

PAY FOR TIME LOST



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▣ Pay for time lost

▣ Recent Supreme Court case

What is pay for time lost?

- A type of creditable compensation
- Payment made by an employer to an employee
- Made for an identifiable period of time in past or future
- Directly related to the claimed injury or event
- Employment relationship

What is included in pay for time lost?

- Pay for time lost = A payment to an employee for a period during which the employee was absent from the active service of the employer.
- Includes:
 - Injury settlements/judgments
 - Dismissal allowances
 - Guaranteed wages
 - Displacement allowances paid for loss of earnings after employee given different job
 - Reinstatement awards including back pay
 - RRB regulation 20 C.F.R. § 211.3

What is the legal basis for pay for time lost?

- Statutory
 - Railroad Retirement Act (RRA)
 - Railroad Unemployment Insurance Act (RUIA)
- RRB Regulations

Railroad Retirement Act statutory language

The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers, or as an employee representative, **including remuneration paid for time lost as an employee, but remuneration paid for time lost shall be deemed earned in the month in which such time is lost.** A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made.

45 U.S.C. § 231(h)(1) (emphasis added)

RRB regulations

- Including: Any month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service....
- 20 CFR § 210.5(d)
- Similar RUIA regulations, 20 CFR § 322.6

Does pay for time lost help employees?

- Additional creditable compensation and service months
- Can qualify employee for occupational disability, age and service annuity
- Can help employee maintain a “current connection”
- However, sometimes employees do not want additional service credits

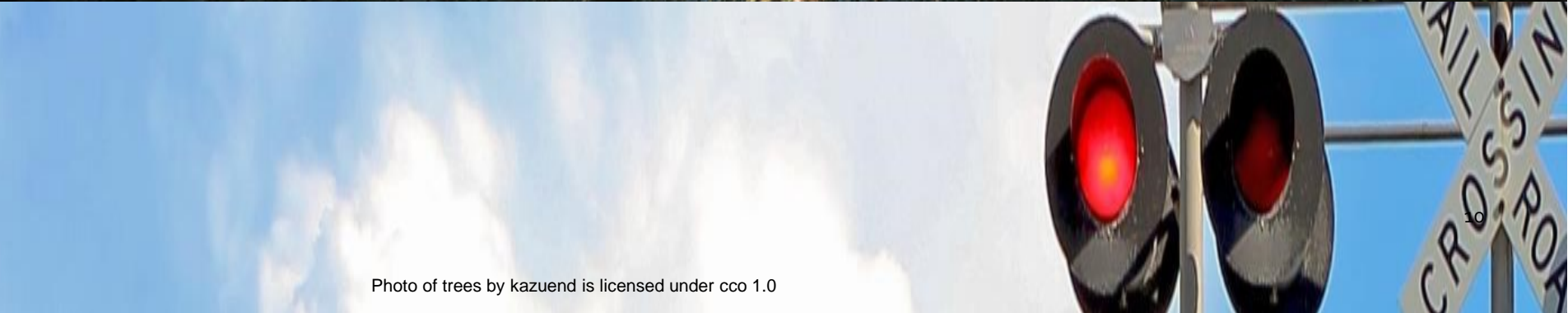


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Typical pay for time lost scenario

- Injured employee
- Federal Employers Liability Act (FELA) lawsuit
- \$\$\$\$\$\$

Effective structuring of pay for time lost settlements

- Payment must be made with respect to an identifiable period of time
- employment relationship for the months in question
- An employee off work due to a disability is still considered employed

Settlements (cont.)

- Employment relationship ends if the employee resigns (relinquishes rights)
- Or employer terminates the employee
- Filing for an RRB age and service annuity relinquishes rights of employment

Settlements (cont.)

- To receive creditable service months from pay for time lost, lost months of service must directly relate to the claimed injury
 - cannot add in past unrelated lost months
- However, months need not be consecutive as long they relate to injury

Settlements (cont.)

- Months may extend into the future (beyond the payment date of the judgment or settlement) depending on circumstances
- service credit cannot be received for future pay for lost time until time period has actually passed

How to allocate settlement amounts

- If pay for time lost is allocated to the months in which time was actually lost, RRB will accept the parties' allocation if the monthly rate is at least 10 times the employee's daily rate (unless a different allocation made by a court)

20 CFR § 211.3(b)

- Example: Employee has \$200 daily pay rate, multiply by 10 days, each month's allocation should be at least \$2,000 per month

Ensuring proper service and compensation credit for pay for time lost settlements

- Employer can (but does not have to) call the RRB in advance to review draft settlement
- Get help from RRB's Quality Reporting Service Center; QRSC phone 312-751-4992; E-mail: QRSC@rrb.gov
- RRB will allow amended compensation reports after settlement if both employer and employee agree

How is pay for time lost allocated when there is a court ordered judgment?

