

PAY FOR TIME LOST



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☐ Pay for time lost

☐ Recent Supreme Court case

What is pay for time lost?

- Pay for time lost is...
- A payment to an employee for a period during which the employee was absent from the active service of the employer.

What is included in pay for time lost?

- Includes:
 - Injury settlements/judgments
 - Dismissal allowances
 - Guaranteed wages
 - Displacement allowances (paid for loss of earnings after employee given lower paying job)
 - Reinstatement awards including back pay

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.

Regulations

- RRA regulation
- 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....

Does pay for time lost benefit employees?

Pros:

- Additional creditable compensation and service months
- Can qualify employee for occupational disability or age and service annuity
- Can help employee maintain a “current connection”

Con: ?

What is a “current connection?”

- a "current connection with the railroad industry" is one of the eligibility requirements for both the occupational disability and supplemental annuities.
- also a factor in determining whether the RRB or the Social Security Administration pays monthly benefits to survivors of a railroad employee.

Current Connection cont.

- To meet the current connection requirement, an employee must generally have been credited with railroad service in at least 12 months of the 30 months immediately preceding the month his or her railroad retirement annuity begins.
- Once a current connection is established at the time the railroad retirement annuity begins, an employee never loses it, no matter what kind of work is performed after.

How does an employee receive pay for time lost?
A typical day....





Typical pay for time lost scenario

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

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 for purposes of relationship

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 unrelated lost months prior to injury
- 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

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
- Employer can obtain help from RRB's Quality Reporting Service Center; QRSC phone 312-751-4992; E-mail: QRSC@rrb.gov, Fax: (312) 751-7123

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.

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

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

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 (below amount required by regulation) 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
- Can use 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

**Rail Employer Reporting Instructions
Appendix II: Pay for Time Lost Worksheet**

Section 1: Identifying Information

Employee's Name: _____ SSN: _____

Section 2: Service Month Allocation

The allocation must relate to the actual period of absence from service due to the injury.

A. Date of Injury: _____ B. Reported Service Months to Date: _____

(Exclude Deemed Service Months in or after the year of Injury)

C. Service Months needed to attain: 120 _____ 240 _____ 360 _____

D. Service Month Allocation:

<u>Year</u>	<u>Allocated Months</u>	<u>Total</u>
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____
_____	J F M A M J J A S O N D	_____

E. Total Allocated Service Months: _____

F. Service Months to Date: _____ + _____
(2B)

G. Projected Total Service Months: = _____

Section 3: Minimum Creditable Compensation Calculation

The monthly compensation allocation must be at least ten times the employee's daily pay rate in effect on the first day to which Pay for Time Lost payments relate.

A. Employee's Daily Pay Rate: _____

B. Minimum Monthly Compensation:

Employee Daily Pay Rate _____ x 10 = _____
(3A)

C. Total Allocated Compensation:

Minimum Monthly Compensation _____ x Total Allocated Service Months _____ = _____
(3B) (2E)

Section 4: Railroad Retirement Tax Act Calculation

Pay for Time Lost compensation is subject to the Tier I, Tier II and Medicare tax rates in effect when the payment is made. Annual maximum earnings bases apply to Tier I and Tier II taxes.

Employer Tax Calculation:

Tier I Taxable Compensation _____ x _____ % = _____ Tier I Tax
 Medicare Taxable Compensation _____ x _____ % = _____ Medicare Tax
 Tier II Taxable Compensation _____ x _____ % = _____ Tier I Tax
 Total Employer Tax: _____

Employee Tax Calculation:

Tier I Taxable Compensation _____ x _____ % = _____ Tier I Tax
 Medicare Taxable Compensation _____ x _____ % = _____ Medicare Tax
 Tier II Taxable Compensation _____ x _____ % = _____ Tier I Tax
 Total Employee Tax _____

Section 5: Railroad Unemployment Insurance Act Employer Contributions

RUIA contributions are calculated using the rates and monthly limits in effect during the months the Pay for Time Lost payments relate. RUIA creditable compensation is calculated by multiplying the service months allocated to the year by the lesser of the applicable RUIA monthly maximum or the employee's allocated monthly compensation.

<u>Year</u>	<u>RUIA Creditable Compensation</u>	<u>Contribution Rate</u>	<u>RUIA Contribution</u>
_____	_____	X _____	= _____
_____	_____	X _____	= _____
_____	_____	X _____	= _____
_____	_____	X _____	= _____
_____	_____	X _____	= _____
_____	_____	X _____	= _____
Total Employer RUIA Contribution			_____

