance Branch.

10580 Escrow Accounts

10580.1 Overview

Although payment of backpay is normally made as provided in Section 10576.1, it is sometimes appropriate to have backpay paid into an escrow account, where it may be held and from where it may be disbursed to discriminatees.

- Escrow accounts are appropriate when:
- The Region wishes to hold backpay due a discriminatee who is missing or otherwise unavailable to receive it

¹³¹ Ibid.

- A respondent is either incapable of or unwilling to prepare individual backpay checks payable to the discriminatees
- A settlement is based on a lump-sum amount to be paid, with allocation of the amount to individual discriminatees not determined at the time of settlement or
- A bankruptcy distribution must be divided and distributed among discriminatees.

Under no circumstances should backpay checks be made payable to a Board employee. Under no circumstances should an account be opened in the name of a Board employee for use in disbursing backpay.

Regions may submit backpay to the Agency's Finance Branch in order to establish an escrow account. The following sections describe procedures for doing so and for disbursing backpay from the escrow account to discriminatees.

10580.2 Opening an Escrow Account Through the Agency's Finance Branch. Instructions to Respondents

When a Region wants to collect and disburse backpay through a Finance Branch escrow account, Regions are strongly encouraged to arrange the transfer of funds by respondents directly to the Finance Branch by wire transfer. This procedure eliminates mailing delays and the waiting period for checks to clear and ensures that the funds are immediately available for investment or distribution. If respondent is unwilling to wire the amounts owed, it should submit a check to the Region made payable to the National Labor Relations Board.

No deduction of any taxes should be made from the respondent's check. Rather, the amount of the check should reflect all backpay, interest, and other amounts, such as reimbursement for medical expenses, that are due, as well as the Employer's FICA tax share of the wage component of backpay. The Finance Branch will handle withholding of payroll taxes and reporting of income for tax purposes at the time it disburses backpay.

The respondent must also submit its Federal tax identification number, which will be used by the Finance Branch for tax reporting purposes.

In cases with more than one discriminatee, a single check may be submitted for all amounts due.

10580.3 Transmitting Checks to Finance Branch

On receipt of the backpay check from the respondent, the Region should write the unfair labor practice case number on the face of the check and send it to the Division of Administration, Finance Branch, with an accompanying memorandum.

The transmittal memorandum should contain the unfair labor practice case name and number, explain the purpose of the check, how the money was obtained (Issuer of the check, Bankruptcy Trustee, Federal Debt Collection Proceedings, or 10(j)), the identity of the type of award, the approximate number of discriminatees, whether the Region will request disbursement within 30 days of deposit and whether Finance should invest the

money. The amount of the check representing the employer's share of FICA taxes should be noted.

The transmittal memo may request that the Finance Branch hold the amount or portions of the amount in escrow. It may also request immediate disbursement of the check, or portions of the check. See Section 10582.1, below, regarding information that must be included in a request for disbursement.

The Region must ensure that the remittance control procedures set forth in OM 92-13 (Appendix 11) are carefully followed. Thus, the check must also be accompanied by Forms NLRB-5472 and NLRB-5473, for use by the Finance Branch in its procedures for confirming receipt of, tracking and reconciling remittances.

10580.4 Interest-Bearing Accounts Through Finance Branch

The Finance Branch will deposit checks into an escrow account with the United States Treasury. All deposits over \$2500 (per case) received by the Finance Branch will be automatically deposited into an interest bearing account unless the transmitting Region specifically requests that they be exempt from investment.¹³² The Region should request the Finance Branch to disburse money invested in interest-bearing securities in the manner set forth in Section 10582.

10580.5 Escrow Accounts Established Through Local Private Banks

On occasion, such as when the sum to be placed in escrow is less than \$10,000 or the escrow period will be less than 30 days, the use of an escrow account in a local bank has enabled the accrual of interest to increase, if only marginally, the amount of backpay available for the discriminatees.

Use of the Finance Branch escrow accounts is strongly preferable to local bank escrow accounts. Escrow accounts established through the Finance Branch allow the Agency to retain full control over disbursement of money held, avoids problems with insurability and avoids the possibility that the Agency will be considered an employer under IRS regulations.

If the Region believes that it is advisable to have the money deposited in an account at a local bank, the account must be established in the name of the respondent, but withdrawals must be approved by the Regional Director. In such an account, the only responsibility of the Region is authorization for disbursement of backpay.

