10512 Determining Compliance Requirements

10512.1 Overview

Once the case is assigned to Compliance, the Region should analyze compliance requirements of the case, advise the parties of those requirements, and establish what actions the respondent must undertake to fulfill them. Compliance processing begins with analysis of the actions required by the remedial provisions of settlement agreements and Board orders. Every Board order in which a violation of the Act is found contains remedial provisions. Orders almost always contain negative provisions, requiring the respondent to cease and desist from the actions that were found unlawful. Orders often contain affirmative provisions also, requiring the respondent to undertake specific actions, either to remedy losses resulting from its unlawful action or to restore conditions to those that existed prior to its unlawful actions.

Informal settlement agreements always contain remedial provisions as well, devised to be consistent with Board orders that have been based on the same or similar circumstances and violations.

In many cases, remedial provisions will be self-explanatory and requirements for their effectuation clear and not subject to dispute. In other cases, requirements will be less clear or disputed by the parties. In these cases, it is the responsibility of the Compliance Officer to investigate the facts and circumstances of the case and to apply appropriate policies and Board precedent in order to achieve compliance or to recommend further action by the Region.

To investigate remedial requirements, the Compliance Officer should begin by becoming familiar with the facts of the case to date, including the results of the Region's administrative investigation and the administrative law judge's decision or Board order. The Compliance Officer will then have to discuss requirements with all parties, advising them of compliance procedures and requirements, eliciting their positions on compliance issues that might be in dispute, and obtaining information needed to settle or determine disputed issues.

The following sections provide guidance for the investigation of a range of compliance issues, as well as case authority and current policies to assist in their substantive determination. Guidance on procedures to follow upon issuance of administrative law judge's decisions can be found in Section 10506.7, upon issuance of Board orders at Sections 10596–10612, and upon issuance of court judgments at Sections 10614–10644.

10514 Negative Provisions

When the Board finds violations under Section 10(c) of the Act, it will issue an order requiring the respondent to cease and desist from further unlawful actions. Board orders are subject to judicial enforcement under Section 10(e). See Section 10632.5(a) regarding the scope of court judgments enforcing Board orders. The Compliance Officer should advise the charging party that it has a responsibility to apprise the Region of non-compliance with negative provisions. The Compliance Officer should not be content to

wait for charging party reports of noncompliance, but should periodically check with the charging party regarding the status of compliance.

Negative provisions of settlements or Board orders, by their nature, require refraining from action rather than undertaking action. With the above actions undertaken by the Compliance Officer, it should be presumed that the respondent is complying with negative provisions, unless there is a complaint of noncompliance.

10516 Affirmative Provisions

Affirmative provisions of settlement agreements and Board orders require respondent action. Examples of affirmative requirements include offering reinstatement, paying backpay, withdrawing recognition from an unlawfully recognized union, and reimbursing employees for dues or initiation fees unlawfully deducted or for hiring hall fees unlawfully exacted. Some affirmative provisions are essentially self-explanatory; others, such as those requiring payment of backpay, almost always require investigation and determination.

Because they require action, affirmative provisions are generally the focus of attention in compliance processing. Sections 10518 through 10566 provide guidance in determining common affirmative provisions.

10518 Notice Posting

Settlement agreements and Board orders almost always require that the respondent post a remedial notice for 60 days. The purpose of the notice is to inform employees or members of their rights protected by the Act and to set forth publicly and in clear language the respondent's remedial obligations.

10518.1 Wording Fixed

The wording on the notice is established by the settlement agreement or Board order. Variation or substitution should not ordinarily be permitted in the course of compliance proceedings. Where, however, all parties agree that modification of the wording in the notice is warranted by changed circumstances, the Regional Director is authorized to grant such request to modify the notice. Where any party is opposed to the proposed modification, the Regional Director should advise the party seeking modification to file its motion with the Board.

10518.2 Location and Number of Notices

General posting provisions require that notices be posted wherever employee or member notices are customarily posted. When Board agents are negotiating the terms of settlement agreements, they should resolve potential posting issues and identify specific posting locations as part of the settlement process. Examples of posting locations include employee bulletin boards, timeclocks, department entrances, meeting hall entrances, and dues-payment windows. Small facilities may require only one notice; large facilities may require a great number.

In Board order cases or when specific posting locations have not been identified as part of a settlement, appropriate posting locations will depend on the circumstances of the case, and must be determined by the Compliance Officer. When the violation was committed by electronic means, such as by the use of e-mail, the Region should normally require the charged party to circulate a copy of the notice in electronic fashion on the same basis and to the same group or class of employees as were sent the electronic message which was determined to have violated the Act.[5] See Appendix 12 for suggested language to be included in informal settlement agreements.

10518.3 Preparation of Notices for Posting

The Region should provide notices for posting, with notice text printed on the appropriate blue and white form. The Region is provided with a copy of notice text with the issuance of an administrative law judge's decision or a Board order. Regions are also supplied with the various blue and white forms that set forth the basis of the posting. Foreign language notices may be posted in addition to notices in English. Translations may be made by bilingual agents/support staff or by a translation service. In addition, the Agency maintains an archive of foreign language notices in a variety of languages that are available for use by the Regions. See OM 03-86 for a list of common notice provisions in Spanish or contact the Division of Operations-Management regarding a list of archived notices available, as noted in OM 99-18.

10518.4 Respondent Effectuation of Posting

A responsible official of the respondent must sign and date notices before posting them, and submit two signed and dated copies of the notice to the Region, along with a certification of posting. The charging party is entitled, upon request, to a photocopy of the signed and dated notice. The certificate of posting must be completed to indicate the date and all locations of posting. In addition to this initial report, the respondent should be asked to report at the end of the posting period that the copies were continuously and conspicuously posted.

10518.5 Posting by a Union

When a union is a respondent, posting provisions generally require that the union return signed and dated notices to the Region to forward to the employer for voluntary posting at the employer's premises. The Region should obtain a sufficient number of signed notices and transmit them to the employer. In the event that respondent maintains a bulletin board at the facility of the employer where the unfair labor practice occurred,

[5] *Public Service of Oklahoma*, 334 NLRB 487 (2001).

the respondent shall also post notices on each such bulletin board during the posting period. In a hiring hall case, it may also be appropriate to require posting of the notice in the referral hall.

10518.6 Side Notices

The posting of a notice adjacent to a Board notice constitutes noncompliance with the posting provision if the side notice's language attempts to minimize the effect of the Board notice or where it suggests that respondent does not subscribe to any of the Board notice's statements. Posting of a settlement agreement form alongside the notice does not normally constitute noncompliance. However, such side notice posting is discouraged if the settlement agreement contains a nonadmissions clause (ULP Manual Section 10130.8) and may constitute noncompliance if the nonadmissions clause is highlighted, circled or otherwise emphasized.[6] Difficult and/or unusual issues involving side notices should be submitted to Advice.

10518.7 Routine Notice Checks

The charging party should be advised to bring to the attention of the Compliance Officer any problems associated with proper posting of notices. The Compliance Officer is responsible for investigating allegations of noncompliance with the posting requirements. That investigation may include an unannounced visit to the respondent's facility to inspect the posting. In addition, it is generally appropriate to make routine checks of posted notices when Board agents are in the neighborhood of the posting site in the course of other business. In order to avoid potential skip counsel rule issues, Board agents can only engage in limited ex parte contacts with a manager or supervisor at the respondent's facility for the purpose of locating and verifying a notice posting. The Board agent should exercise caution that he or she does not engage in any substantive conversation about the subject of the attorney's representation or any topic that in any way affects the underlying unfair labor practice. The Board agent should also be careful not to elicit or obtain any attorney-client privileged information. In the event the posting is inadequate or improper, communications about such issues should be with the attorney representing the respondent. See ULP Manual Section 10058.2.

10518.8 Possible Contempt for Refusal to Post Notices

Before recommending contempt for respondent's failure to post a notice, the Region should obtain proof, in the form of an affidavit from an eyewitness, who may be a Board agent, that no notice was posted or that the posting was deficient. In the alternative, a documented admission by the respondent of a failure to post should be provided.

10520 Notice Mailing

Most Board orders require the respondent to mail notices at its expense to current and certain former employees if the facility involved in the case has been closed during

[6] See, for example, *Bangor Plastics*, 156 NLRB 1165, 1166–1167 (1966), enf. denied 392 F.2d 772 (6th Cir. 1968); *Bingham-Williamette Co.*, 199 NLRB 1280, 1281–1282 (1972). Compare *St. James Mercy Hospital*, 307 NLRB 322, 324 (1992), where respondent's letter mailed to employees pointed out it entered into a settlement agreement without admitting it had committed unfair labor practices found not to constitute noncompliance, where respondent's letter was in response to false claims by the union that the Board had ruled against the respondent, and the letter was not posted with the notice.

the proceedings or if, in a refusal to hire case, the number of discriminatees exceeds the number of jobs available with the result that all discriminatees might not be able to see the notice posting. Many settlement agreements also include a notice mailing requirement in place of or in addition to the normal posting requirement. In situations where mailing is required, respondent is required to certify that it has complied with the notice mailing provisions by submitting a list of names and addresses of employees to whom it mailed notices and the date of mailing.

10522 Preserve and Make Available Records

When respondent has been ordered to make employees whole, there is usually a corresponding affirmative requirement that respondent make records available that are necessary to analyze the amount of backpay or other monetary remedy due. After preliminary investigation, the Compliance Officer may need to detail for respondent the nature of records required for the particular case, as respondent may not readily discern on its own the records most appropriate for determining backpay.

The Board requires respondents to promptly take action to comply with its orders. Respondents are expected to begin taking affirmative steps to comply within 14 days from the date of the order.[7] Similarly, the Board generally requires respondents "within 14 days of request" to provide copies or otherwise make available for review, all payroll and any other records necessary for the calculation of backpay.[8] Regions should request that these records be provided in both electronic and hard-copy formats. These time limits may be applied as a general rule; however, reasonable requests for an extension of time to provide records from an otherwise cooperative respondent should typically be granted. The failure to promptly make backpay records available should signal Regions to seek enforcement of the Board's order and to consider other means of obtaining records necessary for calculating backpay.

When a respondent refuses to make records available as required under a Board order, experience has shown that contempt proceedings, even when summary, aimed at procuring such records are unduly time consuming and cumbersome. A better approach is for the Region to subpoena the records from the respondent or others pursuant to Section 11 of the Act, assuming that the person to whom the request is made does not cooperate voluntarily.

For example, an outside payroll service may be a source of wage information and may be subject to a subpoena if respondent does not cooperate voluntarily. The respondent's outside accountants or auditors also may be a good source of such information. See Section 10618.1 regarding investigative subpoenas and applicable clearance requirements.

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[7] *Indian Hills Care Center*, 321 NLRB 144 (1996).
[8] *Ferguson Electric Co.*, 345 NLRB 142 (2001).

10522.1 Report to the Regional Director on Compliance Steps Taken

Board orders generally require the respondent to submit to the Regional Director a report of steps taken to comply with other provisions of the order. Such reports should be requested in the course of compliance actions. Their contents depend upon other circumstances of the case.

10524 Reimbursement for Dues Deducted

When an employer is found to have deducted dues payments unlawfully, reimbursement to employees may be ordered by the Board. Reimbursements due are to be computed with reference to books and records of both employer and union.

10526 Compliance With a 10(k) Determination of Dispute

See Unfair Labor Practice Proceedings Manual Section 10214.

10528 Bargaining

10528.1 Overview

In cases where a respondent has violated Section 8(a)(5) or 8(b)(3) of the Act, a standard affirmative provision in a settlement agreement or Board order requires the respondent to bargain collectively, on request, over working conditions covering the employees in a described unit. Other bargaining provisions will address the circumstances of the case and may require such actions as to meet and bargain, to restore conditions that were unlawfully unilaterally changed, to provide requested information, or to reduce an agreement to writing. Most bargaining cases involve an employer respondent, but bargaining requirements in cases involving either an employer or union are generally equivalent. Some affirmative requirements will be self-explanatory, while others will require investigation and determination.

10528.2 Affirmative Requirements That Require Charging Party Request

Affirmative requirements involving bargaining often require respondent action only on the request of the charging party. When this is the case, the Compliance Officer should notify and remind the parties of this qualification in compliance requirements.

For example, a remedial provision of a Board order may require that, on the union's request, a respondent employer must reinstate terms of a collective-bargaining agreement that it unlawfully unilaterally changed when the agreement expired. The union must decide whether to request such a reinstatement and in some circumstances may conclude not to do so. For example, the parties may have bargained during the pendency of unfair labor practice proceedings and reached a complete new agreement. Only if the union requests reinstatement of the terms of the expired agreement is the employer required to reinstate them. The Region should not serve as a conduit for such requests; rather, the Region should satisfy itself that such a request has in fact been made.

When a charging party makes the appropriate request, compliance with the provision requires that the action be undertaken; the Compliance Officer must evaluate all that is entailed in the action. Where the charging party does not request specified respondent action because it has reached an agreement with the respondent, that

agreement may constitute compliance with the provision. Where there is neither an agreement nor a request to undertake a specified action, both parties should be aware that, absent special circumstances, the compliance obligation is continuing.

10528.3 Obligations to Recognize, Meet, and Bargain

In cases where a respondent has refused to meet and bargain as a result of its desire to test the certification of a union as the exclusive bargaining representative ("test of cert" cases), the Region should immediately contact the respondent and confirm whether respondent still intends to refuse to recognize and bargain with the union. Upon such confirmation or if respondent fails to respond to the Region's contacts, the Region should recommend enforcement proceedings be initiated no later than seven (7) days after issuance of the Board order. In cases where the respondent has refused to recognize or meet with the charging party and affirmative provisions require it to meet and to bargain upon request of the charging party, compliance should be monitored by periodic checks on the status of negotiations. Accurate and complete information about bargaining conferences and interparty communications should be obtained and kept in the Region file. The Region should exercise caution, however, that its function be confined to ensuring that bargaining takes place; it should not encourage specific bargaining positions or otherwise render assistance of a mediatory nature.

10528.4 Bargaining Obligations Monitored for a Reasonable Period of Time

The process of collective bargaining may be prolonged and compliance with affirmative bargaining provisions may be accomplished only over a long period of time. The point at which the Compliance Officer ceases to monitor bargaining will depend on the circumstances of the case. It is generally appropriate to cease monitoring and to close cases when a new agreement has been reached, when the parties have reached a good-faith impasse in negotiations for a new agreement, or when the charging party has established that it is no longer interested in pursuing bargaining.

10528.5 Make-Whole Benefit Funds

When a respondent has unlawfully unilaterally discontinued payments to benefit trust funds, it is typically ordered to make whole the union funds on behalf of employees possessing a nonspeculative future economic interest in those funds.[9] Retroactive payments to the funds can also be ordered without any offset for the cost of providing substitute benefits.[10]

On the other hand, if an individual's economic interest in the future viability of a union fund is merely speculative, contributions to that fund may not be ordered on the individual's behalf.[11] Examples of individuals who have a nonspeculative economic interest in the funds would include individuals who have obtained pension vesting rights, individuals who would have obtained vesting rights absent the unfair labor practice, or individuals who are currently employed by an employer that is contributing to the same funds.

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[9] *Roman Iron Works*, 292 NLRB 1292, 1293 fn. 15 (1989) and *Ron Tirapelli Ford*, 304 NLRB 576 fn. 2 (1991).

[10] *Stone Board Yard*, 264 NLRB 981 (1983), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984).

[11] *1849 Sedgwick Realty LLC*, 337 NLRB 245 (2001); *Centra Inc.*, 314 NLRB 814, 819–820 (1994), enf. denied on other grounds 110 F.3d 63 (6th Cir. 1997); *Manhattan Eye, Ear & Throat Hosp. v. NLRB*, 942 F.2d 151, 157–160 (2d Cir. 1991); and *NLRB v. Transport Service Co.*, 973 F.2d 562, 569 fn. 3 (7th Cir. 1992).

To assess the liabilities to benefit trust funds in cases where it is determined that retroactive payments are required, the Compliance Officer must establish benefit contribution rates, the complement of unit employees, and the backpay period.

For example, a Board order requires retroactive contributions to a health and welfare fund as required under terms of a collective-bargaining agreement. The agreement establishes that the contribution rate is $1.50 for every hour worked. Employer payroll records will establish who the unit employees were and the number of hours they worked during the backpay period. With this information, the full liability will be determined by arithmetic. In cases involving large numbers of unit employees, spreadsheet programs greatly facilitate calculation of liabilities.

The Board has required payment of liquidated damages and/or interest on delinquent payments to union funds in cases where the language of the parties' collective-bargaining agreement and/or the funds' trust agreements allow for the payment of liquidated damages.[12] Information about the specific requirements set forth in the benefit plans should be solicited from the fund administrator early in the compliance investigation. The Region should ensure accurate interpretation of the plan's coverage and request the administrator to compute the liability due under the parameters of the plan. The Region should take the administrator's calculation into account in determining the amounts due.

In cases where respondents have unlawfully ceased making contributions to benefit funds, affirmative provisions of settlement agreements and Board orders also generally require that employees be made whole for losses resulting from the cessation of contributions. See Sections 10544.2 and 10544.3 for discussion of losses to individual employees resulting from lost health and retirement benefits. See Section 10552.4 for discussion of the treatment of interim health and retirement benefits in determining net employee losses.

10528.6 Disestablishment

Disestablishment contemplates a complete and permanent termination of all relationships between an employer and the affected labor organization, and any successor having to do with wages, hours, and other working conditions. It does not necessarily mean complete dissolution of the organization, although the order may bring about that result. Disestablishment is effected by the employer's written notification to the union, sent to the last known officers (if there is doubt as to present existence), that it withdraws recognition from or will not grant recognition to the union, whichever is appropriate, and disestablishes the union as bargaining representative for its employees.

The employer must also specifically notify employees that it has disestablished the union as bargaining representative for its employees and that they are free to join or not to join any other union. It must perform such other affirmative acts as may be required by the order, such as providing instructions to supervisors to withdraw from membership in the union or from participation in the union's affairs.

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[12] See *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979), and *J.R.R. Realty Co.*, 301 NLRB 473, 475 fn. 16 (1991). See also *Ryan Iron Works*, 345 NLRB No. 56 (2005).

10530 Reinstatement

10530.1 Overview

When a respondent has unlawfully terminated an employee or taken other action to adversely change terms or conditions of employment, the standard Board remedy is that the employee be offered full reinstatement to the former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights or privileges previously enjoyed. The underlying remedial principle is that the employee be restored to circumstances that existed prior to the respondent's unlawful action or that would be in effect had there been no unlawful action. The following sections address procedures and issues in effectuating reinstatement.

Remedial orders also generally require respondents to make whole employees for losses suffered as a result of an unlawful termination or adverse action. Sections 10536–10568 address procedures and issues in determining backpay required to make an employee whole. Section 10592.8 addresses settlement procedures pertaining to reinstatement issues.

