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Reporting Back Pay to the Social Security Administration

Introduction

The Social Security Administration (SSA) has special rules for back pay awarded by a court or government agency under a statute to enforce a worker's protection law. These rules are for social security coverage and benefit purposes. This publication — written primarily for employers — discusses what constitutes back pay under a statute and how to report these payments to SSA.

What Is Back Pay?

Back pay is pay received in one period for employment (or potential employment) in an earlier period. For social security coverage and benefit purposes, all back pay, whether or not under a statute, is wages except amounts specifically designated otherwise, e.g., damages, interest, penalties, and legal fees. However, the period for which back pay is credited as wages for social security purposes is different if the back pay is awarded under a statute.

Back Pay Under a Statute

Back pay awarded under a statute is a payment by an employer pursuant to an award, determination, or agreement approved or sanctioned by a court or government agency responsible for enforcing a Federal or state statute that protects an employee's right to employment or wages.

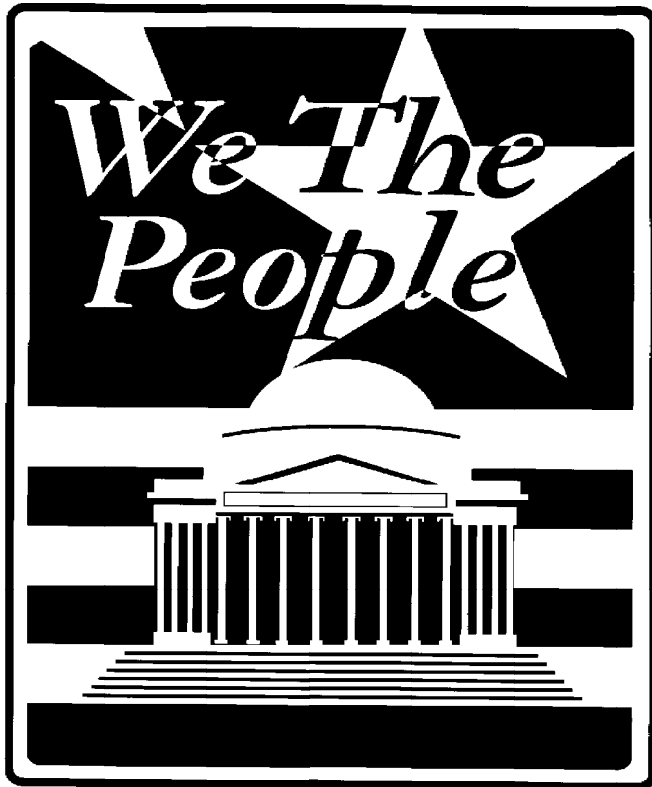
Examples of pertinent statutes include:

- Age Discrimination in Employment Act,
- Americans with Disabilities Act,
- Civil Rights Act,
- Equal Pay Act,
- Fair Labor Standards Act,
- National Labor Relations Act,
- State minimum wage laws, and
- State statutes that protect rights to employment and wages.

Payments based on laws that have a similar effect as those listed above may qualify as payments made under a statute, as may actions by a government agency. For example, the Department of Labor is authorized to initiate legal action to recover unpaid minimum wages or overtime under the provisions of the Fair Labor Standards Act.

Settlement agreements for back pay awards are sometimes negotiated out of court as a result of, or in lieu of, a legal suit. If the back pay award from such an agreement is intended to comply with the provisions of a Federal or state law that restores an employee's right to employment or wages, the back pay award is back pay under a statute.

If a court-approved or sanctioned settlement agreement includes a clause that states the agreement is not an admission of discrimination, the clause does not change the nature of the back pay award.



Nonstatutory Back Pay

If a payment for back wages is negotiated between an employer and employee without an award, determination, or sanction by a court or government agency, the payment is not considered to be made under a statute. Delayed wage payments and retroactive pay increases resulting from union negotiation or payments under local ordinances or regulations are not payments under a statute.

If the employer is uncertain as to whether the back pay case was awarded under a qualified statute, the employer may need to contact his or her personnel department or legal counsel or the attorney who filed the suit.

Reporting Back Pay

Employers should report back pay as wages in the year actually paid to the employee on Form W-2 (or magnetic media wage reports). If an employer did not include these wages on a previously filed W-2 report, the employer should prepare a wage correction report (Forms W-2c or magnetic media) to add the amount of the back pay award to the wages previously reported.

SSA differs from the Internal Revenue Service (IRS) in its treatment of back pay awards. The IRS treats all back pay as wages in the year the award is paid for **tax** purposes. SSA also treats back pay as wages in the period(s) paid, **except** for back pay awarded under a statute.

Under the U.S. Supreme Court decision, *Social Security Board v. Joseph Nierotko*, 66 U.S. 637 (1946), SSA credits back pay awarded **under a statute** to an individual's earnings record in the period(s) wages should or would have been paid. This is important because wages not credited to the proper year may result in lower social security benefits or failure to meet the requirements for benefits.

To meet the needs of both IRS and SSA, employers should **not** prepare Forms W-2 or W-2c to **allocate** back pay under statute wages for social security wage purposes. Employers should prepare a special report (with the information noted below) and send it to:

Social Security Administration
Office of Retirement and Survivors
Insurance
Division of Coverage, ERRB
3-F-26 Operations Building
6401 Security Boulevard
Baltimore, MD 21235

Information SSA Needs to Properly Credit Back Pay Under a Statute. The following information should be reported to SSA at the time the employer submits the Form W-2 (or magnetic media) wage report to SSA for the year in which the statutory back pay was paid to the employee.