Local bank escrow accounts should not be used in the following situations:

- When there is concern that the respondent will seek protection under the Bankruptcy Code before backpay has been fully disbursed, because a bankruptcy petition may impede disbursements from the escrow account.
- When the respondent has ceased or will cease operations, because of the potential for a determination by the IRS that the Agency is the employer when the respondent goes out of business.

¹³² In circumstances where it is apparent the Region will be unable to distribute the money for well in excess of 30 days, Finance should be advised of the anticipated period the funds will be held. This will allow the funds to be invested in treasury bonds with a later maturity date, which may provide a higher rate of interest.

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- When the escrow account will exceed \$100,000, the insurability limit established under F.D.I.C. regulations.

In these situations, the backpay escrow accounts established by the Finance Branch must be used.

The respondent employer is responsible for all required payroll transactions, such as preparation of the backpay checks, payment of FICA and withholding taxes to the Internal Revenue Service and preparation of tax and W-2 forms. Local bank escrow accounts should be established only in banks or other financial institutions where deposits are Federally insured.

To disburse money from an escrow account in a local bank in the name of the respondent, the Regional Director should authorize the release of the moneys to the respondent for issuance of the backpay checks. The respondent should be advised to prepare the backpay checks on the basis of the Compliance Officer's apportionment, making the appropriate tax withholding deductions from the backpay amount and submitting the appropriate taxes and its matching FICA payment to the IRS.

10582 Disbursement From a Finance Branch Escrow Account

10582.1 Procedures for Requesting Disbursement

The Region should request disbursement of money held in an escrow account by submitting a memorandum to the Finance Branch that sets forth what amounts should be disbursed, for what purpose and to whom. More specifically, the memorandum should:

A. Identify each discriminatee to whom a disbursement is to be made and include the discriminatee's social security number and current mailing address. A spreadsheet should be attached to the memo containing the following columns: social security number, first name, last name, address, city, state, zip.

B. State the amount and the nature of the disbursement. That is, it must set forth what amounts, among the disbursement, constitute wages, interest, reimbursement of dues, reimbursement for medical expenses, or other components of backpay. A disbursement to a single discriminatee may constitute more than one component of backpay. This information should be included in the spreadsheet referred to above with the following columns: backpay, interest on backpay, expenses, interest on expenses, medical expenses and interest on medical expenses.¹³³ Additional columns may be added if necessary.

C. State the amount of employer FICA tax contribution, the employer's Federal tax identification number and the employer's current or last known address. The memo should also state if the employer's share of FICA should be withheld from the amount to be distributed.

D. Identify missing discriminatees and inform the Finance Branch that additional requests for disbursement of the balance of the checks will be submitted as the remaining discriminatees are located.

¹³³ Normally, discriminatees would receive a prorated share of interest earned in the event the escrow amount was invested by the Finance Branch.

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10582.2 Finance Branch Procedures for Disbursement

The Finance Branch will transmit payment requests to the Treasury Department, using information provided in the Region's memo. At the same time, the Finance Branch will send the Region preprinted envelopes with a Headquarter's return address and the name and address of the discriminatee and a detailed listing of the checks that will be sent from Treasury. The Finance Branch will have Treasury send backpay checks directly to a designated agent in the Region (this should not be the Compliance Officer). The Region will have someone other than the Compliance Officer verify that the checks are made out to a discriminatee who is entitled to the money, as shown on a certified list prepared in the Region. The Region should use the envelopes provided by Finance. Undelivered checks will be returned to the Finance Branch by the Postal Service, in which event, the Finance Branch will contact the Compliance Officer for a new address.¹³⁴

The Finance Branch will withhold and transmit to IRS the appropriate amounts for income tax and FICA from the wage portion of the backpay amount. The Finance Branch will also prepare and mail W-2 or 1099-MISC forms to the discriminatees no later than January 30 of the year following disbursement.

The Finance Branch will not, however, be responsible for calculating or remitting to taxing authorities any amounts owed by the respondent on the backpay for Federal and state unemployment taxes nor will the Finance Branch be responsible for any reporting functions in connection with these taxes. These taxes are solely the responsibility of the respondent and the respondent should be so advised.

The Finance Branch will not withhold any state or local income taxes. Discriminatees should be advised that they are responsible for reporting earnings and making payment of state or local taxes as appropriate.

The Finance Branch will notify the Region when it receives notification from the U.S. Treasury that the check was not cashed within 1 year from the date it was issued. The Finance Branch will also notify the Region when it receives a check that was returned because of an improper address. Upon such notification, the Region should promptly investigate the problem and provide the Finance Branch a correct address as soon as possible.