10530.2 Reinstatement to Former Position

When the former position is well defined and still exists at the time reinstatement is offered, the respondent should offer the employee reinstatement to that position.[13] Reinstatement is not foreclosed because the position has been filled since the unlawful action or because a replacement employee will have to be displaced in order to effectuate reinstatement. Contentions that reinstatement would be disruptive or adversely affect morale do not serve to preclude reinstatement.[14]

Full reinstatement also requires restoration of seniority[15] and other benefits and privileges,[16] restoring the employee's status to what it would have been had there been no interruption of employment by the unlawful action.

For example, 2 years after an employee has been terminated, a Board order issues requiring that the employee be offered full reinstatement to the employee's former position. Full reinstatement requires not only placement in the employee's former position, but also credit for seniority for the 2-year period between the termination and reinstatement. Restoration of seniority and other privileges can affect future vacation accrual, credit toward retirement, standing in the event of a layoff, and other terms of employment. Full reinstatement also requires reinstatement at terms that would be in effect at the time of the reinstatement offer had there been no unlawful action, including pay raises and changes in benefits.[17] If the employee would have been promoted or transferred during the period between the unlawful action and the reinstatement offer, reinstatement should be to the position to which the employee would have been promoted or transferred, at terms applicable to the new position.[18]

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[13] See, for example, *Chase National Bank*, 65 NLRB 827, 829 (1946); and *Panoramic Industries*, 267 NLRB 32, 38–39 (1983).
[14] See, for example, *Fry Products*, 110 NLRB 1000 (1954).
[15] See, for example, *Rainbow Coaches*, 280 NLRB 166, 184 (1986).
[16] See, for example, *Staats & Staats, Inc.*, 254 NLRB 888, 899 (1981).
[17] See, for example, *Kansas Refined Helium Co.*, 252 NLRB 1156, 1159 (1980).
[18] See, for example, *Mooney Aircraft*, 164 NLRB 1102, 1103 (1967).

It is the Compliance Officer's responsibility to investigate what is required to effectuate full reinstatement and to establish what terms are in effect at the time of reinstatement. The employer's established practices and the experience of other employees in similar jobs should provide a basis for determining full reinstatement requirements.

10530.3 Reinstatement to a Substantially Equivalent Position

In the event that the employee's former position no longer exists at the time reinstatement is offered, the standard reinstatement provision in a Board order requires reinstatement to a substantially equivalent position.[19] In this situation, it is the Compliance Officer's responsibility to investigate the circumstances of the elimination of the former position and what treatment the employer would have accorded the employee in the absence of the unlawful action.

In construction industry cases, reinstatement rights may expire with the completion of work at the jobsite where the unfair labor practice occurred. In salting cases, reinstatement rights may expire depending on the date on which the discriminatee would have voluntarily left employment with the employer.[20] The Board generally reserves for compliance the decision as to whether employment would have continued beyond the end of work at a given jobsite. The Compliance Officer's investigation in such cases should focus on whether, absent the unfair labor practice, discriminatees would have been laid off at the end of the job, or in the alternative, would have remained employees of the Respondent and been transferred to other jobs following completion of work at the jobsite in question.

10530.4 Reinstatement Rights of Strikers

Employees engaged in strikes have certain reinstatement rights on their unconditional application to return to work.

Unfair Labor Practice Strike

Unfair labor practice strikers are entitled to full reinstatement on unconditional application, even if the employer must dismiss other employees hired to replace them during the unfair labor practice strike.[21]

Generally, the Board will order the respondent to reinstate unfair labor practice strikers on application and to make them whole for any loss of pay resulting from the failure to reinstate them within 5 days after their application.[22] If the employer rejects, unduly delays, or ignores any unconditional application to return to work or attaches unlawful conditions to reinstatement, backpay will commence as of the date of the unconditional application to return to work.[23]

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[19] See, for example, *Chase National Bank*, 65 NLRB 827, 829 (1946).

[20] See *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118.

[21] See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 fn. 9 (1956), affg. 214 F.2d 462, 466 (2d Cir. 1954), enfg. 103 NLRB 511, 518–519, 562 (1953).

[22] See, for example, *Drug Package Co.*, 228 NLRB 108, 113–114 (1977), enfd. in part and remanded in part 570 F.2d 1340 (8th Cir. 1978).

[23] See, for example, *Drug Package Co.*, 241 NLRB 330, 332 fn. 13 (1979).

An employer's valid offer of reinstatement to some but less than all of a group of unfair labor practice strikers will toll backpay for those to whom the offer is made. They do not lose their rights to reinstatement if they refuse the offer because it was not made to the entire group.[24]

Economic Strike

Economic strikers are entitled to full reinstatement upon unconditional application if their jobs are available or, if such are not available, reinstatement to substantially equivalent positions.[25] Economic strikers are also to be made whole for losses resulting from a refusal or delay in reinstatement.

If, at the time of the economic strikers' application for reinstatement, their jobs are held by permanent replacements, the employer need not discharge the replacements to make room for the strikers.[26] Moreover, if vacancies are not available because of substantial business reasons (such as a business downturn), the respondent need not immediately reinstate strikers.[27]

Although an employer need not offer immediate reinstatement to economic strikers if no positions are available at the time they offer to return to work, if vacancies later arise, the employer must seek out the strikers and offer them reinstatement, unless they have obtained regular and substantially equivalent employment elsewhere, or unless the employer can show legitimate and substantial business justification for failing to offer such reinstatement.[28]

The requirement of unconditional application can be satisfied by an application by the union, acting as the strikers' agent, on behalf of all strikers; individual applications by the strikers are not necessary.[29] Similarly, an employer's offer of reinstatement to the strikers as a group may be adequate if made to the union representing the strikers.[30]

10530.5 Withdrawal From Labor Market No Bar to Reinstatement

A discriminatee's withdrawal from the labor market does not normally terminate the employer's obligation to reinstate.[31]

See Section 10560 regarding actions that constitute unavailability for employment and withdrawal from the labor market. Such actions, although not ending the employer's reinstatement obligation, do affect backpay.

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[24] See, for example, *Southwestern Pipe*, 179 NLRB 364, 365 (1969), modified on other grounds 444 F.2d 340 (5th Cir. 1971).

[25] See, for example, *Laidlaw Corp.*, 171 NLRB 1366, 1367–1370 (1968), enfd. 414 F.2d 99, 103–106 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[26] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 335 (1938), reaffd. in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). It is the employer's burden to establish that strike replacements are permanent rather than temporary. See *Chicago Tribune Co.*, 304 NLRB 259, 261 (1991) (the employer must show a mutual understanding between itself and the replacements that they are permanent). The determination of the replacement date turns on if and when a commitment to hire an employee for a permanent job was made and accepted, irrespective of when the individual actually starts working or whether the individual has completed any posthire tests or a probationary period. See *Solar Turbines*, 302 NLRB 14 (1991); and compare *Harvey Mfg.*, 309 NLRB 465 (1992).

[27] See, for example, *Robinson Freight Lines*, 129 NLRB 1040, 1041 (1960), enfd. 289 F.2d 937 (6th Cir. 1961); and *Oregon Steel Mills*, 291 NLRB 185, 191–192 (1988), enfd. 134 LRRM 2432 (9th Cir. 1989), cert. denied 110 S.Ct. 2617 (1990).

[28] See, for example, *Laidlaw Corp.*, supra; *Harvey Engineering & Mfg. Corp.*, 270 NLRB 1290, 1292 (1984).

[29] See, for example, *Ekco Products Co.*, 117 NLRB 137, 147–148 (1957), and *Colonial Haven Nursing Home*, 218 NLRB 1007, 1011 (1975).

[30] See, for example, *Birmingham Ornamental Iron Co.*, 251 NLRB 814 fn. 1 (1980).

[31] See, for example, *Deena Artware*, 112 NLRB 371, 376 (1955), enfd. 228 F.2d 871 (6th Cir. 1955).

10530.6 Reinstatement When a Union is the Respondent

When a union has unlawfully caused an employee to be terminated, it may not be in a position to effectuate reinstatement. Reinstatement provisions in Board orders against union respondents often require specific union actions to seek reinstatement by the employer, such as notifying the employer that it no longer has objections to the employment of the employee.[32]

See Section 10546 regarding backpay when a union is the respondent.

10530.7 Unresolved Reinstatement Issues; Potential Contempt Issues

In those cases where the amount of backpay may depend on whether there has been proper reinstatement, and when an enforced Board order requires reinstatement, the Region should submit the matter to the Contempt Litigation & Compliance Branch (copy to the Division of Operations-Management), with a recommendation as to whether contempt proceedings are warranted. The case should be submitted even where there appears to be a legitimate factual or legal controversy surrounding the reinstatement. When the facts clearly show insufficient basis for initiating contempt proceedings, telephonic consultation suffices.

Where a case has been submitted to the Contempt Litigation & Compliance Branch, the Region should continue to conduct whatever investigation is necessary to compute backpay and to prepare a compliance specification. Unless otherwise instructed by Contempt, the Region should defer issuance of a compliance specification until the General Counsel has decided to recommend, or the Board has decided whether to authorize, contempt proceedings.

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[32] See, for example, *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773, 774 (1981).

10532 Exceptions to Reinstatement

10532.1 Overview

Standard reinstatement provisions are clear on their face. There are, however, situations in which reinstatement is not appropriate and is instead precluded. Where respondent contends that reinstatement is not appropriate, it is the responsibility of the Compliance Officer to investigate the situation and recommend a Regional determination.

When it is determined that reinstatement is precluded, backpay is tolled as of the date it was foreclosed. Section 10536.2.

The following sections address situations in which reinstatement might be precluded.

10532.2 No Positions Available for Reinstatement

If there has been a major reduction in the employee complement, the general reinstatement obligation may be precluded if it is established that the employee would have lost his or her position in the course of events in the absence of any unlawful action.

For example, during the course of unfair labor practice proceedings concerning an employee termination, the employer closed its plant, laid off all employees and went out of business. The Board ultimately found the termination to have been unlawful and ordered reinstatement for the employee. The compliance investigation established that the employee would have lost his or her position at the time of the plant closing and the Region determined that reinstatement was not required in order to comply with the Board order.

In situations where reinstatement is not required because of the elimination of any position to which reinstatement would be appropriate, reinstatement provisions of a Board order still require restoring the employee to conditions that would have applied had there been no unfair action.

For example, if the employee, absent the unlawful action, would have recall rights from a layoff, transfer rights to other employer facilities, or preference in future hiring, appropriate employer action should be required. In such situations, it may be appropriate for the Compliance Officer to periodically confirm that the respondent is following recall or preferential hiring policies.

At times, the Board order may provide specifically that an employee be placed on a preferential hiring list.[33]

In cases in which reinstatement is ordered for several employees and there are insufficient positions for all, the same principle of restoring what would have happened should be applied to determine which of the discriminatees should be reinstated to available positions and what arrangements should be made for the rest.

In a refusal-to-hire case where the Board has ordered instatement to the applicants and the number of applicants exceeds the number of available jobs, a compliance

[33] See, for example, *Venezia Bread Co.*, 147 NLRB 1048 (1964).

proceeding may be used to determine which of the applicants would have been hired for the openings and are entitled to instatement and backpay. The applicants who are in the group that exceed the number of openings would be entitled to a refusal-to-consider remedy.[34] The respondent would have to consider them for future openings in accord with nondiscriminatory criteria.[35]

10532.3 Employee Disqualification

Respondent may contend that a discriminatee is no longer suitable for a job for such reasons as ill health, lack of skill, new equipment, or change of job content, and that reinstatement should be precluded.

In such situations, the Compliance Officer should investigate the nature of the changed circumstances and the established employer policies, and should seek to determine what would have happened to the employee in the absence of any unlawful action. The respondent bears the burden of showing that reinstatement is not appropriate under the circumstances presented. This burden cannot be met with speculation or statements that are not factually supported.[36]

The Board has also found that if the discriminatee's duties were limited by physical disability before the unlawful action, reinstatement must be to a position suitable to his or her physical limitations.[37]

It may be appropriate to require a trial period at a job in which changes have been made since the unlawful action. If the trial period ends unsatisfactorily for the employee and a complaint is made that the employee was not given a fair trial, further investigation is warranted to determine whether the employee received support and training equivalent to other similarly situated employees.

Should the Compliance Officer feel it would be of assistance, he or she should consult with trade school specialists, union officials with long experience in the industry, the Apprenticeship Bureau of the Department of Labor, the State Unemployment Commission or Industrial Commission, or similar authorities in the field. Careful investigation by the Compliance Officer may disclose that the relevant evidence refutes the contentions and that the employee should be afforded further training or transfer to an available job for which that individual is qualified, as may be necessary.

Even where an employee is determined to no longer be qualified for his or her former position, reinstatement to another position may be required. Such a determination, again, depends on employer policies and the principle that the employee should be treated as though no unlawful action had occurred.

10532.4 Employee Actions That Preclude Reinstatement

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[34] In all cases involving a court-enforced instatement order where the respondent has not offered instatement, Regions should submit the case to the Contempt Litigation & Compliance Branch. Where the facts clearly show insufficient basis for initiating contempt proceedings, telephone consultation may suffice.

[35] See *FES*, 331 NLRB 9, 14 (2000).

[36] See, for example, *Contemporary Guidance Services*, 300 NLRB 556, 558–560 (1990).

[37] *Lipman Bros.*, 147 NLRB 1342, 1347 (1964), enfd. 355 F.2d 15 (1st Cir. 1966). See, for example, *Oil Workers (Kansas Refined) v. NLRB*, 547 F.2d 575, 590 (D.C. Cir. 1976).

Employee misconduct can preclude a respondent's reinstatement obligation.[38] Employee actions that result in loss of certification or qualification for a position may also preclude reinstatement.[39]

For example, if an unlawfully fired truckdriver lost his driver's license as result of a driving infraction during the course of unfair labor practice proceedings, reinstatement to a driving position may be precluded.[40] Reinstatement may be warranted to another position if that would be consistent with respondent's policies.

In such situations, the respondent bears the burden of establishing that reinstatement is inappropriate. The Board has evaluated employee misconduct in the context of unfair labor practices[41] and underlying respondent motive.[42]

10532.5 Undocumented Workers

When an employer's obligation to reinstate an employee conflicts with requirements of the Immigration Reform and Control Act of 1986, reinstatement may be precluded.[43] See Section 10560.7 for discussion of Agency policies under IRCA as they affect both backpay and reinstatement.

10534 Reinstatement Offers

10534.1 Overview

An employer's obligation to reinstate under provisions of a settlement agreement or Board order is met when it has made a valid reinstatement offer.

Employee rejection of a valid reinstatement offer not only ends employer reinstatement obligations, but also ends the backpay period. Section 10536.2.

The following sections address issues concerning the validity of an employer reinstatement offer and employee obligations in accepting an offer.

10534.2 Validity of Offer

In general, reinstatement offers must be for full reinstatement to former conditions, or to conditions that would be in effect had there never been an unlawful action. Reinstatement offers that qualify or limit full reinstatement in any way may not be valid, and thus may not serve either to meet the reinstatement requirement of a settlement agreement or a Board order nor to end the backpay period.[44]

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[38] See, for example, *Clear Pine Mouldings*, 268 NLRB 1044 (1984). See also *John Cuneo, Inc.*, 298 NLRB 856 (1990) (misrepresentations on employment application form). See also *ABF Freight System v. NLRB*, 510 U.S. 317 (1994), where the Court upheld the Board's reinstatement order even where the discriminatee was found to have "lied" before the ALJ. For example, *Keeshin Charter Service*, 250 NLRB 780 (1980).

[39] See, for example, *Keeshin Charter Service*, 250 NLRB 780 (1980).

[40] See *DeJana Industries*, 305 NLRB 845 (1991) (reinstatement with backpay awarded if employee could obtain license in a reasonable period of time).

[41] See, for example, *Precision Window Mfg.*, 303 NLRB 946 (1991).

[42] See, for example, *Viele & Sons, Inc.*, 227 NLRB 1940 (1977).

[43] *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002).

[44] See *D.L. Baker, Inc. t/a Baker Electric and its Alter Ego and/or Successor Baker Electric, Inc. and Daniel L. Baker and Maggie Barry, Individual*, 351 NLRB No. 35 (2007) where the Board found respondent's offer was to nonequivalent employment and thus invalid.

To avoid misunderstanding, the Compliance Officer should advise employers to make offers of reinstatement in writing. Such offers should be in English and, if appropriate, in the language customarily used by the employer to communicate with the discriminatee.[45] Similarly, discriminatees should be advised to respond to the offer in writing. Employers should be advised that they should communicate a reinstatement offer directly to the discriminatee or his/her representative. An offer of reinstatement made directly to an employee's representative is valid as long as the other requirements of a valid offer are met.[46] Offers made to Agency personnel are not valid offers.

It is the responsibility of the Compliance Officer to investigate contentions that a reinstatement offer constitutes less than full reinstatement. This investigation will require review of established employer policies in relevant areas, such as seniority, transfer, and layoff. Determination of the validity of the offer will depend on applying the principle that the employee is to be reinstated to conditions that would exist in the absence of the unlawful action.

A discriminatee may refuse an inadequate offer of reinstatement without waiving the right to reinstatement.[47]

When the adequacy of the offer is disputed, and its determination is close or subject to compliance proceedings, the Compliance Officer should advise both the employer and the employee that a reinstatement offer ultimately found to be inadequate will not end the backpay period nor meet the employer's reinstatement obligation.

An offer ultimately found valid will have ended the backpay period, will have met the employer's reinstatement obligation even if rejected by the employee, and thus will not have to be made again by the employer at the time of the ultimate determination.

It may be appropriate to point out to the employee that it would be prudent to accept an offer, pending disposition of a dispute over its validity. Ultimate disposition could include additional backpay (if reinstatement was at inadequate wages) and restoration of additional conditions.

10534.3 Reinstatement Offered Conditioned on Further Unfair Labor Practice Proceedings

An otherwise valid reinstatement offer that advises the employee that the employer is still asserting the lawfulness of its past action against the employee in pending unfair labor practice proceedings is valid. An otherwise valid reinstatement offer made without payment of backpay is also valid.[48] An employee who rejects such an offer will not be entitled to a future offer, and the backpay period will end.

When reinstatement offers are made with such conditions, unfair labor practice proceedings will continue, as will compliance proceedings to obtain backpay through the end of the backpay period.

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[45] *Sure-Tan, Inc.*, 277 NLRB 302 (1985).

[46] *Sun World, Inc.*, 282 NLRB 785, 788 fn. 4 (1987).

[47] See, for example, *Holo-Krome Co.*, 302 NLRB 452, 454 (1991). *D.L. Baker, Inc. t/a Baker Electric and its Alter Ego and/or Successor Baker Electric, Inc. and Daniel L. Baker and Maggie Barry, Individual*, ibid.

[48] See, for example, *Consolidated Freightways*, 253 NLRB 988 (1981), on remand on other grounds 669 F.2d 790 (D.C. Cir. 1981), reported 290 NLRB 771 (1988), enfd. 892 F.2d 1052 (D.C. Cir. 1989).

An offer that is conditioned on the employee withdrawing unfair labor practice charges or waiving backpay is not a valid offer.[49]

10534.4 Period for Acceptance of Offer

A valid reinstatement offer must give the employee a reasonable period to accept and report to work. There are no hard-and-fast deadlines for accepting a reinstatement offer and what constitutes a reasonable period depends on the circumstances of both employer and employee.