If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost.

45 U.S.C. § 231(h)(2)

- Similar language in Railroad Unemployment Insurance Act 45 U.S.C. § 351(i)

Judgments (cont.)

- General Verdict
 - If no specific allocation for lost time in the court judgment, then RRB considers whole amount pay for time lost if original claim included time lost
 - RRB will review court filings, pleadings, jury instructions to determine if claim included lost time

Judgments (cont.)

- Specific Verdict
 - If allocation of certain amount to lost time and remainder to other damages, then only amount allocated to lost time is considered pay for time lost
 - If entire allocation is for specific items besides lost time, then none of the amount is pay for time lost

Judgments (cont.)

- RRB presumes that pay for time lost ceases upon settlement date or date of verdict/judgment unless otherwise specified by the parties
- Unless a judgment/verdict specifies an amount and months into the future and indicates that the employment relationship will continue, payment of the judgment/verdict may not result in pay for time lost into the future

Judgments (cont.)

- Amount of compensation for each lost month depends on whether allocation was specifically made by court
- RRB will accept lower monthly compensation amount as creditable if court ordered

How to report pay for time lost

- **1)** Determine whether pay for time lost might apply
- **2)** If so, determine whether any portion of the amount is allocated to eligible months and how many months
- See Pay For Time Lost Worksheet (for employer's use only- does not need to be submitted to RRB)

https://rrb.gov/index.php/RERI_Appendix_II_Pay_for_Time_Lost_Worksheet

Reporting (cont.)

- 3) For settlements - ensure that at least 10 times the employee's daily pay rate in effect on the first day to which pay for time lost payments relate is allocated for each month
- 4) For court judgments, if no specific allocation, then year's annual earnings maximum amount divided by 12 is used for compensation until total amount is exhausted or pay for time lost period is completed

Reporting (cont.)

- 5) Ensure that proper Report of Creditable Compensation Adjustments BA-4 is filed with RRB
- Assistance on determining proper reporting can be sought through the RRB's Quality Reporting Service Center; QRSC phone 312-751-4992
- E-mail: QRSC@rrb.gov

Warning!



Pay for time lost and unemployment or sickness payments

- An employee cannot receive an annuity for any month he also receives compensation. 45 U.S.C. § 231a(e)
- Employee also cannot receive unemployment or sickness benefits while receiving compensation. 45 U.S.C. § 351(k)
- If a payment is made for time lost which covers a period for which unemployment or sickness benefits under the RUIA were previously paid, an overpayment is established and reimbursement is due the RRB from the employee.

45 U.S.C. § 352(f)

Unemployment or sickness payments (cont.)


- If the payment by the railroad includes an amount specifically designated as other than pay for time lost (e.g. for medical expenses), an RRB 12(o) lien may be established in favor of RRB if sickness benefits were paid for the same injury. 45 U.S.C. § 362(o)
- Check with RRB's Sickness and Unemployment Benefits Section (SUBS); Phone:(312) 751-4820
- E-mail:SUBS@rrb.gov

Pay for time lost and tax issues

- Ensure that proper RRTA payroll taxes* (Tier 1 and Tier 2) are withheld up to yearly maximums for calendar year in which payment is made
- Tax Rates are calculated based on the year the payment was made, not on the year the months of service were credited to the employee

Tax issues (cont.)

- Employer is responsible for remitting RRTA taxes* whether employer or employee is actually responsible as part of settlement
- Employer must pay applicable RUIA contributions for each affected year
 - Must contact RRB to find out applicable RUIA contribution rate
 - Check with RRB's Sickness and Unemployment Benefits Section (SUBS); Phone:(312) 751-4820
 - E-mail:SUBS@rrb.gov

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- Recent Supreme Court case involving the Railroad Retirement Tax Act and pay for time lost

BNSF Railway Co. v. Loos, U.S. Supreme Court

- Lower court: Michael Loos v. BNSF Railway Co., District Court of Minnesota
- 8th Circuit Court of Appeals and Supreme Court: BNSF Railway Co. v. Loos
- 1/23/2018 – *BNSF files Petition for a Writ of Certiorari* with the U.S. Supreme Court
- 05/14/2018- Petition granted for October term
- Multiple lower courts have disagreed on the issue

Main issue in BNSF v. Loos

- Issue is BNSF's obligation to withhold and pay the IRS the plaintiff's share of Railroad Retirement Tax Act payroll taxes on Loos' wage loss award
- Question is: Does RRTA include pay for time lost within the definition of "compensation"
- RRTA was amended in 1975 and 1983 to delete all language regarding pay for time lost

BNSF v. Loos (cont.)

- IRS regulations still include language stating pay for time lost is compensation
- Pay for time lost language was left in the RRA's definition of compensation.
- Additionally, personal injury awards are not taxable under FICA



Questions?

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THANK YOU!