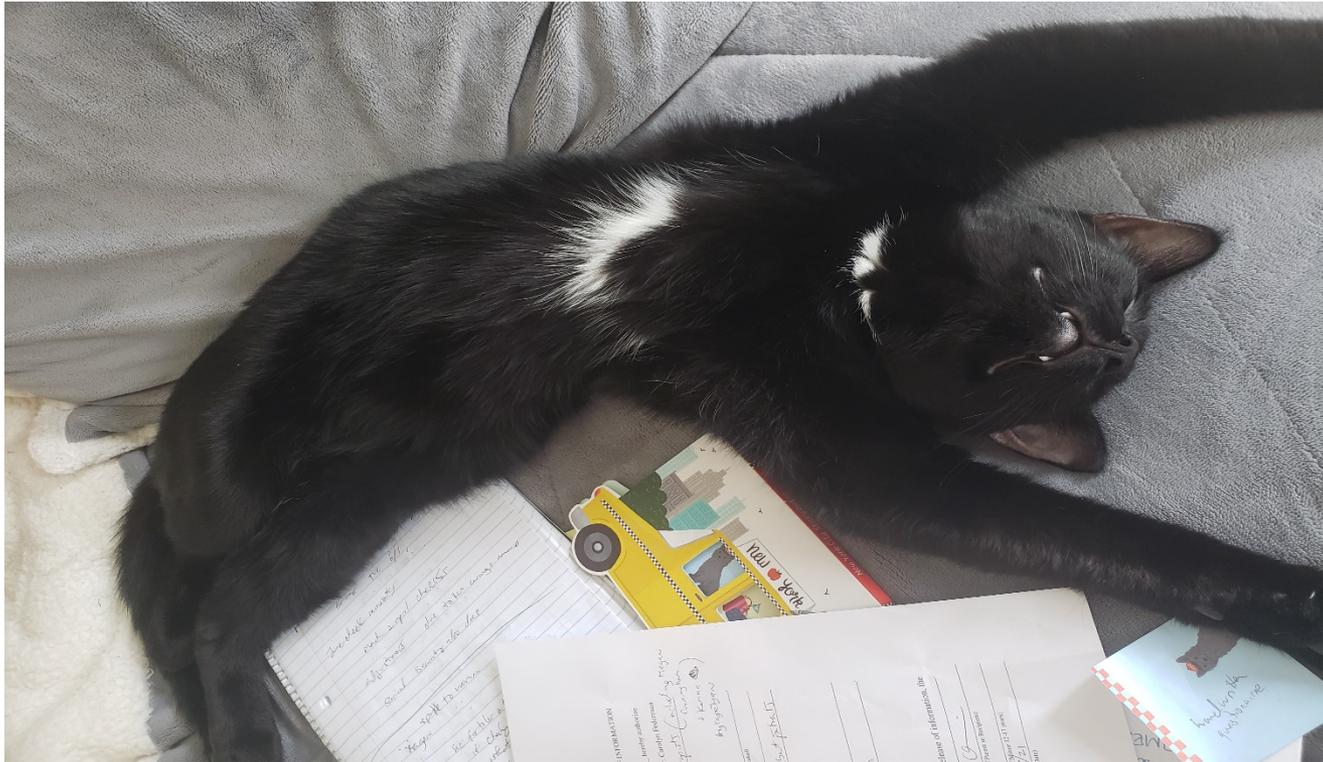
Reporting (cont.)

- 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
- 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 with reporting can be sought through the RRB's Quality Reporting Service Center; QRSC phone 312-751-4992
- E-mail: QRSC@rrb.gov, Fax: (312) 751-7123

Pop Quiz!



Pay for time lost and unemployment or sickness payments

- Employee cannot receive unemployment or sickness benefits while receiving compensation.
- What happens if employee receives time lost payments for time period when s/he previously received unemployment or sickness benefits?

Unemployment or sickness payments (cont.)

- RRB 12(o) lien – what is this?
- How to find out information about 12(o) lien?
- Fax or electronically submit forms to RRB's Sickness and Unemployment Benefits Section (SUBS):
- Phone: (312) 751-4820
- E-mail: SUBS@rrb.gov
- Fax: (312) 751-7185

Unemployment or sickness payments (cont.)

- On RRB's website:
 - Can submit the following forms to SUBS:
 - Form ID3S (12(o) (lien amount request)
 - Form ID3U (unemployment insurance amount request)

Pay for time lost and tax issues



- Important!!
- 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
- Employer is responsible for remitting RRTA taxes even if employee is responsible as part of settlement

Tax issues (cont.)

- ALSO....



- Employer must pay applicable RUIA contributions for each affected year
 - Must contact RRB to find out applicable RUIA contribution rate for the proper year
 - Check with RRB's Quality Reporting Service Center; QRSC phone 312-751-4992
 - E-mail: QRSC@rrb.gov, Fax: (312) 751-7123

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- Recent Supreme Court case involving the Railroad Retirement Tax Act and Pay for Time Lost

BNSF Railway v. Loos

- **Lower court**, *Loos v. BNSF Railway*, 2015 U.S. Dist. LEXIS 84663 (D. Minn. June 30, 2015) and *Loos v. BNSF Railway*, 2015 U.S. Dist. LEXIS 167603 (D. Minn. Dec. 15, 2015)
- **Court of Appeals**: *Loos v. BNSF Railway*, 865 F.3d 1106 (8th Cir. 2017)
- **Supreme Court**: *BNSF Railway v. Loos*, 139 S. Ct. 893 (2019)
- (Remanded) *Loos v. BNSF Railway*, 920 F.3d 1218 (8th Cir. 2019)

BNSF Railway v. Loos

- Issue: BNSF Railway's obligation to withhold and pay the IRS Mr. Loos' share of Railroad Retirement Tax Act (RRTA) payroll taxes on Loos' wage loss award.
- Question: 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 Railway v. Loos (cont.)

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

BNSF Railway v. Loos (cont.)

- On March 4, 2019, the United States Supreme Court issued a ruling holding for BNSF and against Loos.
- Court held that pay for time lost in an employer-employee context is taxable compensation under the Railroad Retirement Tax Act.



Questions?

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THANK YOU!