During the period between the unlawful action and the reinstatement offer, an employee may obligate himself or herself to activities that cannot be terminated immediately. The employee must be given adequate time to disengage himself or herself before being required to accept reinstatement or abandon reinstatement rights.[50]

If an otherwise valid reinstatement offer states an unreasonable reporting date, the employee may still have an obligation to respond, and inquire as to the employer's flexibility concerning the actual return date. Failure to respond may stop the running of backpay.[51] A reinstatement offer may be invalid if it makes clear that it will lapse if the employee does not report by an unreasonable date.[52]

An employee may not require the employer to hold an offer of reinstatement open indefinitely.[53] In situations where the employee is not immediately available to accept a reinstatement offer, a determination of the reasonable period to apply should take into account the employer's established practices.

For example, if an employee is pregnant and near term at the time she is offered reinstatement, the amount of time until she is required to return to work should be consistent with the employer's established policies regarding maternity leave, as well as provisions of the Family and Medical Leave Act of 1993.

The inability of an employee to accept a reinstatement offer because of illness does not relieve the employer of its reinstatement obligation.[54] The employee, however, must contact the employer and inform the employer of the illness.

10534.5 Reinstatement Offered to an Employee Engaged in a Strike

If an employee who has been unlawfully terminated is participating in a strike at the time the employer offers him or her reinstatement, the employee is not required to abandon the strike in response to an offer of reinstatement. If the employee continues participating in the strike, however, his or her reinstatement rights become those of an employee participating in a strike. Section 10530.4.

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[49] See, for example, *Adscon, Inc.*, 290 NLRB 501, 502 (1988).

[50] See, for example, *L. A. Water Treatment*, 263 NLRB 244, 246 (1982).

[51] See, for example, *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988).

[52] See, for example, *Toledo (5) Auto/Truck Plaza*, 300 NLRB 676 fn. 2 (1990).

[53] See, for example, *Tennessee-Carolina Transportation*, 108 NLRB 1369, 1371 (1954), remanded on other grounds 226 F.2d 743 (6th Cir. 1955).

[54] See, for example, *NLRB v. Mooney Aircraft*, 61 LRRM 2164, 2165–2166 (5th Cir. 1966), contempt proceeding on order in 138 NLRB 1331, 1333 (1962), enfd. 328 F.2d 426 (5th Cir. 1964).

A reinstatement offer to a striking employee should also end the backpay period. A new backpay period may begin after the striking employee makes an unconditional offer to return to work.

10534.6 Employee in the Armed Forces

When an employee who is required to be reinstated is in the Armed Forces, the employer's offer of reinstatement should be in the form of a letter, with a copy to the Region, advising the employee that he or she is being offered full reinstatement to his or her former or substantially equivalent position upon notifying the employer of acceptance within 90 days after discharge from the service, or from hospitalization continuing after discharge for a period of not more than 1 year.

The 90-day period (1 year if hospitalized) is intended to provide the employee with the protection of the Veterans Reemployment Rights Statute, Title 38 U.S. Code, Chapter 43, Sections 4321–4327.[55]

The Compliance Officer should inform the employee of the order as it applies to him or her and instruct the employee to notify the Region as to his or her whereabouts. After discharge from the Armed Forces or hospitalization and on timely notification thereof to the employer, the employee's right to reinstatement will be governed by general reinstatement principles.

10534.7 Missing Employees

If an employer makes a reasonable effort to communicate a reinstatement offer to an employee, but is unable to locate the employee, the backpay period may be suspended. Section 10562.3. However, the failed effort does not end the employer's reinstatement obligation and the Board may later require reinstatement as part of its order;[56] if the employer is later advised of the employee's availability for work, the employer may be required to offer.[57]

See Section 10584 regarding the extinguishment of remedial obligations to employees who remain missing after compliance is otherwise effectuated.

10534.8 Waiver or Rejection of Reinstatement Offer

If an employee declines a valid reinstatement offer, the employer's reinstatement obligation is ended. There is no obligation to make the offer again.

A valid reinstatement offer ends the backpay period, but does not meet the requirements of backpay provisions of a settlement agreement or Board order. That is, backpay must still be paid for the period between the unlawful action and the reinstatement offer.

Statements made by an employee during the course of unfair labor practice proceedings that purport to waive or decline the right to reinstatement, do not end the

[55] See, for example, *Diversified Case Co.*, 263 NLRB 873, 875 fn. 8 (1982).
[56] *Burnup & Sims, Inc.*, 256 NLRB 965 (1981).
[57] *Jay Co.*, 103 NLRB 1645 (1953).

backpay period or serve to relieve the employer of its obligations under reinstatement provisions of a settlement agreement or Board order that results from the proceedings.[58]

10536 Backpay

10536.1 Overview

Backpay is the standard Board remedy whenever a violation of the Act has resulted in a loss of employment or earnings. Losses can result not only from terminations in 8(a)(3) cases, but also from unlawful actions in 8(a)(1), (4), or (5) cases, as well as in 8(b)(1)(A) or (2) cases.

The goal in determining backpay is the same in all cases. The Act is remedial; when it has been violated, its intent is to restore the situation to that which would have taken place had the violation not occurred. Backpay awards are intended to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation. Backpay awards do not include punitive damages but may include compensable damages, such as the loss of a car or house due to the discriminatee's inability to make monthly payments as a result of being unlawfully laid off or terminated. Situations involving compensatory damage issues should be submitted to the Division of Advice. See OM 99-79.

Backpay awards also effectuate the purposes of the Act by discouraging respondents from further unfair labor practices and by assuring discriminatees that the Government is protecting their rights under the Act.

The basic method of determining backpay is the same in all cases. Backpay is based first on the earnings a discriminatee would have had but for the unlawful action. Against this gross amount is offset the discriminatee's actual earnings from other employment that took place after the unlawful action, less the necessary expenses incurred by the discriminatee in seeking and holding interim employment. Under some circumstances, the amounts that would have been earned had the discriminatee not quit, been discharged from, or refused interim employment are deducted from gross backpay. The difference is the net backpay award. Backpay also includes other compensation, such as benefits, lost as a result of the unlawful action, and is adjusted for in any net backpay award.

10536.2 Definition of Backpay Terms

Discriminatee and or Claimant: An employee, member, or applicant for employment who suffers economic losses as a result of an action unlawful under the Act.

Backpay Period: The period during which backpay liability accrues, beginning when the unlawful action took place and ending when a valid offer of reinstatement is made or when the backpay period has been tolled for other valid reasons (for example, when discriminatee would have voluntarily ended employment in salting case, closure of the facility; evidence that discriminatee would have been laid off during the backpay period notwithstanding the unfair labor practice; or death of the discriminatee) or when conditions in effect prior to the unlawful action have been restored.

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[58] See, for example, *Heinrich Motors*, 166 NLRB 783, 785 (1967), enfd. 403 F.2d 145, 149 (2d Cir. 1968); *Lyman Steel Co.*, 246 NLRB 712, 714 (1979); and *Big Three Industrial Gas Co.*, 263 NLRB 1189, 1203 (1982).

Gross Backpay: What the discriminatee would have earned from respondent had there been no unlawful action. Earnings include not just wages, but all other forms of compensation such as vacation pay, health and retirement benefits, bonus payments, and use of vehicles.

Interim Earnings: Earnings of the discriminatee from other employment obtained during the backpay period.

Expenses: Necessary expenses incurred by the discriminatee in seeking and holding interim employment that he or she would not have otherwise incurred are offset against quarterly interim earnings, such as stamps, mileage for job interviews, etc. In quarters in which there are no interim earnings, the discriminatee is not entitled to reimbursement for expenses.

Net Backpay: The amount owed a discriminatee by respondent. Net backpay is generally gross backpay minus interim earnings, but may be adjusted by discriminatee expenses, other gross compensation not subject to offsetting interim earnings, and periods during the backpay period in which the discriminatee was unavailable for employment or failed to seek interim employment.

10536.3 Compliance Responsibilities

The Region is responsible for determining net backpay due in all cases. To do so, information and supporting records should be obtained from both respondent and the discriminatees. Although it is important to elicit the cooperation of all parties in providing information and various forms of assistance should be accepted, the Region should not rely wholly on the parties to determine any component of backpay. Further, although settlement of backpay should be encouraged, the Region should also retain the initiative, address all issues and obtain all information required to make a backpay determination.

10536.4 Initiation of the Backpay Investigation

Determination of backpay should begin as soon as the Region determines that an unfair labor practice charge has merit and that backpay is among the appropriate remedies. Such a determination will support immediate settlement efforts. It will inform respondents of potential future liabilities in the absence of settlement and provide an opportunity to inform discriminatees of their responsibility to seek interim employment and maintain records of interim earnings. Finally, it will facilitate and expedite the formal determination of backpay that may be necessary should the case result in a Board order or judgment.

Section 10508 discusses points during the course of unfair labor practice proceedings when initiation of compliance action is appropriate.

10538 Backpay Investigation Procedures

Appropriate steps in investigating and determining backpay include identifying and discussing backpay issues with all parties; obtaining information and supporting records regarding wage rates, work schedules, available overtime, promotions, or other conditions relevant to determining gross backpay; obtaining information and appropriate documentation from discriminatees regarding interim earnings and availability for work;

evaluating information to determine a reasonable gross backpay formula and gross backpay amounts; preparing net backpay estimates; initiating settlement negotiations; and, where necessary, formally determining backpay.

10538.1 Review of Case Record and Background

Information gathered and facts established during unfair labor practice proceedings and related representation cases should be reviewed and used as a basis for the backpay investigation. Affidavits, file memos, correspondence, position statements and other documents including, for example, exhibits made part of the record in the unfair labor practice hearing or in a related representation case may provide information on wage rates, work assignments, unit employees, significant dates, and other important information. The administrative law judge decision and Board order may also establish certain facts, such as the date of a discharge or unlawful action, on which the backpay determination must be based.

10538.2 Discussion With the Parties

The investigation of gross backpay may begin by asking respondent, charging party, and the discriminatee how they think gross backpay should be determined and how much it should be. Both may be familiar with rates and methods of compensation, identity of comparable or replacement employees and other issues that will be addressed to determine gross backpay.

When eliciting information and positions, the Compliance Officer must impress on the parties that the Region is ultimately responsible for determining backpay and other compliance issues.

In less complex cases and where all parties agree on relevant facts, gross backpay, as well as other backpay issues, may be determined based on representations of the parties. In cases where parties disagree on facts or where not all parties have access to full information, it will be necessary to obtain documentation to support representations.

10538.3 Relevant Records

In cases where documentation or records are required, they should be requested and obtained as soon as possible. In most cases, the employer's records will be the principal source of information on which to base a gross backpay determination. Board orders normally include a provision requiring respondents to preserve and make available records needed by the Region for determining backpay. When necessary, there are other records that can be used for documenting employment or earnings. Keep in mind that many employer and union records may be maintained in electronic form. The Compliance Officer should request that records be provided in electronic form, as well as hard copy, particularly when the records are complex or voluminous. Records provided in spreadsheet form, which can be easily sorted and otherwise arranged aid in analyzing the data and constructing a backpay formula. The Contempt Litigation & Compliance Branch or the Office of Chief Information Officer can provide assistance if parties' electronic records are not compatible with agency software.

Main sources of information include the following:

- Timecards and work schedules are often maintained as a basis for payroll records.

- Personnel files often contain such information as hire and termination dates, transfers, job classification, and wage rate changes, as well as information useful in locating missing discriminatees or other witnesses.

- Payroll records. Even small employers now often use electronic payroll services which summarize earnings in various useful ways.

- Tax records can provide earnings documentation. Employers must issue employees a W-2 statement of annual earnings by the end of January for the previous year's earnings. Employers in most states must also file a quarterly payroll statement for unemployment tax purposes that states gross employee earnings.

- State employment department records. Most state unemployment departments maintain records of past employment and earnings, as entitlement for unemployment benefits is based on past employment. In some states, the departments may provide this information to the Region upon request.

- The Social Security Administration will provide reports on earnings that can document employee earnings subject to some limitations. SSA reports generally do not show earnings for the most recent period, show earnings only on an annual basis, and may not show earnings above FICA tax limits. To provide earnings information, the Social Security Administration requires submission of Form SSA-581. This form requires the Region to obtain the written authorization of the person whose earnings records are requested, as well as that person's social security number. The Region may specify the period of time for which records are being sought. Since obtaining the written authorization on SSA-581 and then awaiting a response from the Social Security Administration may be time consuming, Regions may wish to procure executed SSA-581s as early as possible in the handling of the case. All Form SSA-581s should be mailed to the Social Security Administration at:

  Social Security Administration
  Attention: DERO
  300 N. Greene Street
  Baltimore, Maryland 21290-0300

- Union records, such as hiring hall dispatch records or records of dues received when assessed on the basis of hours worked, may provide documentation of employment dates and hours.

- Trust fund records of employer contributions and employee credit hours may also provide information regarding hours of employment.

10538.4 Evaluation of Information

When information has been obtained, it must be evaluated to determine a reasonable method of measuring gross backpay, actual earnings rates to apply to that method, and proper interim earnings offsets to determine net backpay.

10540 Gross Backpay

10540.1 Overview

The objective in determining gross backpay is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period, had there not been an unlawful action.

Gross backpay must take into account all benefits and forms of compensation that a discriminatee would have earned from employment, had there not been an unlawful action. All forms of wages, including overtime, premiums, tips, bonus payments, and commissions, are to be considered in determining gross backpay. Health insurance, contributions to retirement plans, meal allowances, employer-provided cars or housing or any other benefit of employment must also be considered.

Gross backpay must also be based on changes in wage rates or other compensation that take place during the backpay period.

The determination of gross backpay is not based on an unattainable standard of certainty. Rather, gross backpay must merely be based on a reasonable method and reasonable factual conclusions. It should be easy to understand and to apply. Over the years, the Board and the courts have applied this broad standard of reasonableness to approve numerous methods of calculating gross backpay.[59]

All changes from the status quo at the time of the unlawful action are significant in selecting a gross backpay formula. A comparison of the company's records before the unfair labor practices with those during the backpay period should disclose changes in pay and hours, periods of high and low employment and earnings, shutdowns, department changes, and bonus payments. Based on analysis of records obtained and the background of the case, a tentative formula should be selected. The records should then be reviewed to make sure they contain sufficient data to enable the ready preparation of a computation in accordance with the formula selected.

If the case is complex, it is advisable to test the formula in a sample computation. This will disclose deficiencies before too much time is invested in the computation.

In cases involving many backpay claimants and long backpay periods, if the Region has reason to believe that backpay issues can be resolved without a formal proceeding, an estimate of backpay may be prepared to serve as a basis for settlement. Section 10592.5. In simpler cases, when computations can be speedily prepared, estimates should be avoided.

The method selected for calculating gross backpay must depend on the facts and circumstances of the particular case. Although there is no fixed method for calculating gross backpay, there are three basic methods by which it may usually be measured and which should be considered in devising a reasonable method in a particular case. These three methods are:

- **Formula One**: The average hours and/or earnings of the discriminatee prior to the unlawful action.

[59] See, for example, *Am-Del-Co., Inc.*, 234 NLRB 1040, 1042 (1978).

- **Formula Two**: The hours and/or earnings of comparable employees.
- **Formula Three**: The hours and/or earnings of replacement employees.

10540.2 Formula One: The Average Hours and/or Earnings of the Discriminatee Prior to the Unlawful Action

Using this method, gross backpay is a projection through the backpay period of the discriminatee's average hours and/or earnings from an appropriate period prior to the unlawful action.

For example, if a discriminatee earned an average of $400 per week for the 6-month period prior to his unlawful termination, under this method, gross backpay would simply be $400 per week, or $5200 in a 13-week calendar quarter, for the duration of the backpay period. If the discriminatee worked an average of 40 hours per week prior to the unlawful action, gross backpay would be calculated by multiplying wage rates in effect during the backpay period by 40 hours per week.

Criteria for adopting this method: This method is applicable when it is concluded that conditions that existed prior to the unlawful action would have continued unchanged during the backpay period. It has the advantage of being easily understood and applied. Projection of average earnings is a reasonable method when discriminatee earnings varied from day-to-day or even week-to-week, but were consistent over a longer period of time. Records of earnings from the period prior to the unlawful action should also be readily obtainable through employer payroll records, tax reports, or other sources described in Section 10538.3. The following circumstances should be considered in deciding whether this method is appropriate in a given case:

- The discriminatee must have been employed long enough prior to the unlawful action to establish a reliable record of average earnings. If the discriminatee did not have sufficient employment to establish a consistent record or if earnings were not consistent—for example, if the discriminatee was employed in a seasonal industry—this method would not be appropriate.
- Even where earnings were generally consistent, care should be taken not to calculate an average using extraordinary variations from normal earnings or schedules. For example, if normal earnings were temporarily affected by a nonrecurring event, such as an accident or a crisis requiring extra overtime, it would generally be most reasonable to exclude the extraordinary period from the calculation of the average.
- Conditions must not have changed during the backpay period. If there were significant changes in the availability of work, methods of compensation or in anything else that would affect hours of work or earnings, other methods may be more appropriate.
- If basic work schedules did not change during the backpay period, but wage rates did, this method might be appropriate, with gross backpay calculated on the basis of a projection of the discriminatee's average work schedule from the period prior to the unlawful action and wage rates that would have been in effect during the backpay period.

- In general, this method is most applicable to a short backpay period. As the backpay period becomes longer, it becomes more likely that significant changes in conditions will occur.

Sample computation of gross backpay based on a projection of average weekly earnings: A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on January 8, 2005. The backpay period ended on July 14, 2005, when the discriminatee declined an offer of reinstatement. All parties agreed that no wage increases were granted and no significant changes in work schedules took place during the backpay period. All agreed that a projection of the discriminatee's average earnings from the period prior to her termination would be a reasonable basis on which to determine gross backpay. Respondent payroll records were examined to determine average earnings during the period preceding the termination. They showed that work schedules and earnings vary from week-to-week. The weeks of November 4, 11, and 18, as well as the weeks of December 2, 9, and 16, all appeared to be normal workweeks, for both the discriminatee and similarly placed employees.

The week of November 25 appeared to be a short week for most employees, as were the weeks of December 23 and 30. All parties agreed that work is slow during holiday periods. These weeks were not considered in establishing the discriminatee's average hours of employment in the period prior to her termination. The week of January 6, 2005, was also excluded, as the discriminatee was terminated in the middle of it.

In other situations, a longer period for establishing average earnings might be more appropriate. In this case, all parties agreed that the November–December period was representative of the work schedule for the entire year. Thus, gross backpay was to be determined on the basis of the discriminatee's average earnings during the 6 weeks identified above. Her earnings for those weeks were:

Week Gross Earnings

November 4	$425.75
November 11	397.80
November 18	440.65
December 2	370.45
December 9	400.00
December 16	405.15
Total earnings:	$2,439.80
Average weekly earnings:	$406.63

Gross backpay computation:

05/1 (January–March): 12 weeks, beginning January 8.
Gross backpay: 12 weeks @ $406.63/week: $4,879.56

05/2 (April–June): 13 weeks
Gross backpay: 13 weeks @ $406.63/week: $5,286.19

05/3 (July–September): 2 weeks, ending July 14.
Gross backpay: 2 weeks @ $406.63/week: $813.26

Cents may be rounded off to whole dollars.