- 1) Employer's name, address, and employer identification number (EIN).
- 2) A signed statement citing the federal or state statute under which the payment was made. (If the statute is **not** identified, SSA will assume the payment was not under a statute and will not allocate to earlier period(s).)
- 3) The name and telephone number of a person to contact. (SSA may have further questions concerning the back pay case or the individual employee information.)
- 4) List of employees receiving the payment and the following specific information for each:
 - The tax year in which the back pay was paid and reported;
 - Employee's social security number (SSN);
 - Employee's name (as shown on his or her social security card);
 - Back pay award amount, **excluding** any amounts that are specifically designated otherwise, e.g. damages, interest, penalties, and legal fees.
 - The period(s) for which the back pay was awarded (beginning and ending dates, month and year);
 - The total amount of other wages paid (if none, indicate zero) subject to social security and/or Medicare taxes and reported in the same year as the back pay award.* **Exclude** from that total the amount of back pay included in that wage report; and
 - Show the amount that should be allocated for each reporting period.* This includes any amount to be allocated (if applicable) to the tax year in which the award payment was made. (If the employer does not give SSA specific amounts to allocate, SSA will allocate

the amount by dividing the amount of the back pay award by the number of months or years covered by the award.)

Questions

If you have questions concerning back pay under a statute, contact your local social security office.

Exception: If you are a state or local government employer covered by an agreement under Section 218 of the Social Security Act and have a question about back pay under a statute when the award was **paid to an employee before January 1, 1987**, contact your state Social Security Administrator's office. That office can contact the SSA, Division of Coverage, at the address above, if further information is needed.

Format for Report to SSA

Most of the information SSA needs to properly credit back pay under a statute should be transmitted to SSA in the format shown below. In a cover letter, include the following information:

- 1) Name and address of employer,
- 2) Statute under which the back pay was paid,
- 3) Name and telephone number of employer contact, and
- 4) Signature of reporting official.

***Note:** For periods before January 1, 1978 (before January 1, 1981, for state and local government employers covered by a section 218 agreement), show the wage amounts by calendar quarters, i.e., quarters ending March 31, June 30, September 30 and December 31. For **all** tax years, the social security and/or Medicare Qualified Government Employment (MQGE) wages (where applicable) must be shown and identified separately. (MQGE is applicable to federal employees beginning with 1983, and for certain state and local government employees beginning in 1986.) For tax years 1991 and later, the social security and Medicare wages must be listed separately.

Format for Report (Under Covering Letter) to Request SSA to Allocate Back Pay Under a Statute Wages

Employer's EIN: xx-xxxxxxx

Tax Year In Which Award Payment Was Paid: 1993

(1) SSN AND EE NAME	(2) AWARD AMOUNT AND PERIOD(S)	(3) OTHER SOC. SEC./MED. WAGES PAID IN AWARD YEAR		(4) ALLOCATION		
		SOC. SEC.	MED./MQGE	YEAR	SOC. SEC.	MED./MQGE
xxx-xx-xxxx HELEN T. SMITH	100,000.00 1/90-12/93	40,000.00	40,000.00	1990	20,000.00	
				1991	25,000.00	25,000.00
				1992	27,000.00	27,000.00
				1993	28,000.00	28,000.00
xxx-xx-xxxx SAM W. EVANS	30,000.00 7/89-12/91	0.00	0.00	1989		6,000.00
				1990		12,000.00
				1991		12,000.00
xxx-xx-xxxx ROLAND S. ADAMS	15,000.00 7/80-12/81	0.00	0.00	9/80	3,500.00	
				12/80	3,500.00	
				1981	8,000.00	

(Explanation of examples:)

Helen T. Smith--The back pay award, excluding interest, was \$100,000--for the periods 1/90-12/93. In 1993 this employee was also paid \$40,000 in other wages. (Her W-2 for 1993 reported \$57,600 for Social Security and \$135,000 for Medicare. The SSA allocation will result in posted wages of \$57,600 for Social Security and \$68,000 for Medicare for 1993.)

Sam W. Evans--The back pay award was \$30,000 for the periods 7/89-12/91. This employee was hired in 1989 and was subject to MQGE only. He was no longer employed by this governmental employer in 1993. (His W-2 for 1993 reported \$30,000 for Social Security and \$30,000 for Medicare. After the SSA allocation, he will not have any posted wages for 1993.)

Roland S. Adams--The back pay award was \$15,000 for the periods 7/80-12/81. He was no longer employed by this State and local government (Section 218) employer in 1993. (His W-2 for 1993 reported \$15,000 for Social Security and \$15,000 for Medicare; after the SSA allocation, he will not have any posted wages for 1993.)

NOTE:

IN COLUMN 2: Exclude amounts specifically designated as damages, penalties, etc.

IN COLUMN 3: Exclude the amount of back pay, if any, included in that amount.

IN COLUMNS 3 AND 4: For periods before January 1, 1978, (and for State and local government (Section 218) employers before January 1, 1981), show the wage amounts by calendar quarters. The Social Security and/or Medicare Qualified Government Employment (MQGE) wages (where applicable) must be shown separately **FOR ALL YEARS**. (Wages subject **ONLY** to MQGE would be shown in the Medicare/MQGE column; no wages would be shown in the Soc. Sec. column.) For tax years 1991 and later, the Social Security and Medicare wages must be listed separately.