10582.3 Escrow for Missing or Unavailable Discriminatees

When backpay is deposited in an escrow account pursuant to a settlement agreement, Board order or court judgment, respondent should be instructed to follow procedures set forth in Section 10580.2 in submitting the backpay amount to hold.

See Section 10562 regarding missing discriminatees and Section 10562.2 regarding methods and resources available for locating missing discriminatees. If the amount submitted represents final net backpay due the discriminatee, the Region should

¹³⁴ This procedure will be used for any case that involves less than 100 checks. For larger cases involving 100 or more checks the Finance Branch will work with the Region to determine the best way to process the disbursements so that the Region will not be overburdened. Request for assistance with cases involving 100 or more checks should be directed to the Chief of the Finance Branch, with a copy to the Region's Assistant General Counsel or Deputy.

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follow procedures set forth in Section 10582.1 for disbursing the amount at the time the discriminatee is located or otherwise available.

If the amount held represents gross backpay or the amount of net backpay due the discriminatee depends on further investigation of interim earnings, mitigation, or other issues after the discriminatee has been found, the Compliance Officer should investigate these issues when the discriminatee has been found.

The respondent should be advised of the results of this investigation and of a proposed distribution to the discriminatee from the amount held in escrow. If agreement is reached, standard procedures for requesting disbursement should be followed. If more is held in escrow than the discriminatee is entitled to, the Region should refund the excess by requesting its disbursement in the form of a check payable to the respondent.

In the event that no agreement can be reached concerning net backpay due the discriminatee, the Region may undertake further compliance proceedings as appropriate depending on the circumstances and the stage of the case. It may be appropriate to revoke an underlying settlement agreement or initiate further compliance proceedings.

10584 Extinguishment of Backpay Entitlement for Discriminatees Missing After a 1-Year Period or Who are Uncooperative

Absent compelling circumstances, if a discriminatee is not located within 1 year of the date that backpay is deposited in escrow or within 1 year from the date a Board order becomes final, whichever is later, the escrow amount should be returned to the respondent and the discriminatee's backpay entitlement shall expire.¹³⁵ The Board has also applied the Starlite Cutting one year escrow remedy to discriminatees who were subpoenaed to testify at the hearing and did not appear. See *The Grosvenor Resort*, 350 NLRB No. 86, at p. 1 (2007). When backpay is paid through installments, the 1-year period will begin when the Region receives the final installment payment.

In an informal settlement agreement, the 1-year period runs from either the date of the approval of the settlement agreement by the Regional Director or the denial of the appeal or expiration of the appeal period in a unilateral settlement, or from the date of receipt of the funds by the Region, whichever occurs later. The settlement should contain provisions for redistribution to located discriminatees if the settlement is less than 100 percent or the return of undistributed funds to the charged party.

10586 Escrow in Cases Involving Bankruptcy

In cases involving bankruptcy proceedings, the total sum allocated by the bankruptcy court should likewise be forwarded to the Region in a check made payable to the National Labor Relations Board. The Region, in turn, will submit the check to the Finance Branch for deposit in an escrow account.

The Region should consult with the Contempt Litigation & Compliance Branch regarding backpay held from a bankruptcy distribution for a missing discriminatee. Section 10670.6.

¹³⁵ See *Starlite Cutting*, 284 NLRB 620 (1987), clarifying 280 NLRB 1071 (1986); see also *Groves Truck & Trailer*, 294 NLRB 1 fn. 3 (1989).

10588 Procedures for Closing Escrow Accounts

If at the end of the period provided for locating discriminatees some are still missing and there are funds remaining in the account, the Region should:

- return the remaining balance to respondent if there was a full 100 percent payout in the case, or
- redistribute the remaining funds (if there was less than a full payout) to the located discriminatees up to a full payout. If the remaining amount is small, the Region should use its discretion as to whether it would be cost efficient to do a second distribution.¹³⁶

When closing the escrow account, the Region should submit a final memorandum to the Finance Branch setting forth the distribution of the remaining balance, either to be returned to the respondent and/or to be distributed to discriminatees whose locations are known.

Before closing an escrow account which was established with money received from a bankrupt respondent, contact Contempt Litigation & Compliance Branch before returning the money to respondent or redistributing the money to discriminatees whose locations are known.

When the balance in the account is to be refunded to the respondent, Finance Branch should be requested to issue a check payable to the respondent and forward it to the Region for distribution with the Region's cover letter closing the case, if otherwise appropriate for closing.

¹³⁶ The Region should contact the Contempt Litigation & Compliance Branch if there is any question as to whether a second distribution should be done. Likewise, the Region should contact Contempt if payment was made to the Board through a bankruptcy proceeding.