10540.3 Formula Two: The Hours or Earnings of Comparable Employees

Gross backpay, using this method, is calculated on the basis of the hours or earnings of another employee or group of employees, whose work, earnings, and other conditions of employment were comparable to those of the discriminatee both before and after the unlawful action.

For example, the discriminatee is one of a number of truckdrivers working for an employer whose operations are seasonal. Available work is shared among the employees and their average earnings are about the same, but their earnings vary substantially over time. Using this method, gross backpay would be based on the average earnings of the other truckdrivers during the backpay period.

Criteria for adopting this method: This method is applicable when there is an employee or group of employees whose earnings prior to the backpay period were comparable to those of the discriminatee. It is particularly applicable when there have been significant changes in conditions during the backpay period and when it can be concluded that the discriminatee's earnings would have changed in the same manner as did those of the comparable group. When this method is based on the average earnings of a group of employees, it is also an objective basis for calculating earnings in the event there is a dispute over how large a discretionary wage increase a discriminatee would have received, or how well the discriminatee would have performed during the backpay period.

Use of this method requires access to employer records that show work and earnings for a number of employees over a prolonged period. The following should be considered in deciding whether or not this method is appropriate in a given case:

- A comparable employee or group of employees must be identifiable. In some situations, where work assignment is strictly by seniority or other clear rules, a single employee may be identified as comparable to the discriminatee. In that situation, gross backpay may be based on the employment and earnings of the single employee. When a discriminatee is one of a number of employees in a job classification, it is generally more appropriate to average earnings from the group to calculate gross backpay. This is especially so when there is employee turnover within the group during the backpay period.

- The representative employee, employees, or substitutes must continue in the employ of the gross employer[60] during the entire backpay period. The group of representative employees may diminish in size during the backpay period, but this is almost inevitable in a period of significant length. The basic requirement is that the remaining members of the representative group continue to be representative in the same sense as the original group. An alternative to the diminished group is to add comparable employees to it as it decreases in size.

- As in any situation in which a comparison is being made, it is important to be alert to factors that skew the comparison. If a discriminatee is compared to a

[60] Gross employer is the employer where the discriminatee was employed at the time of the unfair labor practice.

single employee, did the two have comparable earnings before the unlawful action? Did anything happen during the backpay period, unique to that single employee, that would have affected his or her earnings in a way that would not have affected the discriminatee's earnings? If the comparison is with a group of employees, care must be taken to ascertain that an appropriate group is defined. Absent some evidence to suggest that a given discriminatee would have exceeded employees' average number of workdays each year, the most accurate method for determining the amount of backpay due is to assume that each discriminate would have worked the annual average number of workdays and earned the same annual wages as the average employee in their classification.[61] Further, care must be taken to ascertain that the group does not contain employees—such as new employees, employees with unusual rates of absenteeism, employees who are not consistently employed,[62] or employees at different wage rates—who are not comparable and whose inclusion in the group will skew its average.[63]

Sample computation of gross backpay based on average earnings of comparable employees: A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on April 1, 2003. The backpay period ended on June 30, 2005, when the discriminatee was reinstated. The respondent was a trucking firm, with about 10 drivers, including the discriminatee. The parties agreed that the drivers' earnings varied during the year, that hours had generally increased during the backpay period, and that two general wage increases were granted during the backpay period as well. The parties also agreed that available work was not assigned through any set system. Some drivers requested more overtime than others, but in general an effort was made to assign work equally. Payroll records showed that some drivers did earn more than others, but that the range of earnings was not great. In the period prior to his termination, the discriminatee had average earnings in comparison with other drivers. It was agreed that gross backpay due the discriminatee should be based on the average earnings of unit drivers during the backpay period.

Respondent's payroll records provided quarterly earnings summaries for all drivers. Drivers who were hired or terminated during a quarter were excluded for purposes of determining average earnings and the following average earnings were calculated for the backpay period.

Yr./Qtr.	*No. of Drivers*	*Total Earnings*	*Average Earnings*
03/2	8	$58,434.00	$7,304.25
03/3	9	82,668.00	9,185.33
03/4	7	47,535.00	6,790.71
04/1	9	95,660.00	10,628.88

[61] See *Painting Co.*, 351 NLRB No. 6 (2007). The Board noted that it may be appropriate to estimate the average number of workdays for a given year based upon work performed in one or two consecutive calendar quarters. The Board further noted that it may be appropriate to estimate the number of workdays in a full calendar quarter based upon the assumption that 65 workdays (13 weeks times 5 days) represents the number of workdays in a full calendar quarter.

[62] See *Fluor Daniel*, 351 NLRB No. 14, slip op. at 2. (2007).

[63] See *Contractor Services Inc.*, 351 NLRB No. 4, (2007) (employees who worked consistently not representative of discriminatees who worked intermittently during the backpay period).

04/2	9	78,640.00	8,737.77
04/3	10	40,738.00	4,073.80
04/4	8	56,814.00	7,101.75
05/1	9	55,880.00	6,208.88
05/2	9	61,213.00	6,801.44

Gross backpay due the discriminatee is the average earnings of the unit drivers, as set forth in the column on the right. It reflects changes in earnings that took place from quarter-to-quarter during the backpay period.

10540.4 Formula Three: The Hours and/or Earnings of Replacement Employees

Gross backpay, using this method, is based on the earnings of another employee or series of employees, who replaced the discriminatee during the backpay period.

For example, the discriminatee was terminated from the position of machine operator and prior to the termination worked only on a particular machine. Another employee was assigned to operate that same machine during the entire backpay period. Under this method, gross backpay would be calculated using the hours or earnings of the replacement employee.

Criteria for adopting this method: This method is applicable when the discriminatee had a clearly defined job that was filled by identifiable individuals during the backpay period. When applicable, it is easy to understand and apply, relatively easy to document, and can be applied for long backpay periods in which changes in wages or other conditions of employment took place. The following should be considered in determining whether or not this method is applicable in a given case:

- The replacement employee must be comparable. Although the discriminatee may have performed a specific job, and that job may have been filled by an identifiable replacement employee during the backpay period, the replacement employee may have been paid a different wage rate, may have required more or less overtime to perform the job, may be less skilled or may otherwise have worked under conditions not fairly comparable to those that would have been in effect for the discriminatee.

- Although it may be concluded that a replacement employee worked under different conditions, performance of the replacement may still provide information on which gross backpay may be calculated. For example, gross backpay may be based on the hours worked by a replacement employee at wage rates that would have been in effect for the discriminatee. Although the replacement employee may have worked at a different rate, the total production of a replacement employee may provide a basis for determining how much work or earnings would have been available to the discriminatee.

Sample computation of gross backpay based on hours worked by a replacement employee: A typical computation of gross backpay using this formula follows. It is based on an unlawful termination that took place on October 31, 2004. The backpay period ended on May 6, 2005, when the discriminatee was reinstated. The discriminatee was the only maintenance mechanic employed by the respondent at its production facility. After her termination, the respondent hired a replacement

immediately and he remained employed until the discriminatee was reinstated. The replacement was laid off on the discriminatee's reinstatement. All parties agreed that the hours of work varied for the maintenance mechanic. During the busy season or when there was an emergency, the mechanic was expected to work substantial overtime. At other times, the mechanic was sent home early. The parties agreed that the discriminatee would have worked the same number of hours during the backpay period as her replacement actually did.

The respondent proposed that gross backpay be based on the actual earnings of the replacement mechanic. The replacement earned only $10 per hour, however, whereas the discriminatee was earning $13.25 at the time of her termination. It was agreed that no wage increases were accorded by the respondent during the backpay period. It was finally agreed that gross backpay of the discriminatee would be calculated using the actual hours worked by the replacement mechanic at the discriminatee's hourly wage rate.

Respondent's payroll records summarized both earnings and hours worked, regular and overtime, on a calendar quarterly basis. Using the formula, the following gross backpay was determined.

Hours of Replacement Employee		
Yr./Qtr.	*Regular*	*Overtime*
04/4	300	25
05/1	512	34
05/2	260	55

Earnings @ $13.25/hour regular earnings and $19.875 overtime earnings:

Yr./Qtr.	*Regular*	*Overtime*	*Total Gross Backpay*
04/4	$3,975.00	$496.88	$4,471.88
05/1	6,784.00	675.75	7,459.75
05/2	3,445.00	1,093.13	4,533.13

10542 Considerations Common to the Use of All Methods

In a particular case, a combination of the above methods, or some other method of determining gross backpay, may be reasonable. The following factors should be considered under any method.

10542.1 Comparisons Must Be Reasonable

Gross backpay will almost always be based on some form of comparison. Comparisons must be evaluated to be certain that they are based on full information and are not unfairly skewed. All earnings, including premiums, overtime and bonus payments, must be considered in evaluating a comparison between employees, as well as unusual and nonrecurring situations. In evaluating employee earnings, first and final earnings are often based on less than a complete payroll cycle and are thus lower than normal earnings. Appropriate adjustments must be made for such situations.

10542.2 Use of Ratios

When the discriminatee can be compared to another employee or group of employees, but had "pre-unlawful" action earnings that varied from the comparable employee or group, it may be appropriate to calculate gross backpay based on the earnings of the comparable employees adjusted by an appropriate ratio.[64]

For example, prior to an unlawful termination, the discriminatee consistently earned 5 percent more than the average earnings of all employees in the same job classification. Gross backpay might be reasonably calculated as 105 percent of the average earnings of the other employees during the backpay period.

10542.3 Overtime Hours

Overtime pay is normally paid at a premium of 1-1/2 times regular wages. Care should be taken to verify the rate at which overtime hours are paid by respondent, as well as whether overtime is paid after 8 hours per day or 40 hours per week. For example, Saturdays, Sundays, or holidays may be paid at premium rates.

10542.4 Absenteeism

Under all methods of calculating backpay, adjustments may be appropriate to reflect absenteeism of either the discriminatee or of employees to whom the discriminatee is being compared. If this concern is valid, it should be considered.

If a discriminatee was rarely or never absent, there should be no adjustment for absenteeism. If backpay is based on a projection of the discriminatee's earnings from the period prior to the unlawful action, those earnings should reflect the effect of absenteeism without need for further adjustment.

When backpay is based on comparison with a group of employees, the Board has approved a method of using employee hours, known as the ''Twenty-four hour method,'' that takes into account normal absenteeism but excludes extraordinary absenteeism.[65] Under this method, when payroll records show that the basic workweek was 5 days, only the average hours or earnings of employees working 24 hours or more are used. When the basic workweek is 4 days, only the average hours or earnings of employees working 16 hours or more are used. When the basic workweek is 3 days or less, the average hours of all employees are used.

Other appropriate adjustments for absenteeism may be determined based on the facts or circumstances of the particular case.

10542.5 Reduction in Available Employment

If the gross employer's operations or employee complement were reduced during the backpay period, it may be that the discriminatee would have lost employment and earnings even if there had been no unlawful action. Gross backpay must take into account such losses. Payroll or other employment records should establish reductions. Note, however, that if reduced operations are caused by or connected with unfair labor practices, strikes or the like, this section does not apply—Section 10542.7.

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[64] See, for example, *Downtown Toyota*, 284 NLRB 1160 (1987).

[65] *Hill Transportation Co.*, 102 NLRB 1015, 1021 (1953).

When the employer has an established and objective system for employee layoffs or reductions in hours, the system should be applied to determine whether a discriminatee or group of discriminatees would have lost work. When there is no established system to effect layoffs or reductions, gross backpay should be based on an objective method, such as one of the following:

Seniority: Although not universal, use of seniority in layoffs and other employment actions is widespread. It is objective and easy to apply. Seniority dates are also usually easy to document. When used to determine gross backpay, all discriminatees, replacement employees or other comparable employees may be ranked on the basis of seniority. The appropriate basis for seniority that is, by job classification, department, or plantwide—must be determined using the circumstances of each case. Available work, as determined from employment records, may then be apportioned on the basis of seniority.

For example, there is work for only 5 employees during a week, there are 5 employees who actually worked and, in addition, there are 10 discriminatees. To use seniority, all 15 employees should be ranked on the basis of seniority. It should be assumed that the five most senior employees, whether discriminatees or not, would have worked during that week. Gross backpay would be due only to those discriminatees among the five most senior employees.

When using seniority to determine work availability for discriminatees, any employee hired after the unlawful action to replace a discriminatee will almost certainly have lower seniority than any discriminatee.

Proportionalization: If no method of effecting layoffs can be determined, it may be most reasonable to base gross backpay on a sharing, or proportionalization, of available employment among discriminatees.

For example, five employees worked during a week, and each earned an average of $400. There were 10 discriminatees. To use proportionalization, the average earnings should be divided among the 10 discriminatees. Thus, gross backpay due each of the 10 would be $200.

It should be noted that proportionalization is only appropriate when there is more than one discriminatee. In applying it, adjustment should be made for any period in which any discriminatee is unavailable for employment.

Proportionalization is not appropriate in refusal-to-hire cases.[66]

10542.6 Strikes and Lockouts

When a discriminatee has been unlawfully terminated and a strike or lockout occurs during the backpay period, gross backpay normally accrues during the period of the strike or lockout.[67] When a discriminatee is unlawfully terminated during a strike, backpay normally accrues from the date of the discharge.[68] When discriminatees have

[66] See *FES*, 331 NLRB 9, 14 (2000).

[67] *Hill Transportation Co.*, 102 NLRB 1015 (1953).

[68] *Abilities & Goodwill*, 241 NLRB 27 (1979).

been unlawfully locked out, backpay continues to accrue even though the discriminatees engage in a strike during the lockout.[69]

In all these situations, the respondent bears the burden of showing that discriminatees would have refused to work during the course of the strike.

The average hours or earnings of the discriminatee or of comparable employees in a normal period may be projected through the strike or lockout period as a basis for calculating gross backpay.

10542.7 Effects of Unfair Labor Practices on Gross Backpay Calculations

The occurrence of an unfair labor practice may be accompanied by turmoil in the workplace, with an effect on hours and earnings of employees. If it is concluded that this has happened, earnings from this period should not be used, or should be appropriately adjusted in calculating backpay.

For example, an employer unlawfully terminates a number of union sympathizers to discourage a nascent organizing campaign. A number of other employees resign in disgust. This abrupt large scale departure disrupts production. Some of the remaining employees must work extraordinary overtime in an attempt to overcome resulting bottlenecks, while other employees are temporarily laid off because no work in progress is moving into their department. Employment and earnings patterns during this period are not likely to be representative of normal operations and may not be an accurate measure of gross backpay.

10542.8 Discriminatee Actions That End Gross Backpay

In cases where discriminatee misconduct or other actions lead to a determination that reinstatement is not required, backpay should also be tolled. See Section 10532.4 for a discussion of actions that might result in ending a normal reinstatement obligation.

10542.9 Construction Industry Cases

When calculating backpay for a non-salting construction industry discriminatee, it is presumed that the discriminatee would have continued to be employed by the respondent employer throughout the backpay period unless the respondent employer demonstrates otherwise.[70] However, in construction industry salting cases, it is the General Counsel's burden to establish the backpay period.[71]

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[69] See, for example, *Somerset Shoe Co.*, 12 NLRB 1057 (1939), modified 111 F.2d 681 (1st Cir. 1940).
[70] See *Dean General Contractors*, 285 NLRB 573 (1987).
[71] See *Oil Capitol Sheet Metal, Inc.,* 349 NLRB No. 118. (2007).

10544 Other Components of Gross Backpay

10544.1 Overview

Lost wages are normally the most important component of gross backpay, but all benefits of employment and forms of compensation must be considered in determining gross backpay. In determining net backpay, interim earnings are not usually deducted from nonwage benefits of employment. The following are among forms of compensation that should be considered as components of gross backpay.

10544.2 Medical Insurance

Discriminatees should be made whole for expenses they incurred due to the loss of medical insurance resulting from an unlawful action. Such losses usually include charges they paid for medical services that would have been reimbursed under terms of the gross employer's medical insurance plan. Also reimbursable are premiums paid by discriminatees to maintain comparable health insurance, to the extent the premiums exceeded those paid when employed prior to the unlawful conduct.[72]

In addition to reimbursement for incurred expenses, in cases where the gross employer made contributions to a health and welfare fund that provided health insurance, the Board has also ordered the respondent to make contributions to the fund on behalf of the discriminatee for the backpay period.[73]

Reimbursable medical expenses are not offset by interim wage earnings in determining net backpay. Note, however, that any reimbursement paid by a medical insurance benefit obtained from interim employment will reduce expenses incurred by the discriminatee and thus have the effect of reducing the amount due as a result of lost medical insurance.

In order to determine whether discriminatees are entitled to reimbursement for charges they paid for medical services that would have been reimbursed under terms of the gross employer's medical insurance plan, it may be necessary to obtain the discriminatee's medical information in documentary or testimonial form from doctors or other regulated entities. The Health Insurance Portability and Accountability Act of 1996 ("HIPPA") and a set of implementing regulations promulgated by the Department of Health and Human Services known as the Privacy Rule establish a legal protocol governing the use and disclosure of most personal medical information. Before soliciting medical informantion from doctors or other regulated entities, authorization to release the information must be obtained from the discriminatee. A sample HIPPA Authorization and cover letter for HIPPA Authorization can be found in Appendix 22.

10544.3 Retirement Benefits

Discriminatees should generally be made whole for lost contributions to pension funds or retirement plans. When the gross employer made contributions to a pension fund, retroactive contributions and appropriate credit should be obtained from respondent. When retirement benefits are in the form of deferred income or profit-

[72] See, for example, *RMC Construction*, 266 NLRB 1064 (1982).

[73] See, for example, *G. Zaffino & Sons, Inc.*, 289 NLRB 571, 572 (1988).

sharing plans, appropriate contributions should be paid as well as reimbursement for lost interest.

Retirement benefits are not offset by interim wage earnings. Equivalent retirement benefits earned from interim employment are appropriately offset against gross retirement benefits.

For example, a discriminatee was unlawfully terminated from a trucking company that made contributions on her behalf to the Teamsters pension fund. Contributions and credit for the discriminatee to that fund are a component of the respondent's gross backpay liability.

The discriminatee's first interim employer had a profit-sharing plan. Contributions to that profit-sharing plan should not be offset against the gross liability to make contributions to the Teamsters pension fund.

The discriminatee next had interim employment in a grocery store that was represented by a different union with a separate pension fund. That interim employer made contributions on her behalf to that union's pension fund. Those contributions should not be offset against the gross liability to the Teamsters pension fund, as they do not compensate the discriminatee for credits to the Teamsters pension fund during the backpay period.

Finally, the discriminatee next obtained interim employment with a trucking company that made contributions on her behalf to the Teamsters pension fund. Those contributions provided the discriminatee with credit toward future retirement benefits identical to that which she would have received from the respondent and thus should be offset against the respondent's gross liability to make contributions on the discriminatee's behalf to the Teamsters pension fund.

Tax Deferred Retirement Programs

In recent years tax deferred retirement plans have become a major feature of employer-sponsored retirement packages. While some employers continue to utilize profit-sharing or similar stock ownership programs, the 401(k) plan has become a common feature of retirement programs.

Section 401(k) of the Internal Revenue Code authorizes the use of pretax employee/employer contributions to create a retirement benefit. These plans generally have more variable terms than traditional "defined benefit" pension plans and engender a variety of calculation issues. 401(k) retirement benefits often necessitate individual calculations for each discriminatee, because the value of the benefit is dependent upon many different and highly individualized factors. For example, there are frequently significant differences in each person's contribution rate, the employer's matching contribution and in investment choices. Thus, it is generally necessary to determine individual contribution amounts, employer matching contributions, investment selections, and finally to chart the earnings/loss of each discriminatee's 401(k) investments for the duration of the backpay period.

Experience has shown that reasonably prompt and accurate calculations or estimates of lost 401(k) plan benefits may be obtained directly from the administrator of the 401(k) plan. In this regard, most 401(k) plans are administered by a third party

investment firm, mutual fund, bank, or insurance company. Generally, the Region should begin by requesting the respondent obtain a calculation of lost benefits from the plan administrator. However, if the respondent is uncooperative, the Region may contact the third party administrator directly to seek information that will be necessary to complete the backpay calculation. Although plan administrators may not be willing to provide information solely on the strength of an informal request, they are often receptive to Agency inquiries and will generally promptly comply with a Section 11 subpoena seeking the necessary information.

Since the calculation of 401(k) plan benefits may prove complex, Regions should be sensitive to the relative value of the benefit to the overall case and to considering alternative means of estimating and/or calculating the benefit. For example it may be appropriate to estimate the value of the benefit by calculating an average of other employees' 401(k) earnings.

10544.4 Insurance or Plan Benefits

Benefits that would have been paid out under sick leave, life or injury insurance, or other employee plans during the backpay period must also be paid to the discriminatee.

For example, if a discriminatee becomes ill during the backpay period, gross backpay may be tolled. Section 10560.2. If, however, the gross employer had a sick pay plan or an insurance plan that paid benefits for periods of illness, such payments would be a component of gross backpay.

Such benefits are not offset by wage earnings from interim employment. They are, however, offset by similar benefits paid as a result of interim employment.[74]

10544.5 Holiday and Vacation Pay

Paid holidays and paid vacations that a discriminatee would have received during the backpay period are part of gross backpay. Discriminatees are only entitled to backpay, however, based on lost vacation and holiday pay. Loss of paid time off is a collateral loss for which there is no compensation.

For example, it is determined that a discriminatee would have earned $5200 in a quarter. It is also determined that of these earnings, $800 would have been for a 2-week paid vacation, and $160 would have been for two paid holidays, during which the discriminatee would not have worked. Full gross backpay is $5200, reflecting what would have been earned in the quarter. There is no additional compensation to reflect that the discriminatee would have received paid time off for vacation and holidays from the gross employer.

Lower vacation or holiday pay from interim employment will affect the net backpay determination only as lower interim earnings.

If a discriminatee receives less paid vacation from an interim employer than he or she would have received from the respondent or gross employer, it is appropriate to reduce net interim earnings by the amount earned during the period that would have been paid vacation under the respondent or gross employer. Section 10542.5.

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[74] See, for example, *Glen Raven Mills*, 101 NLRB 239, 250 (1952), modified on other grounds 203 F.2d 946 (4th Cir. 1953).

If a gross employer has the practice of paying extra vacation wages instead of giving paid vacation time off, such vacation wages should be treated as part of gross backpay.

For example, the respondent provided no paid vacation, but on employees' anniversary dates gave them one week's pay, in addition to their regular wages. Gross backpay for every discriminatee should be based on regular earnings and 1-week's pay as of their anniversary dates during the backpay period.

10544.6 Tips

Tipping is very common in bar, restaurant, and similar service industries. Tips are earnings and must be considered in determining full gross backpay. Tip earnings are, however, often difficult to document.

In recent years, the Internal Revenue Service has required employers in businesses in which tips are customary to report earnings attributable to tips on the basis of a percentage of gross sales. Because of this, employer payroll records and tax forms will often show an amount for tip earnings. It may happen, however, that the employer or discriminatee will argue that actual tip earnings were other than the amounts reported for tax purposes. Tax reports should be considered as a basis for determining tip income, but are not dispositive.

Other records, such as credit card receipts, diary entries of tip earnings or bank deposits, might provide documentation of actual tip earnings. Statements provided by the discriminatee and by similarly placed employees might also be a basis for determining tip earnings. Employer records of gross sales and of reported earnings can also provide a basis for comparing, projecting and adjusting tip earnings during the backpay period. In the end, determination of tip earnings must be based on a reasonable assessment of documentary evidence and credible testimony.[75]

10544.7 Other Forms of Compensation

A reasonable assessment of the value of housing, demonstration cars, meals, and other forms of compensation that the discriminatee would have received but for the unlawful action must also be included in determining gross backpay.[76]

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[75] For example, *Hacienda Hotel & Casino*, 279 NLRB 601 (1986); and *Original Oyster House*, 281 NLRB 1153 (1986).

[76] Examples of the variety of payments included in gross backpay are: *Underwood Machinery Co.*, 95 NLRB 1386, 1403 (1951) (promotions); *Peyton Packing Co.*, 129 NLRB 1275, 1276 (1961); *Indianapolis Wire-Bound Box Co.*, 89 NLRB 617, 642, 650 (1950) (loss resulting from discriminatory eviction); *McCarthy-Bernhardt Buick*, 103 NLRB 1475, 1488 (1953); *C. Pappas Co.*, 82 NLRB 765, 767, 796 (1949) (commission increases); *Phoenix Mutual Life Insurance Co.*, 73 NLRB 1463, 1466 (1947) (commissions and renewals); *Stanton Enterprises*, 147 NLRB 693, 699 (1964), enfd. 351 F.2d 261 (4th Cir. 1965); *Home Restaurant Drive-In*, 127 NLRB 635 fn. 2 (1960) (tips); *Hickman Garment Co.*, 196 NLRB 428, 429 fn. 2 (1962), enfd. 471 F.2d 611 (6th Cir. 1972) (Christmas bonus); *Aerosonic Instrument Corp.*, 128 NLRB 412, 414 (1960) (incentive bonus); *Dinion Coil Co.*, 96 NLRB 1435, 1461 (1951), enfd. 201 F.2d 484 (2d Cir. 1952) (holiday pay); *Nabors v. NLRB*, 323 F.2d 686, 689–690 (5th Cir. 1963), enfd. in relevant part 134 NLRB 1078, 1085–1087 (1961), cert. denied 376 U.S. 911 (1964) (profit-sharing bonus); *International Trailer Co.*, 150 NLRB 1205, 1210, 1211 (1965) (incentive and leadership bonus); *Golay & Co.*, 184 NLRB 241, 242–243, 247 (1970), enfd. 447 F.2d 290, 294–295 (7th Cir. 1971) (wage increases, vacation pay, and insured medical expenses); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1126–1129 (1965), enfd. in relevant part 365 F.2d 888, 892 (D.C. Cir. 1966) (pension contributions); *Madison Courier*, 180 NLRB 781, Appendix A at 795 fn. __ (1970), remanded on other grounds 472 F.2d 1307 (D.C. Cir. 1972) (insurance premiums and Christmas bonus); *Tennessee Packers*, 160 NLRB 1496, 1501 (1966) (sick); *Ellis & Watts Products*, 143 NLRB 1269, 1270 (1963), enfd. 344 F.2d 67 (6th Cir. 1965) (overtime); *Brown & Root*, 132 NLRB 486, 491 (1961), enfd. in relevant part 311 F.2d 447 (8th Cir. 1963) (shift differential); *Heinrich Motors*, 166 NLRB 783, 786 (1967), enfd. 403 F.2d 145 (2d Cir. 1968) (vacation pay); *Miami Coca-Cola Bottling Co.*, 151 NLRB 1701, 1713 (1965), enfd. in relevant part 360 F.2d 569, 572–573 (5th Cir. 1966) (safety awards); *L. J. Williams Lumber Co.*, 93 NLRB 1672, 1676, 1691 (1951), enfd. 195 F.2d 669, 672–673 (4th Cir. 1952), cert. denied 344 U.S. 834

Such benefits are not normally subject to offsets from interim wage earnings.

10546 Gross Backpay When a Union is a Respondent

Union backpay liabilities may arise from various situations, including causing an employer to terminate a discriminatee for unlawful reasons or unlawfully operating an exclusive hiring hall. Although the union is not the employer, the method of calculating gross backpay is the same as in all other cases. That is, gross backpay is calculated on the basis of what employment the discriminatee would have received had the unlawful action not taken place.

For example, if a union caused the gross employer to terminate a discriminatee, gross backpay will be based on what employment the discriminatee would have had with that employer, but for the termination.

If a union unlawfully failed to refer a discriminatee from its hiring hall, gross backpay will be based on what employment and earnings would have resulted from that referral.

Because the gross employer may not be a respondent in these cases, there may not be access to employer employment and earnings records. Section 10538.3 suggests other sources of obtaining information needed to determine backpay. In addition, it may be appropriate to seek gross employer records through use of an investigative subpoena. Section 10618.

Hiring hall records should provide information concerning which employees were referred and to which employers. Union benefit fund reports might serve to document actual employment of comparable employees during the backpay period.

In addition, because the union is not the employer, it cannot end the backpay period itself by offering reinstatement. In some circumstances, such as when there is also an unfair labor practice proceeding against the employer, the union may toll its backpay liability by notifying the employer and the discriminatees in writing that it has no objection to their reinstatement.[77] When there are unfair labor practice proceedings against both union and employer, primary liability may be against either, depending on the circumstances of the case.[78]

When the union is solely liable for backpay, the Board has found that backpay should not be tolled until the discriminatee is either reinstated by the employer or until the discriminatee obtains substantially equivalent employment elsewhere.[79]

(payments for transporting employees to plant); *Taylor Mfg. Co.*, 83 NLRB 142, 144 (1949) (Veterans Administration payments under G.I. program); *Raymond Pearson, Inc.*, 115 NLRB 190, 192, 210 (1956), enf. denied on other grounds 243 F.2d 456 (5th Cir. 1957) (employer ordered to pay to deceased discriminatee's estate any losses suffered with regard to bonuses, emoluments, insurance coverage, and other benefits accorded to employees by employer and which discriminatee would have enjoyed but for discharge); *Texas Co.*, 42 NLRB 593, 609 (1942), enfd. 135 F.2d 562 (9th Cir. 1943) (room and board); *Delorean Cadillac*, 231 NLRB 329 (1977) (reimbursement for loss of use of company demonstrator car).

[77] See, for example, *C. B. Display Service*, 260 NLRB 1102 (1982); and *Port Jefferson Nursing Home*, 251 NLRB 716 (1980).

[78] See, for example, *Q.V.L. Construction*, 260 NLRB 1096 (1982); *Hendrickson Bros.*, 299 NLRB 442 (1990); *Exxon Co.*, 253 NLRB 213 (1980); and *Zoe Chemical Co.*, 160 NLRB 1001 (1966).

[79] See, for example, *Sheet Metal Workers Local 355 (Zinsco Electrical Products)*, 254 NLRB 773 (1981); *Iron Workers Local 118 (Pittsburgh Des Moines Steel)*, 257 NLRB 564, 567–568 (1981).

10548 Use of Alternative Methods in Backpay Determinations

In order to make efficient use of Agency resources and expedite the calculation and distribution of backpay in certain cases, Regions are encouraged to consider innovative methods, such as those described below, even where such methods may result in computations that are somewhat less precise than traditional Board methods. The types of cases that may be appropriate for the utilization of alternate computation methods are those that involve large numbers of claimants over extended backpay periods, refusal to reinstate strikers, contract abrogation, hiring halls and dues reimbursement cases. To the extent possible, the Region should get the agreement of the parties as to the use of these novel approaches.

10548.1 Statistical Sampling Techniques

Statistical sampling is a widely accepted procedure to determine characteristics of a population by selecting and analyzing data from a small percentage of the population. These methods can be used for both settlements and formal compliance proceedings to accurately approximate gross backpay, interim earnings, reimbursable expenses and other monetary remedies. Sampling is particularly well suited to cases involving many individuals and when individual data is difficult to obtain or extremely time consuming to analyze.[80]

For example, a case involves 800 unfair labor practice strikers who made unconditional offers to return to work on the same day and were refused reinstatement. One year later, all discriminatees received valid offers of reinstatement. Gross backpay is not in dispute. However, obtaining and analyzing interim earnings information for such a large number of individuals to calculate backpay by traditional methods would obviously be an extremely time-consuming project. Rather, detailed quarterly interim earnings and expense information from a relatively small randomly selected sample of the discriminatees could be obtained. Average quarterly interim earnings and expenses of the sample could then be applied to all discriminatees in the case to approximate their net backpay.

Specific methods and the degree of precision required will vary depending on the circumstances of the case. When sampling or other statistical modeling techniques are used to determine remedies in formal compliance proceedings, the Compliance Officer should contact the Contempt Litigation & Compliance Branch for assistance with developing the formula and for referrals to outside statisticians, who can provide expert advice and potentially testify in support of the formula at the compliance proceeding. Less precision may be required when these methods are used to determine remedies for settlement agreements.

10548.2 Use of Approximations and Averages

The nature of some violations, particularly those involving unilateral changes or withdrawal of recognition, may make it impractical to precisely determine individual

[80] See, for example, *Laborers Local 135 (Bechtel Power Corp.)*, 301 NLRB 1066 (1991), and 311 NLRB 617 (1993), where the Board affirmed a compliance specification based on use of random samples to determine liability in a hiring hall case. Available records made it impossible to reconstruct all out-of-order hiring hall referrals, so backpay for all improperly referred individuals was projected based on the average loss of the individuals selected in the sample.

backpay amounts. In those situations the best formula may be a reasonable approximation based on available evidence.

For example, prior to an unlawful unilateral change, nonmandatory overtime was made available to unit employees based on seniority. The respondent changed to a rotation procedure not based on seniority. Because the overtime was not mandatory, there is no practical formula to determine exactly how much overtime each individual "lost" because of the change. A reasonable approximation can be made by obtaining records to show the amount of overtime each individual worked in the 2 years prior to the change and the total amount of all overtime worked during that period and then computing each individual's overtime as a percentage of total overtime hours worked in the 2-year period. Each individual's share of overtime worked during the backpay period can be projected by multiplying the individual percentage factor by the total overtime hours worked by all employees during the backpay period.[81]

10548.3 Alternative Approaches to Allocation of Lump Sum Backpay Amounts

When total net backpay liability has been determined or agreed upon, it may be appropriate to develop and utilize nontraditional methods to expedite the distribution of backpay shares to individual discriminatees. In cases resolved by settlement, any equitable method of distribution to which the parties agree may be acceptable, including equal share distribution, omission of consideration of interim earnings and expenses in determining shares, and use of a formula based on averages or samples. See also Sections 10562.4 and 10648.7.

For example, a respondent's unlawful withdrawal of recognition resulted in its discontinuance of contractual economic benefits, such as overtime after 8 hours, bonuses and shift premiums. The parties reached a settlement as to a total lump sum backpay amount. Assuming this is a large unit and the backpay period extends over several years, determining individual shares by analyzing respondent payroll records would be a time-consuming project and delay distribution of backpay. Equal share distribution may be appropriate, but such a method may overpay individuals who worked only a portion of the backpay period and minimize backpay to individuals who worked the full period. An alternative approach could be to assign a percentage factor to each individual based on the number of weeks they worked in the unit during the backpay period compared to total number of weeks worked by all unit employees during the backpay period. Each individual's share of the lump sum would be determined by multiplying their percentage factor by the lump sum amount. See Appendix 5 for an example of a simple spreadsheet using this method.

10550 Interim Earnings

10550.1 Overview

All compensation earned by a discriminatee following the unlawful action (during the backpay period) must be considered as interim earnings. Generally, interim earnings

[81] See *Intermountain Rural Electrical Assn.*, 317 NLRB 588 (1995). See also *Great Lakes Chemical Corp.*, 323 NLRB 749 (1997), for a discussion of a formula to approximate backpay in a refusal to hire case where the respondent hired substantially less than the number of employees it actually needed and required them to work significant overtime to avoid a successorship obligation. In both cases the Board noted the General Counsel is required only to utilize a nonarbitrary formula designed to produce a reasonable approximation of what is owed.

are deducted from gross backpay in determining the net backpay due a discriminatee. There are, however, exceptions; see, for example, Section 10554.

The Compliance Officer will fully investigate interim earnings, determine all issues involving proper treatment of interim earnings and make appropriate offsets against gross backpay to calculate net backpay. Full investigation of interim earnings issues is necessary to achieve settlement of or voluntary compliance with backpay requirements in unfair labor practice cases, as well as to prepare for a compliance hearing, should such a proceeding be necessary.

In the event of a dispute concerning interim earnings, it is the respondent's legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action.[82]

10550.2 Maintaining Contact With Discriminatees

The discriminatee is the most important source of information regarding interim earnings and adjustments to gross backpay needed to determine net backpay. It is of utmost importance that contact is maintained with discriminatees throughout the course of unfair labor practice proceedings.

Regions are encouraged to set up a database system to facilitate continuing contact with discriminatees during the pendency of the cases. The database can be used to maintain current contact information for each discriminatee in all pending cases. This database can also be used as the basis for a "mail merge function" for transmitting expense and search for work forms to discriminatees on a quarterly basis. The Contempt Litigation & Compliance Branch can provide assistance in setting up such a system.

10550.3 Interviewing Discriminatees

At appropriate times in the course of compliance proceedings, all discriminatees should be interviewed either in person or by telephone to review and update information concerning the following issues:

- availability for employment,
- efforts to obtain interim employment,
- identity of all interim employers,
- earnings from interim employment,
- expenses incurred in seeking and holding interim employment, and
- periods of low earnings and unemployment.

During the interview, the Compliance Officer should address any issues concerning the discriminatees' responsibility to seek interim employment and their availability for interim employment. Sections 10558 and 10560.

The result of the discriminatee interview should be a complete account of their employment related activities during the backpay period and identification of all issues concerning interim earnings, expenses, and availability for employment.

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[82] See, for example, *Mastro Plastics Corp.*, 136 NLRB 1342, 1346 (1962).

10550.4 Documentation

The Compliance Officer should obtain documentation of interim earnings whenever appropriate. Discriminatees should cooperate in providing the most common form of documentation of interim earnings: pay slips, W-2 forms or other earnings reports from the interim employer. State unemployment services generally maintain excellent records of gross earnings from all employers. Such records are usually conveniently organized by calendar quarter. Compliance Officers may have individual discriminatees obtain these records from their state unemployment office. Regions may also obtain these records directly from the state either in hard copy or electronically.

It may be inappropriate to contact current interim employers for earnings information because communications from the Compliance Officer could adversely affect the discriminatee's current employment relationship. Thus, the Compliance Officer should consult with the discriminatee regarding that relationship before going to the current interim employer for earnings information.

Former interim employers may be contacted to obtain appropriate documentation, although without discriminatee authorization many employers will not release employment information.

Appendix 6 sets forth a pattern letter that may be used for requesting earnings information from an interim employer.

In those situations where interim employer records are not available, Section 10538.3 sets forth sources that may be used to document earnings.

Note also that a discriminatee's failure to cooperate in the investigation and documentation of interim earnings may indicate an effort to conceal interim earnings. Section 10550.5 (immediately following).

10550.5 Discriminatee Concealment of Interim Earnings

In most cases, the discriminatee interview and submission of supporting earnings documentation should resolve interim earnings issues. When a respondent challenges the completeness of a discriminatee's account, the Compliance Officer should investigate the respondent's contentions.

When the Region is satisfied that a complete account of interim employment and earnings has been obtained, it should so advise the parties. The respondent then assumes the burden of establishing additional interim earnings. See Section 10550.1.

In cases where it is established that a discriminatee has concealed interim earnings, it is Board policy to deny backpay for the period of concealment.[83] If the Region concludes that a discriminatee has concealed interim earnings and, therefore, is not entitled to any backpay during the period of concealment, the charging party should be notified. Should the charging party dispute the Region's determination in a post Board Order case, the Compliance Officer should advise the charging party that it has the right to request a written determination by the Regional Director. See Section 10602 and

[83] See *American Navigation Co.*, 268 NLRB 426 (1983); *C. R. Adams Trucking*, 272 NLRB 1271, 1276 (1984); see also *Ad Art*, 280 NLRB 985 fn. 2 (1986).

the Rules and Regulations, Sections 102.52 and 102.53, regarding the compliance determination letter and the charging party's appeal rights.

10552 Interim Earnings That Require Special Consideration

In most situations, interim earnings will be based on an hourly wage or a set salary and total interim earnings will be easily summarized and offset against gross backpay. Some forms of earnings and compensation do require special consideration. Examples include the following:

10552.1 Earnings in Addition to Base Wages or Salary

Premiums, tips, bonus payments, awards, holiday and vacation pay, and similar forms of compensation are earnings. In determining net backpay, they should be treated by the same methods used in determining gross backpay and included with regular interim earnings. Sections 10540.1 and 10544.4–10544.7.

Sections 10554.1–10554.5 discuss situations in which interim earnings are not deducted from gross backpay.

10552.2 "Under-the-Table" Earnings

Any compensation paid for providing service is a form of earnings, regardless of whether it has been properly reported for income tax purposes. Cash or under-the-table earnings obtained during the backpay period should be treated like any other interim earnings.

10552.3 Self-Employment

A discriminatee's decision to engage in self-employment should not be regarded as a failure to seek interim employment. In general, self-employment should be regarded as a reasonable effort to mitigate losses. Section 10558. However, the Board has held that engaging in a "hobby" is not self employment. *The Grosvenor Resort*, 350 NLRB No. 8, at pp. 6-7 (2007).

Net earnings from self-employment during the backpay period should be offset against gross backpay.

The Compliance Officer may face problems in determining net earnings from self-employment. In general, net earnings are the difference between gross receipts and offsetting expenses. Income statements and other records kept for a business by an outside accountant are generally the best means of determining net earnings. If the discriminatee did not use an outside accountant, his or her business records may be the only documentation of earnings available. Federal tax returns may also establish net earnings from self-employment. Internal Revenue Schedule C is the form used to report net earnings from self-employment; the schedule requires reporting of gross receipts as well as offsetting expenses approved by IRS.

Tax returns are not dispositive of net earnings from self-employment. For example, it may be shown that tax returns were not properly prepared or that expenses claimed against net earnings for tax purposes were in fact some form of compensation to the discriminatee.

In addition, when a substantial source of revenue for a self-employed discriminatee is the discriminatee's invested capital in the business, some adjustment of the income from the business should be made to apportion earnings between the part resulting from their invested capital and that from services. The usual method of doing this is to deduct the interest that would have been paid by the discriminatee to a willing lender of the investment capital, rather than conventional legal interest.

As in other aspects of the backpay investigation, the goal in determining net income from self-employment is to reach reasonable conclusions as to actual earnings based on the facts and circumstances presented.[84]

10552.4 Medical and Retirement Benefits

A medical insurance plan or contributions to a retirement fund are not normally treated as interim earnings and offset against gross backpay. Note also that although these benefits are considered components of gross backpay, they are not normally subjected to offsets from wages earned in interim employment. Health insurance and retirement contributions earned through interim employment may, however, be offset against equivalent benefits that are components of gross backpay. Sections 10544.2 and 10544.3.

10552.5 Other Nonwage Compensation

The reasonable value of other forms of compensation, such as employer-provided housing, cars, or meal allowances, should be treated as interim earnings and offset against gross backpay.[85]

Nonwage forms of compensation, when part of gross backpay, are not normally offset by wages earned in interim employment. Section 10544.1.

In some circumstances, it is not appropriate to deduct such nonwage compensation from gross backpay. For example, where an interim employer provides employee housing, but such is required because the work is in a remote location, the housing may have no real value or be equivalent to an expense the discriminatee would have had to incur in order to obtain the interim employment.

10552.6 Compensation Received for Salting Activities

A 'salted' member or 'salt' is a union member who obtains employment with an unorganized employer at the direction of a labor organization to advance the union's interests there."[86] Often the individual receives compensation from the labor organization for his or her salting activity. The compensation received by the salt from the labor organization for salting activity should not be offset against the salt's backpay.[87] The employer may mitigate its backpay liability by showing that the salt did not make a reasonably diligent effort to obtain substantially equivalent employment during the backpay period, and the Board has denied backpay to a salt for failing to mitigate where

[84] See, for example, *Velocity Express, Inc.*, 342 NLRB 888 (2004), *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980).
[85] See, for example, *Empire Worsted Mills*, 53 NLRB 683, 692 (1943).
[86] *Aztech Electric Co.*, 335 NLRB 260 fn. 4 (2001).
[87] *Ferguson Electric Co.*, 330 NLRB 514 (2000).

union-imposed limits resulted in an unreasonably limited job search. *Contractor Services Inc.*, 351 NLRB No. 4 (2007).

10554 Earnings and Income Not Deductible From Gross Backpay

Interim earnings are generally offset against gross backpay. Exceptions are discussed in the following sections. Further, unearned income is generally not offset against gross backpay.

10554.1 Unearned Income and Collateral Benefits Not Deductible

Unearned income is income derived from any source other than an employment relationship. Collateral benefits are any form of assistance not based on employment or a return of service by the recipient. Unearned income and collateral benefits can include interest earnings from stock or savings; gifts or loans where no work or service is expected in return; most forms of public assistance; and most forms of insurance payments.[88]

Unemployment insurance payments are collateral benefits; as such, they are not interim earnings and are not offset against gross backpay.[89] However, workers compensation benefits, to the extent they are temporary disability benefits, are considered a substitute for lost wages during the temporary disability period, and are deductible as interim earnings. To the extent the unemployment insurance benefits constitute permanent disability benefits, they are considered as reparations for the physical injury suffered, and do not constitute interim earnings.[90]

Strike benefits are collateral benefits if they are given without condition. If a union requires a discriminatee to perform strike duty or some other form of service as a condition for receiving strike benefits, the strike benefits may be earnings and offset against gross backpay.[91]

10554.2 Earnings During Periods Excepted from Gross Backpay Not Deductible

When it has been determined that there is no gross backpay liability during some period within the backpay period, interim earnings earned during the same period should not be offset against any gross backpay for another period or for the entire period.[92]

For example, it is established that the respondent shut its operation down for 4 weeks during the backpay period. As a result, there is no gross backpay liability during that 4-week period. Any interim earnings that the discriminatee earned during that period should not be offset against gross backpay determined due during other parts of the backpay period. Care must be taken to determine what interim earnings were actually earned during such excepted periods.

10554.3 Interim Earnings Based on Hours in Excess of Those Available at Gross Employer Not Deductible

In cases where a discriminatee worked substantially more hours for an interim employer than he or she would have worked for the gross employer, only interim

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[88] See *Medline Industries*, 261 NLRB 1329, 1337 (1982), for a discussion of collateral benefits.

[89] *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951).

[90] *Domsey Trading Corp.*, 351 NLRB No. 33, at pp. 9-10 (2007).

[91] See, for example, *Lundy Packing Co.*, 286 NLRB 141 fn. 2 (1987), enfd. 856 F. 2d 627 (4th Cir. 1988). See also *Hansen Brothers Enterprises*, 313 NLRB 599, 605 (1993); *Domsey Trading Corporation*, id. at p. 3.

[92] See, for example, *San Juan Mercantile Corp.*, 135 NLRB 698, 699 (1962).

earnings based on the same number of hours as would have been available at the gross employer should be offset against gross backpay.[93]

This situation is most likely to occur when a discriminatee worked more overtime hours for an interim employer than would have been available with the gross employer, but is applicable in any situation.

For example, it is determined that gross backpay is based on a wage rate of $10 per hour and a regular workweek of 40 hours, or $400 per week. Total interim earnings for the same period are $440 per week, but are based on a regular hourly wage rate of $8, a regular workweek of 40 hours, and 10 hours of overtime per week. Although full interim earnings exceed gross backpay, in this situation it is not appropriate to offset the interim earning derived from overtime against gross backpay. Thus, only interim earnings from the regular 40-hour workweek, or $320, should be offset against gross backpay.

Similarly, if it is determined that gross backpay is based on a reduced workweek of 30 hours, only those earnings derived from the first 30 hours of interim employment should be offset against gross backpay.

Net backpay is determined on the basis of calendar quarters. Sections 10564.2 and 10564.3. Consistent with this policy, excess interim hours must also be allocated to calendar quarters and compared with gross hours only within the same quarter.

10554.4 Supplemental Employment or Moonlighting

When a discriminatee holds two separate jobs simultaneously during the backpay period, income from the second job is generally not deductible against gross backpay. If the discriminatee held a second job before the unlawful action and continued to hold that job through the backpay period, earnings from the second job are not deductible.[94] This principle applies even if the supplemental employment is not continuous or is with different employers.[95]

For example, a discriminatee worked as a musician during evening hours prior to the unlawful action. He continues this part-time work during the backpay period, working as a musician for different employers. These earnings are not offset against gross backpay.

If the discriminatee had no second job before the unlawful action, but during the backpay period holds either two full-time jobs or one full-time job plus an additional part-time job, only the earnings from one full-time job should be deducted. This is consistent with the principle that interim earnings based on hours in excess of those available at the gross employer are not deductible. Section 10554.3.

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[93] See, for example, *United Aircraft Corp.*, 204 NLRB 1068, 1073–1074 (1973); See also *EDP Medical Computer Systems*, 293 NLRB 857, 858 (1989).

[94] See, for example, *Acme Mattress Co.*, 97 NLRB 1439, 1443 (1952); see also *U.S. Telefactors Corp.*, 300 NLRB 720, 722 (1990).

[95] See *Regional Import & Export Trucking Co.*, 318 NLRB 816 fn. 9 (1995).

If the discriminatee held a second job prior to the unlawful action and then increased the hours of employment at that job during the backpay period, earnings derived from the increase in hours are deductible interim earnings.[96]

For example, prior to his unlawful termination, the discriminatee did carpentry work on weekends. During the backpay period, he does this work throughout the week. Earnings from the additional hours of work beyond those the discriminatee normally worked prior to the termination should be treated as deductible interim earnings.

10554.5 Interim Earnings During Periods That Would Have Been Paid Vacation Periods Under the Gross Employer

If a discriminatee receives less paid vacation from an interim employer than he or she would have received from the respondent or gross employer, it is appropriate to reduce net interim earnings by the amount earned during the period that would have been paid vacation under the respondent or gross employer.[97]

10556 Expenses Deductible From Interim Earnings

Expenses incurred by a discriminatee in seeking or maintaining interim employment are deducted from interim earnings, thus reducing the amount of interim earnings offset against gross backpay.[98] Such expenses include expenses that would not have been incurred during the course of gross employment, such as increased transportation costs in seeking or commuting to interim employment, the cost of tools or uniforms required by an interim employer, room and board when working away from home, contractually required union dues and/or initiation fees, if not previously required while working for respondent,[99] or the cost of moving if required to assume interim employment.

Expenses are only deducted from interim earnings. They are not added to gross backpay. Thus, when there have been no interim earnings, expenses incurred in seeking interim employment have no effect on net backpay, which would be based on gross backpay without any offset. Expenses incurred in seeking or holding interim employment should be allocated to calendar quarters. Sections 10564.2 and 10564.3.

For example, the discriminatee obtains interim employment, but the interim employer is located 20 miles farther from her home than the gross employer. Mileage for the additional drive should be deducted from earnings at the interim employer before offsetting those interim earnings against gross backpay, by using the mileage rate in effect at the time to compensate Federal employees for their use of private automobiles while on Government business.

Deductible expenses may be determined on the discriminatee's account and reasonable conclusions made. Early contact with the discriminatee can avoid later problems in documenting expenses by advising the discriminatee of the importance of

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[96] See, for example, *Golay & Co.*, 184 NLRB 241, 245 (1970).

[97] See *Heinrich Motors*, 166 NLRB 783, 792–793 (1967), enfd. 403 F.2d 145 (2d Cir. 1968); see also *Central Freight Lines*, 266 NLRB 182, 183 (1983).

[98] See, for example, *Nelson Metal Fabricating*, 259 NLRB 1023 (1982), and *UARCO, Inc.*, 294 NLRB 96, 102 (1989).

[99] See *Nelson Metal Fabricating*, supra.

keeping appropriate records. It may also be appropriate to require documentation of some expenses.

In a compliance hearing the Region bears the burden of proving expenses that will be offset against interim earnings. Section 10648.4.

Evidence of expenses incurred in seeking interim employment may also serve to establish the discriminatee's effort to mitigate losses. Section 10558.

10558 Mitigation

10558.1 Overview

A discriminatee must make reasonable efforts during the backpay period to seek and to hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate.[100]

Respondents often question a discriminatee's efforts to seek employment, particularly when the discriminatee has been unemployed for a substantial period. The Compliance Officer should investigate the discriminatee's search for work, keeping in mind that the Board and courts have found that the discriminatee's obligation is to make a reasonable effort to find work under existing circumstances.[101] The focus of the investigation is on the search for work; the discriminatee's success or failure in finding work is not determinative.[102] The Board has found that a wide range of efforts meets the reasonable effort standard and resolved doubt in favor of the discriminatee as the wronged party.[103] However, the Board, in *The Grosvenor Resort*, 350 NLRB No. 86, (2007), found that discriminatees who applied for work one or two times a month, engaged in an inadequate search for work (at pp. 5-7).

If, following the investigation, the Region concludes that the discriminatee has met his or her obligation to mitigate, it is the respondent's burden to establish that the discriminatee failed to make a reasonable effort to seek interim employment.

See Section 10592.6 regarding treatment of disputed mitigation in settlement discussions.

See Sections 10648.4 and 10648.6 regarding treatment of mitigation in a compliance proceeding.

10558.2 Investigating Mitigation

The Compliance Officer is responsible for investigating mitigation issues. The discriminatee's account of his or her efforts to obtain employment and of any loss of interim employment will be the primary source of information upon which a determination will be based. Whenever there is a mitigation issue, the discriminatee

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[100] See, for example, *Painters Local 419 (Spoon Tile Co.)*, 117 NLRB 1596, 1598 fn. 7 (1957).

[101] See, for example, *NLRB v. Arduini Mfg. Co.*, 384 F.2d 420, 422–423 (1st Cir. 1968); see also *Aircraft & Helicopter Leasing*, 227 NLRB 644, 646 (1976).

[102] See, for example, *Midwest Motel Management Corp.*, 278 NLRB 421 (1986).

[103] See, for example, *United Aircraft Corp.*, 204 NLRB 1068 (1973); see also *Lundy Packing Co.*, 286 NLRB 141 (1987).

should give a complete account of his or her efforts to seek employment. Particular attention is appropriate for prolonged periods of unemployment.

The Region should not allow respondent counsel to interview discriminatees concerning mitigation issues without clearance from the Division of Operations-Management. Section 10592.7.

As set forth in Section 10508.8, the Compliance Officer is responsible for communicating with discriminatees as soon as the Region has determined that a violation has occurred that may result in a backpay remedy. Disputes concerning mitigation may be avoided if the discriminatee is clearly advised at that time of his or her obligation to mitigate; the discriminatee should be further advised to keep careful notes or records of his or her efforts to seek interim employment. Form NLRB-4288 contains such advice.

10558.3 Evaluating Mitigation Efforts

The efforts a discriminatee is expected to make to get interim employment are those expected of reasonable persons in like circumstances. A variety of actions may demonstrate an effort to seek employment, including registering with state or private employment services, checking newspaper ads, visiting employers, and asking friends and relatives. Specific actions to seek employment may be influenced by age, health, education, employment history, and station in life, as well as by employment and unemployment trends in the area. The presence or absence of any particular search activity does not determine mitigation.

Failure to obtain interim employment, even for a prolonged period, does not establish a failure to mitigate.

The evaluation of mitigation must take into account circumstances that limit opportunities and discourage efforts (for example, unemployment may be high or a discriminatee may have limited skills). In such circumstances, the number of employment applications filed or even the amount of time devoted to searching for employment is not dispositive of mitigation.

Discriminatees who have been terminated from skilled or high wage employment may reasonably limit their job search to equivalent employment.[104] Discriminatees are not normally required to accept lower-paying employment or to move in order to accept employment.[105]

In connection with the issue of searching for work, the Board has held that an unlawfully discharged employee does not have to instantly seek new employment.[106] However, the Board has also stated that absent circumstances justifying a longer delay, discriminatees must begin their search for work within 2 weeks from the time they were discharged to be entitled to backpay for the first two weeks following their discharge. If they fail to start seeking work within the 2 week period, entitlement to backpay will not begin until they begin a proper search for employment.[107]

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[104] Discriminatees with "extensive experience in a specialized field" may be required to seek interim employment within their area of specialization avoid a finding of willful loss. *Associated Grocers*, 295 NLRB 806, 811 (1989); *NHE/Freeway, Inc.*, 218 NLRB 259 (1975); *Knickerbocker Plastic Co.*, 132 NLRB 1209 (1961).

[105] See, for example, *Hacienda Hotel & Casino*, 279 NLRB 601, 605–606 (1986); see also *Iron Workers Local 15*, 298 NLRB 445, 469 (1990).

[106] See, for example, *Saginaw Aggregates*, 198 NLRB 598 (1972); see also *Retail Delivery Systems*, 292 NLRB 121, 125 (1988).

[107] *The Grosvenor Resort*, 350 NLRB No. 86 (2007); *Domsey Trading Corporation*, 351 NLRB No. 33, at pp. 8-9 (2007).

In the end, a determination of mitigation will depend on applying the standard of reasonable efforts to the unique circumstances of the case.

10558.4 Loss of Interim Employment

An unreasonable discriminatee action that results in a loss of interim employment may constitute a failure to mitigate. Should a discriminatee reject an offer of interim employment, quit interim employment,[108] or be terminated from interim employment, the circumstances should be fully investigated. The discriminatee should be interviewed and corroboration sought from the interim employer if appropriate.

When a discriminatee voluntarily quits interim employment, the burden shifts from the respondent to the Region to show that the decision was reasonable.[109] The Region will be able to carry its burden if the interim job was "substantially more onerous," or was "unsuitable,"or "threatened to become unsuitable" or if the quit was caused by "unreasonable working conditions." (See *The Grosvenor Resort*, above at p. 5 (2007), citing *Lundy Packing Co*., 286 NLRB 141, 144 (1987), enfd. 856 F.2d 627 (4th Cir. 1988)).

When a discriminatee has been involuntarily terminated from interim employment, however, a higher standard may apply, namely that the discriminatee must have engaged in gross misconduct, before the termination constitutes a failure to mitigate.[110]

When it is determined that a loss of interim employment was a failure to mitigate, the amount of lost interim earnings should be calculated and offset against gross backpay as though actually earned by the discriminatee.[111]

10560 Unavailability for Employment or Withdrawal From Labor Market

10560.1 Overview

When a discriminatee becomes unavailable for employment or withdraws from the labor market, gross backpay is generally tolled for the period of unavailability. Investigation of this issue will again depend largely on the discriminatee interview. Sources of documentation could include medical records, school records, or institutional records, depending on the case. Common situations of unavailability for employment are discussed in the following sections.

10560.2 Illness or Injury

In general, backpay is tolled for a discriminatee who has been unable to work due to illness or injury for a period of 3 days or more. If the gross employer had sick leave or similar benefits, compensation due under such benefits should be considered as a component of gross backpay. Section 10544.4.

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[108] In *The Grosvenor Resort*, above at p. 5, the Board found that the discriminatee was not justified in quitting an interim job because she was embarrassed by the comment of a co-worker made in the presence of customers. The Employer was permitted an offset of an amount equal to that which she would have earned had she not quit, until she found another job.

[109] See, for example, *Pope Concrete Products*, 312 NLRB 1171, 1173 (1993); *Big Three Industrial Gas Co.*, 263 NLRB 1189, 1199 (1982); and *Alamo Cement Co.*, 298 NLRB 638 (1990).

[110] See *Ryder Systems*, 302 NLRB 608, 610 (1991).

[111] See *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1212–1216 (1961).

10560.3 Exceptions: Unavailability Due to Injury or Illness Attributable to Interim Employment or Unfair Labor Practices

Exceptions to the general policy are when periods of unavailability for employment result from an injury suffered during interim employment[112] or from an unfair labor practice.[113]

10560.4 Pregnancy

When a discriminatee is unavailable for employment as a result of pregnancy, backpay is often tolled. The period of unavailability is not determined by any formula, but must be established in each case. The appropriate tolling period is the period the discriminatee would have taken off from work in the absence of any unlawful action. This period may be established by any relevant evidence, including the statement of the discriminatee, medical records, the amount of pregnancy leave taken for past pregnancies, and the gross employer's medical leave policies, unless those policies violate relevant equal opportunity laws, including the Family and Medical Leave Act of 1993.

10560.5 Attendance at an Educational Institution

Backpay should normally be tolled during any period in which the discriminate is a full-time student. This normal policy may be rebutted if the discriminatee was a full-time student prior to the unlawful action, or can demonstrate an availability for employment through such actions as continued efforts to seek employment or an established willingness to leave school at any time for employment or reinstatement.[114]

10560.6 Military Service

Service in the Armed Forces constitutes unavailability for employment.[115]

10560.7 Undocumented Workers

The Supreme Court concluded in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), that Immigration Reform and Control Act (IRCA) precludes the Board from awarding backpay to any terminated individual who was not legally authorized to work in the United States during the backpay period, inasmuch as such award conflicted with Federal statues and policies unrelated to the Act.

As a result of the Supreme Court's decision in *Sure Tan, Inc. v. NLRB*, 467 U.S. 883, 902–903 (1984), the Board has conditioned the reinstatement remedies of discriminatees on their being lawfully entitled to be present and employed in the United States.

General Counsel Memoranda 88-9, 98-15, and 02-06 set forth current policy regarding reinstatement and backpay where a discriminatee's legal status is in dispute. Effective November 6, 1986, IRCA established, among other provisions, requirements that employers verify the legal residence status of employees.

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[112] See, for example, *American Mfg. Co.*, 167 NLRB 520, 522–523 (1967).

[113] See, for example, *Greyhound Taxi Co.*, 274 NLRB 459 (1985), see also *Moss Planning Mill Co.*, 103 NLRB 414, 419 (1953).

[114] See, for example, *J. L. Holtezendorff Detective Agency*, 206 NLRB 483, 484–485 (1973).

[115] *U.S. Steel Corp.*, 293 NLRB 640 fn. 2 (1989).

Discriminatees first hired before November 6, 1986: The respondent is responsible for establishing that a discriminatee hired before the IRCA effective date is not lawfully entitled to be present and employed in the United States. This burden is met only by proffering a final U.S. Citizenship and Immigration Services (USCIS) determination that a discriminatee is not lawfully entitled to be present and employed. Because of this, it is not necessary or proper to address a discriminatee's immigration status before the Board, as the determination of this status must be made by the USCIS.

Regions should submit to Advice any cases which present the question of whether a respondent could rely on an USCIS determination that has been appealed.

Compliance action should not be held in abeyance pending the outcome of any USCIS proceeding. A discriminatee hired on or before November 6, 1986 is presumed to be entitled to backpay and reinstatement unless and until USCIS determines that he or she is not entitled to be present and employed in the United States.

A final USCIS determination that a discriminatee is not entitled to be lawfully present and employed in the United States forecloses a reinstatement and backpay remedy.

Discriminatees first hired after November 6, 1986: Under provisions of IRCA, an employer who knowingly hires "unauthorized workers" after November 6, 1986 is subject to criminal sanctions. Employers must also obtain verification from employees hired after November 6, 1986 that they are lawfully present and available for employment in the United States.

A respondent who reinstates an employee who was first hired before November 6, 1986, is not subject to these IRCA provisions, as an unlawful termination is not considered an interruption in employment.

Respondents must comply with IRCA provisions for all employees hired after November 6, 1986, and thus may require that discriminatees complete the appropriate portion of the I-9 form and submit appropriate documentation as a condition of reinstatement. Thus, where the respondent knows at the time of hire that a discriminatee is ineligible for employment, the appropriate remedy is for respondent to extend an offer of reinstatement only after the discriminatee presents to the employer, within a reasonable time, completed USCIS Form I-9s sufficient to establish his or her work eligibility. *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2d Cir. 1997). No backpay is due under these circumstances. *Hoffman Plastics*, supra. In situations where discriminatees do not complete an I-9 form and present appropriate documentation, both reinstatement and backpay are precluded. If a respondent can establish that it would not have hired or retained the discriminatee had it known of his or her undocumented status during the period of employment, Regions should refrain from seeking a reinstatement or backpay remedy. If the respondent contends that a discriminatee has submitted fraudulent documentation of immigration status, the issue should be submitted to Advice. Regions should also submit to Advice any issue concerning a discriminatee's failure to seek or obtain interim employment because of an inability to provide required documentation of immigration status.

Regions should continue to seek compensation for undocumented workers for work previously performed under unlawfully imposed terms and conditions (for example, a unilateral change of pay or benefit).[116]

10560.8 Other Forms of Unavailability for Employment or Withdrawal From the Labor Market

Unavailability for employment may result from any number of situations.

Incarceration or institutionalization normally renders a discriminatee unavailable for employment. When discriminatees take vacations, travel, attend to personal concerns or otherwise appear to be unavailable for employment, the circumstances of the case must be evaluated.[117]

A withdrawal from the labor market is characterized by a cessation of efforts to seek employment. Thus, a withdrawal from the labor market should constitute a failure to mitigate as well and should be determined in the same manner. Section 10558.3.

10560.9 Retirement

If a discriminatee has retired and has withdrawn from the labor market by ceasing further efforts to seek employment, backpay should be tolled. However, application for or receiving Social Security or other retirement benefits does not necessarily establish a withdrawal from the labor market.[118]

10562 Investigation of Backpay When Discriminatees Are Missing

10562.1 Overview

Even when discriminatees are missing or unavailable, backpay should be determined at appropriate times during the pendency of unfair labor practice proceedings. It is very important that the Compliance Officer maintain contact with discriminatees from the earliest phases of unfair labor practice proceedings, as the absence of a discriminatee will complicate determination of backpay issues and may delay full resolution of a case. See Section 10508.8 for procedures to follow to establish and maintain contact with discriminatees at the time a complaint issues.

Where contact has been lost or where discriminatees are only identified later in the course of proceedings, strenuous efforts should be made to locate them. Section 10562.2 discusses methods and resources that may be used in locating missing discriminatees. Subsequent sections discuss procedures to use in resolving unfair labor practice cases when discriminatees cannot be found or are unavailable.

10562.2 Resources Available for Locating Missing Discriminatees

There are many methods for finding discriminatees. The most promising methods in a particular case will depend on the circumstances of the case. The following are among methods and resources available for finding missing discriminatees:

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[116] *Tuv Taam Corp.*, 340 NLRB 756 fn. 4 (2003).

[117] See, for example, *L'Ermitage Hotel*, 293 NLRB 924 (1989).

[118] See, for example, *Roman Iron Works*, 292 NLRB 1292 fn. 3 (1989). *Hansen Bros. Enterprises*, 313 NLRB 500, 608 (1993).

Employer records. Employer personnel and payroll records should include a last known address. Employment applications and other personnel records may include references or names of other individuals who could help locate a person. Employer records should also include a social security number, which is helpful to pursue other search methods, as discussed below.

Form NLRB-916. The NLRB claimant identification form should be mailed to all discriminatees at the time the complaint issues. Section 10508.8. The form asks discriminatees for names of individuals who will be able to help locate them in the future.

Private data service. The NLRB maintains a flat-rate contract with a private database service (presently AutoTrak) to provide address information for individuals. This service collects information on individuals from credit applications and reports and has proven useful in providing address information quickly at a low cost. The Division of Operations-Management issues periodic memoranda regarding the current provider of this service, procedures for using it and training. The Region is responsible for deciding which employees in the Region, in addition to the Compliance Officer, will be provided with a password to access this service.

Coworkers, witnesses. Contacts made during the unfair labor practice investigation are sources of information in locating missing discriminatees.

Unions, other associations, licensing boards. If the discriminatee was a member of a union or other association, or worked in an occupation that required some form of licensing, these are sources of information.

State employment departments. Most states have a department that is responsible for assessing unemployment taxes and for administering payment of unemployment benefits. They can often provide address information on an individual based on recent employment or receipt of unemployment benefits. The information required by these departments to search their records, such as discriminatee name and social security number, as well as procedures for submitting a request for information, varies; Compliance Officers should inquire with the appropriate state employment department.

State Motor Vehicle Departments. Most State Motor Vehicle Departments maintain address information based on vehicle registration or driver's licenses. Again, policies regarding information requests and identifying information needed to respond to a request vary; Compliance Officers should inquire with the appropriate state office.

The Social Security Administration. The Social Security Administration (SSA) maintains records of payroll taxes paid by employers on behalf of individuals. Thus, SSA may have information concerning current employers of individuals. SSA also has current address information for individuals receiving a benefit. SSA will forward Agency letters to individuals, care of their current employers, or directly to individuals for whom it maintains a current address.

To use this method to attempt to reach a missing person, an appropriate letter to the individual should be prepared. Such a letter may include information about the case, urge that the individual communicate with the Compliance Officer, note the importance of cooperation, and include a Form NLRB-916 as well as a return envelope. The letter

should be enclosed in a blank envelope. Only the individual's name and social security number should be on the envelope.

SSA charges the Agency a nominal fee, billed on a quarterly basis, for each request processed. In order to make certain the Agency is correctly billed, it is necessary to verify the SSA charges. Accordingly, by the 10th day after the end of each quarter, each Region should electronically submit to the Division of Operations-Management an Excel spreadsheet setting forth the name and social security number of each individual for whom the Region requested information in the previous quarter. In the event no requests were submitted to SSA, an e-mail to this effect should be forwarded to the Division of Operations-Management.

The Internal Revenue Service. The Internal Revenue Service (IRS) will also forward letters to discriminatees if it has an address on its records for that individual. Under its confidentiality policy, IRS will not provide the NLRB with an individual's address, nor will it advise the NLRB whether it had an address or whether any letter it forwarded was returned.

To attempt to reach a missing individual by requesting that IRS forward a letter, an appropriate letter should be prepared and addressed to the individual. That letter should contain, in addition to information concerning the case and the importance of communicating with the Region, the following paragraph:

> In accordance with current policy, the Internal Revenue Service (IRS) has agreed to forward this letter because the National Labor Relations Board does not have your current address. The IRS has not disclosed your address or any other tax information and has no involvement in the matter aside from forwarding this letter.

The letter should be placed in a blank envelope, with only the name and social security number of the individual on it. The letter should be accompanied by a cover letter to the IRS requesting that the enclosed letter be forwarded based on its address records. When the request is to forward letters to more than one individual, the cover letter should list all individuals to whom letters are to be forwarded, with the list in sequential order by social security number, not alphabetically by name.

If a Region is requesting that IRS forward letters to fewer than 50 individuals, the request should be submitted to the district director of the Internal Revenue Service, to the attention of the disclosure officer, for the IRS district in which the Region is located. See www.irs.gov. On this website, conduct a search for Policy Statement P-1-187.

If a Region wishes to request that IRS forward letters to 50 or more individuals, the Region should obtain clearance from the Division of Operations-Management before submitting it. If clearance is granted, the request should be submitted to Internal Revenue Service, Office of Government Liaison and Disclosure, CL:GLD Room 1603, 1111 Constitution Avenue, N.W., Washington, D.C. 20224.

IRS, although willing to forward letters to individuals for whom it has address information, asks that its service be considered only as a last resort. Prior to submitting a request involving 50 or more individuals, Regions should consider communicating with the IRS Disclosure and Security Division to ascertain the time required to process a

request and other considerations that might affect a decision to submit the request. See www.irs.gov. On this website, conduct a search for Project 753, Computerized Mail-Out Program.

Newspaper advertisements. On rare occasions, newspaper advertisements may offer a useful means of locating missing discriminatees. The Region should consult with the Division of Operations-Management as to how to obtain funds for the advertisements.

10562.3 Tolling Backpay When Discriminatees Are Missing

The backpay period may be suspended when a respondent establishes that it has made a reasonable effort to locate and offer reinstatement to a discriminatee that it cannot locate.[119] The backpay period may resume and standard reinstatement requirements will remain, at such time as the discriminatee is located. Section 10534.7.

10562.4 Determining Backpay for Missing Discriminatees

Even when discriminatees are missing, backpay should be determined when respondents wish to settle a case or comply with a Board order, when compliance proceedings must go forward or at any time it is appropriate to determine backpay in order to resolve a case. It is particularly important in cases involving more than one discriminatee that resolution of the case not be impeded for the discriminatees who are available by the fact that other discriminatees cannot be found.

Although the discriminatee should provide information used in determining gross backpay, a reasonable determination of gross backpay may be possible based on gross employer records and other witnesses.

In cases involving a number of discriminatees, it may be established that a missing discriminatee is comparable to other discriminatees for determining gross backpay.

It will be unlikely that interim earnings and related issues can be fully determined without contact with the discriminatee. For purposes of resolving cases, two methods of establishing interim earnings are available. In cases involving a number of comparable employees, an estimate of interim earnings may be based on the average interim earnings of other discriminatees, or on an estimate derived from the use of statistical sampling. If comparisons with other discriminatees seem inappropriate or if the number of discriminatees is too small to support the use of one of these methodologies, interim earnings may be estimated as 35 percent of gross backpay.

See Section 10592.9 regarding settlement of backpay in cases involving missing discriminatees.

See Sections 10648.7 and 10662.7 regarding treatment of missing discriminatees in a compliance specification.

See Section 10582.3 regarding escrow of backpay in cases involving missing discriminatees and Section 10584 regarding the eventual extinguishment of a missing discriminatee's backpay entitlement after compliance is otherwise achieved.

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[119] See, for example, *Bodolay Packaging Machinery*, 271 NLRB 10 (1984).

10562.5 Procedures for Determining Backpay Due Uncooperative Discriminatees

Should a discriminatee refuse to cooperate, it must be remembered that the remedies afforded by the Act are public rights, not private. Enforcement of the Act cannot be frustrated by the whim or preference of individual discriminatees. When appropriate, backpay due an uncooperative discriminatee may be determined using the same methods as for missing discriminatees, set forth in Section 10562.4.

In some situations, noncooperation may appear to be a concealment of interim earnings. Section 10550.5.

See Section 10592.10 regarding settlement of cases involving uncooperative discriminatees.

See Sections 10648.7 and 10662.7 regarding treatment of uncooperative discriminatees in compliance proceedings.

10562.6 Procedures for Determining Backpay Due Deceased Discriminatees

Backpay should be determined for a deceased discriminatee. Gross backpay may be determined using the appropriate method and information available from the gross employer or other sources. Even though death tolls the backpay period, any life insurance or death benefit provided by the gross employer will be a component of gross backpay.

A death certificate may generally be obtained from the health department of the county in which the death occurred. Death certificates generally contain information which can be used to communicate with the next of kin. Next of kin may be able to provide all information and documentation required to determine interim earnings, mitigation, and availability for employment issues, as well as information concerning the deceased discriminatee's estate which will be needed in order to make payment of net backpay.

Form NLRB-4181, Authorization to Social Security Administration to Furnish Employment and Earnings Information of Decedent, may be used to obtain an earnings report from the Social Security Administration. Form NLRB-4181 must be completed and signed by appropriate next of kin and should be submitted, with a covering memorandum, to the Director in Charge of Accounting Operations, Social Security Administration, Baltimore, Maryland 21235.

Section 10576.6 sets forth procedures for distributing backpay due a deceased discriminatee.

10564 Net Backpay

10564.1 Overview

Net backpay is the amount of backpay a respondent must pay a discriminatee. The challenge in calculating net backpay is determining all components of gross backpay, including appropriate offsets resulting from interim employment, and resolving issues of mitigation, tolling, and availability for employment.

10564.2 Allocation to Calendar Quarters

Net backpay is calculated on the basis of calendar quarters. To determine net backpay, all gross backpay, expenses and interim earnings offsets must be allocated to calendar quarters within the backpay period and a net backpay amount calculated for each quarter. Total net backpay in a case is the sum of net backpay as calculated for each quarter.

Because backpay is determined on the basis of calendar quarters, earnings that have been documented on an annual basis must be allocated to calendar quarters. For example, W-2 forms and social security earnings reports provide earnings information on an annual basis. To allocate total annual earnings to calendar quarters, it may be appropriate to attempt to confirm employment dates and quarterly earnings with employers. Where this is impossible or impractical, a reasonable allocation may be made on the basis of approximate employment dates provided by the discriminatee.

Several Regions have developed spreadsheet and database programs that are very useful in calculating and summarizing net backpay and interest. Compliance Officers and other Board agents responsible for calculating backpay are strongly encouraged to become familiar with the use of spreadsheet and database software as an efficient means of calculating and presenting backpay determinations.

10564.3 No Carryover of Offsets

No net backpay is due in any quarter in which offsets from interim earnings equal or exceed gross backpay. Offsetting interim earnings that exceed gross backpay in any quarter are not applied against gross backpay due in any other quarter. For example, a discriminatee was unemployed for the remainder of the quarter in which he was unlawfully discharged. The following quarter he obtained interim employment that paid substantially more than he had been earning from the respondent prior to his discharge. A year later, the respondent offered him reinstatement, ending the backpay period. His total earnings from interim employment exceeded total gross backpay accrued throughout the backpay period. Since net backpay is determined on a calendar quarterly basis and interim earnings in excess of gross backpay within a quarter are not applied against gross backpay accruing in other quarters, the discriminatee in this case is due backpay only for the quarter in which he was discharged. *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

10564.4 Determining Backpay When the Backpay Period Has Not Ended

The backpay period is normally ended when the discriminatee has been offered reinstatement to his or her former position. See Section 10530 for a full discussion of reinstatement and tolling of the backpay period. In many cases, it will be useful to make a current assessment of backpay liabilities even though the backpay period continues. In

these situations, the parties should be apprised of current net backpay. In many cases, it will also be useful to advise the parties of the current rate of accrual of additional net backpay. When a respondent is acting to comply and offers reinstatement to a discriminatee, it is generally appropriate to calculate net backpay through the tolling date. The Compliance Officer must also confirm that reinstatement has in fact been offered and that the end of the backpay period has been properly reached.

10566 Interest

Interest is charged on net backpay and other monetary liabilities due in an unfair labor practice case. It is the Compliance Officer's responsibility to determine the interest amount due. Some Regions have developed spreadsheets or databases to assist the Agency with the calculation of interest. In addition, the Agency's intranet site has an interest calculation program available. Spreadsheet formats allow for clear presentation of backpay and interest amounts on a calendar quarter basis, for quick and accurate updating of total interest rates and for summing total net backpay and interest amounts. Regions are encouraged to calculate interest using these tools.

Occasionally a party asks how interest has been determined. The following sections provide an explanation of the calculation of interest.

10566.1 Calculation of Interest

The amount of interest charged is based on the amount of backpay due, the length of time for which it has been due, the interest rates in effect during that period of time, and the method of applying those interest rates.

10566.2 Interest on Backpay is Not Compounded, But Charged as Simple Interest

The total interest rate charged on backpay due is the sum of the rates in effect over the period of time for which interest is charged.

For example, net backpay of $10,000 is due for the fourth quarter of 2001. At the end of 2002, a year has passed since the backpay was due. The interest rate in effect throughout 2002 is 6 percent. The total interest rate as of the end of 2002 is thus 1 year at 6 percent per year or 6 percent. The interest amount due at that time is thus $600.

10566.3 A Different Interest Factor is Used for Each Different Calendar Quarter of the Backpay Period

Net backpay is determined for each calendar quarter of the backpay period. Section 10564.2. Interest on net backpay is charged commencing with the last day of the calendar quarter in which net backpay is due until backpay has been paid. Thus, a different total interest factor must be calculated for every calendar quarter of the backpay period. The total interest amount due on net backpay due for all quarters of the backpay period is the sum of the interest amounts calculated for each calendar quarter.

Extending the above example, net backpay of $10,000 is also due for the first quarter of 2002. The backpay period ended at that time. At the end of the fourth quarter of 2002, the total interest rate charged on backpay due in the first quarter of 2002 is three-

fourths of the annual interest rate of 6 percent, or 4.5 percent. The interest amount due at the end of 2002 on backpay due for the first quarter of 2002 is $450.

The total interest amount due at the end of 2002 on the total backpay of $20,000 is the sum of the interest amounts due on backpay for the fourth quarter of 2001 and the first quarter of 2002, or $1050.

10566.4 The Interest Rate in Unfair Labor Practice Cases is the Varying Rate Assessed by the Internal Revenue Service on Underpaid Taxes:[120]

The rate has changed greatly over recent years; the Division of Operations-Management regularly issues memoranda providing the most recently established rate. The following chart recites interest rates and the periods of time during which they have been in effect from October 1, 1994 through September 30, 2005:

Effective Period	*Annual Percentage Rate*	*Quarterly Percentage Rate*
October 1, 1994 to March 31, 1995	9	2.25
April 1, 1995 to June 30, 1995	10	2.5
July 1, 1995 to March 31, 1996	9	2.25
April 1, 1996 to June 30, 1996	8	2
July 1, 1996 to March 31, 1998	9	2.25
April 1, 1998 to December 31, 1998	8	2
January 1, 1999 to March 31, 1999	7	1.75
April 1, 1999 to March 31, 2000	8	2
April 1, 2000 to March 31, 2001	9	2.25
April 1, 2001 to June 30, 2001	8	2
July 1, 2001 to December 31, 2001	7	1.75
January 1, 2002 to December 31, 2002	6	1.5
January 1, 2003 to September 30, 2003	5	1.25
October 1, 2003 to March 31, 2004	4	1
April 1, 2004 to June 30, 2004	5	1.25
July 1, 2004 to September 30, 2004	4	1
October 1, 2004 to March 31, 2005	5	1.25
April 1, 2005 to September 30, 2005	6	1.5

10566.5 The Total Interest Rate is the Sum of the Varying Rates in Effect During the Period for Which Interest is Charged

Because a different interest amount is calculated for each calendar quarter, it is generally most convenient to work with quarterly interest rates. For example, net backpay of $10,000 is due for the fourth quarter of 2002. Interest is charged commencing with the last day of the quarter. Thus, as of December 31, 2004, the last day of the fourth quarter of 2004, applying the rates set forth above in Section 10566.4, total interest of 9.25 percent is charged:

[120] *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

First quarter of 2003	1.25 percent
Second quarter of 2003	1.25 percent
Third quarter of 2003	1.25 percent
Fourth quarter of 2003	1.00 percent
First quarter of 2004	1.00 percent
Second quarter of 2004	1.25 percent
Third quarter of 2004	1.00 percent
Fourth quarter of 2004	1.25 percent
Total Interest Rate	9.25 percent

The total interest amount due as of December 31, 2004 on backpay due for the fourth quarter of 2002 is $925.

The total interest rate charged as of December 31, 2004 for net backpay due for the first quarter of 2003 is 8.0 percent, reflecting accrual of interest at the above rates commencing with the last day of the first quarter of 2003.

The total interest rate charged as of December 31, 2004 for net backpay due for the second quarter of 2003 is 6.75 percent, reflecting accrual of interest at the above rates commencing with the last day of the second quarter of 2003.

10566.6 Total Interest Rates Must Be Periodically Updated

The total interest rate is always calculated as of a specific date. The total interest rate charged increases as time passes and must be updated to remain current. Extending the above example, as of March 31, 2005 the total interest rate charged on backpay due for the fourth quarter of 2002 has increased to 10.5 percent, because of the accrual of an additional 1.25 percent interest in the first quarter of 2005. Total interest due on March 31, 2005 for backpay due for the fourth quarter of 2002 is $1050. As of March 31, 2005 the total interest rate charged for backpay due for the first quarter of 2003 is 9.25 percent and the total interest rate charged for backpay due for the second quarter of 2003 is 8.0 percent. As of June 30, 2005 the total interest rate charged for backpay due for the fourth quarter of 2002 has increased to 12.0 percent, with the accrual of an additional 1.5 percent interest for the second quarter of 2005. The different total interest rates charged for different calendar quarters of the backpay period all increased by the same amount at the close of each new calendar quarter. Each increased by the quarterly interest rate in effect during the quarter that just closed.

10566.7 Calculating Interest in the Current Calendar Quarter

When the backpay period has not ended, it is often appropriate to calculate current net backpay and to project the continuing accrual of backpay. It also may be appropriate to calculate interest to a current date within a calendar quarter or to project interest to a date in anticipation of payment of backpay.

Because interest begins to accrue commencing with the last day of the calendar quarter in which backpay is due, interest is not charged on backpay that has accrued or is accruing within the current calendar quarter.

Interest on backpay due for earlier quarters does accrue during the current calendar quarter. Interest due in the current calendar quarter is calculated by the same method set forth in preceding sections, but using a monthly, weekly, or daily interest rate

for the current quarter. The monthly interest rate is one-third the quarterly interest rate; the weekly interest rate is one-thirteenth the quarterly interest rate; and the daily interest rate is one-ninetieth the quarterly interest rate. In the above example (from Section 10566.6), the total interest rate charged on backpay due for the fourth quarter of 2002 was 9.25 percent as of December 31, 2004. The interest rate in effect during the first calendar quarter of 2005, beginning January 1, is 1.25 percent per quarter. At this quarterly rate, the monthly interest is .4167 percent, the weekly interest rate is .096 percent and the daily interest rate is .0139 percent. Thus, as of February 1, 2005, the total interest rate charged on backpay due for the fourth quarter of 2002 is 9.6667 percent, reflecting accrual of interest for the month of February at the monthly rate of .4167 percent. As of February 7, 2005, the total interest rate charged on backpay due for the fourth quarter of 2002 is 9.7627 percent, reflecting accrual of interest for the first week of February at the weekly rate of .096 percent. As of February 8, 2005, the total interest rate charged on backpay due for the fourth quarter of 2002 is 9.7766 percent, reflecting accrual of interest on February 7 at the daily rate of .0139 percent.

Interest is charged on backpay until the date backpay has been paid. With net backpay of $10,000 and a daily interest rate of .0139 percent, the total interest amount increases by only $1.39 per day. When interest is being calculated in anticipation of payment, judgment should be exercised to avoid an excessive expenditure of time to gain a precision that will represent only a small difference in the final amount of interest due. However, available spreadsheet and database programs, interest can easily be projected by entering the anticipated payoff date in the program file.

10566.8 Interest on Other Backpay Liabilities

Board orders may provide for reimbursement of medical expenses, refunds of dues or other forms of monetary liabilities, with interest. When they do, the method of calculating interest is the same as that used for net backpay, set forth in the above sections.

10566.9 Interest on Liabilities to Benefit Funds

The standard provision in a Board order that requires retroactive payments to benefit funds refers to *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979). In addition to basic contributions, that provision requires payments to funds for late contributions based on provisions of the funds themselves or, in the absence of such provisions, to evidence of losses to the funds that are directly attributable to the unlawful withholding of contributions. To charge interest or other fees on benefit fund contributions due, the Compliance Officer must determine what provisions have been established by the benefit fund for such charges. These charges may be applied to the contribution liabilities. In the absence of specific provisions, fund practice or another reasonable assessment of interest lost, may be a reasonable basis for assessing the loss to the fund. Note, however, that although benefit funds often have provisions requiring payment of legal expenses incurred as a result of failure to make timely payment of contributions, the Board will not include payment of these legal expenses in a compliance proceeding.[121]

[121] *G. T. Knight Co.*, 268 NLRB 468, 470–471 (1983).

10568 Sample Backpay and Interest Calculation

Assuming it is May 1, 2005 and a Board order has just issued, finding that John Jones was unlawfully terminated on August 15, 2003 and ordering reinstatement and backpay for him.

Gross Backpay: The compliance investigation establishes that at the time of his termination, Jones was earning $12.50 per hour and working a regular schedule of 40 hours per week. The Respondent offers little or no overtime, but had steady work available from the time of Jones' discharge through the present. It also had a wage freeze in effect until November 15, 2004 when all employees received a $1 an hour wage increase. Based on the above, it is determined that gross backpay due Jones is based on a projection of his predischarge hourly wage rate and the November 2004 wage increase and weekly schedule, or $500 per week through November 15, 2004 and $540 per week thereafter. For the third quarter of 2003, the backpay period is the 6.5-week period August 16–September 30. Gross backpay due for that quarter is thus $3250. For the current quarter, through May 1, 2005, gross backpay is $2338.

Interim Earnings: Jones has accounted for his interim earnings and availability for employment. He searched for interim employment without success until mid-October 2003. He then obtained employment and through December 2003 earned $6000. He continued with that employment through July 2004, earning $2500 per month, a total of $7500 in the first and second quarters of 2004. His earnings in July 2004 were $3000. On August 1, however, he was injured in an auto accident that was unrelated to his interim employment. He remained disabled until October 1, 2004. He was released for work on that date, but had lost his interim employment as a result of his 2-month absence. On November 1, he began a series of temporary interim jobs earning a total of $3200 through December 31. On January 1, 2005, he obtained regular interim employment paying him $10 per hour and earned a total of $5200 during the first quarter of 2005. At present, his work remains steady, with the same wage rate and a 40-hour workweek, so that he has gross wages of $400 per week.

Expenses: Jones incurred interim expenses of $150 in September 2003 and $100 in October 2003 searching for interim employment. Respondent provided a health care plan to employees without cost to employees. Jones was without medical insurance coverage from his termination until October 1, 2003. During this time he incurred medical expenses of $75, $125, and $310 which would have been covered under Respondent's plan. On October 1, 2003 Jones purchased a medical insurance policy equivalent to Respondent's plan for $150 per month and has continued that policy to date.

Gross backpay, interim earnings, net backpay, the total interest rate, and the interest amount through May 1, 2005, are set forth below.

Yr./ Qtr.	*Weeks*	*Hours/ Week*	*Hourly Rate*	*Gross Backpay*	*Interim Earnings*	*Interim Expenses*	*Net Interim Earning*	*Net Backpay*	*Medical & Other Expenses*	*Total Backpay*	*Interest Rate %*	*Interest*
03/3	6.5	40.0	12.5	3250.00		150.00			75.00 125.00 310.00			
Quarter Total				**3,250.00**		**150.00**			**510.00**	**3,760.00**	**7.16**	**269.22**
03/4	13	40.0	12.50	6,500.00	6,000.00	100.00			450.00			

Quarter Total				**6,500.00**	**6,000.00**	**100.00**	**5,900.00**	**600.00**	**450.00**	**1,050.00**	**6.16**	**64.68**
04/1	13	40.0	12.50	6,500.00	7,500.00				450.00			
Quarter Total				**6,500.00**	**7,500.00**		**7,500.00**		**450.00**	**450.00**	**5.16**	**23.22**
04/2	13	40.0	12.50	6,500.00	7,500.00				450.00			

Quarter Total				**6,500.00**	**7,500.00**	**7,500.00**		**450.00**	**450.00**	**3.91**	**17.60**
04/3	4.33	40.0	12.50	2,165.00	3,000.00			450.00			
Quarter Total				**2,165.00**	**3,000.00**	**3,000.00**		**450.00**	**450.00**	**2.91**	**13.10**
04/4	6.5	40.0	12.50	3,250.00	750.00			450.00			
	6.5	40.0	13.50	3,510.00	1,500.00						
					500.00						
					450.00						
Quarter Total				**6,760.00**	**3,200.00**	**3,200.00**	**1,820.00**	**450.00**	**4,010.00**	**1.66**	**66.57**
05/1	13	40.0	13.50	7,020.00	5,200.00			450.00			
Quarter Total				**7,020.00**	**5,200.00**	**5,200.00**	**1,820.00**	**450.00**	**2,270.00**	**0.41**	**9.31**
05/2	4.33	40.0	13.50	2,338.20	1,832.00			150.00			
Quarter Total				**2,338.20**	**1,732.00**	**1,732.00**	**606.20**	**150.00**	**756.20**		
						TOTAL	**9,836.20**	**3,360.00**	**13,196.20**		**463.68**

With regard to the example, note the following:

Interim earnings exceed gross backpay for 04/1, 04/2, and 04/3, leaving no net backpay for those quarters, but interim earnings in excess of gross backpay for those quarters are not offset against gross backpay from any other quarter. Section 10564.3.

In this example, all calculations have been based on 13-week calendar quarters. Particularly during short backpay periods, it may be appropriate to base calculations on the exact number of weeks or days.

Gross backpay for 04/3 is for 1 month, reflecting Jones' unavailability for work for 2 months during that quarter. Section 10560.2.

Jones' $150 expense searching for interim employment in September 2003 did not increase his gross backpay for that period because interim expenses only offset against interim earnings and do not add to gross backpay. Section 10556. Jones is entitled to reimbursement for medical expenses he incurred during that period and for periods in which interim earnings exceeded gross. Section 10552.4.

Gross backpay is not adjusted during the period of Jones' injury based on sick leave or disability benefits provided by the gross employer. The compliance investigation established that the gross employer provided no such benefit. Section 10544.4.

Jones lost interim employment as a result of his auto accident. Although gross backpay is tolled for the period of his resulting disability, as noted above, the Region determined that his automobile accident was not the result of gross misconduct on his part that would constitute a willful loss of earnings. Section 10558.4.

Net backpay is currently accruing at the rate of $140 per week.

Total interest rates are based on rates set forth in Section 10566.4. For example, interest on backpay due for the calendar quarter 03/3, 7.16 percent, is the sum of the quarterly rates of 1.0 percent in effect for the fourth quarter of 2003, 1.0 percent in effect for the first quarter of 2004, 1.25 percent for the second quarter of 2004, 1.0 percent for the third quarter of 2004, 1.25 percent for the fourth quarter of 2004, 1.25 percent for the first quarter of 2005, and .41 percent for April 2005. The monthly rate for April 2005 is

one-third the quarterly rate of 1.25 percent. Interest for each quarter of the backpay period is charged from the last day of the quarter. There is no interest charged for backpay due in the current quarter, 05/2. Section 10566.7. Interest is currently accruing at a weekly rate of .096 percent. The interest amount on net backpay is thus accruing at the rate of $11.96 per week.

10570 Proceedings After Compliance Requirements Have Been Determined

In the course of investigating compliance requirements, the Compliance Officer will communicate with all parties, eliciting respective positions on compliance issues, answering questions, and establishing facts. Although the Compliance Officer will seek cooperation and assistance from the parties, he/she also will make it clear to the parties that the Region is ultimately responsible for determining compliance requirements. From the investigation, the Compliance Officer will reach conclusions as to the compliance requirements of each case. At this point, it is generally appropriate to prepare correspondence in which he/she should advise the parties of these requirements, to avoid misunderstandings as to what they are and to provide both charging party and respondent the opportunity to dispute any conclusion. The correspondence should fully set forth the basis for the conclusions the Compliance Officer has reached, including facts which have been established and arguments considered.

For example, a letter advising the parties of backpay due under a Board order should set forth information concerning gross backpay and interim earnings on which the backpay determination is based. It should include wage rates and work schedules used to calculate gross backpay, as well as the method used. It should present interim earnings, and address any mitigation issues raised. An appropriate sample letter is found in Appendix 7.

After advising the parties of the Region's conclusions regarding compliance requirements, the Compliance Officer should contact the parties to confirm acceptance of the conclusions or identify areas of dispute. The following sections set forth procedures for subsequent actions when compliance requirements are undisputed by the parties, when compliance requirements are disputed by a party and when the respondent fails to comply.

10572 Compliance Requirements Undisputed

When all parties agree with the Region's conclusions regarding compliance requirements, the Compliance Officer is responsible for ascertaining that the requirements have been accomplished and, at the appropriate time, recommending that the Regional Director close the case.

Section 10576 discusses procedures for collecting and disbursing backpay. Section 10706 sets forth procedures for reporting and closing cases on compliance.