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Law Project

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Recovery of Unpaid Wages for Undocumented Workers Tax Reporting and Payment Options

Undocumented workers and their advocates continue to win back-pay awards for unpaid minimum wages and overtime and other monetary remedies from employers. This is because a worker's immigration status and/or lack of a Social Security Number (SSN) do not relieve employers' obligation to pay workers for all work performed.

When workers succeed in reaching a settlement for unpaid wages or get a court or agency order requiring employers to pay them, both employees and employers have tax reporting and payment requirements. Increasingly, employers are attempting to use these tax reporting and payment obligations to delay or in some cases avoid altogether paying monies owed to workers. Ironically, these tactics are often used against undocumented workers even when employers did not withhold or report taxes for the workers when they were employed. Such tactics should not succeed.

Employers' Tax Obligations in Settlements

Employers must report to the IRS all payments to employees and former employees, withhold FICA and income taxes and pay the employer portion of FICA and FUTA on all wages paid.¹ In a typical agreement to pay unpaid wages and other damages, monies owed are allocated between wages and non-wage income (including liquidated or punitive or other damages). In simple cases, employers issue a check to the worker, along with two IRS Forms: a 1099 MISC Form with the non-wage income listed and no taxes withheld, and a W-2 Form with the wage income and appropriate amounts withheld.

If the workers to whom money is owed have not provided the employer with a Social Security Number (SSN) or have provided an SSN that the employer believes is false, the employer may try to delay or stop payment of the agreed-upon funds until the workers provide it with appropriate tax reporting numbers.

Workers' Tax Reporting Numbers

If the employer required the employee to fill out an IRS Form I-9 upon hire, the worker should simply tell the employer to use the number provided on the I-9. If the employer refuses, workers can offer to provide the employer with an IRS Form W-9.

Workers should use an IRS Form W-9, at <http://www.irs.gov/pub/irs-pdf/fw9.pdf> to provide the paying employer with the tax reporting number the worker wishes the employer to use when it issues the IRS Forms 1099 MISC and W-2. The W-9, "Request for Taxpayer Identification Number and Certification," permits any person, including "resident aliens" as broadly defined under the tax laws, to provide a taxpayer identification number to an employer required to report payments to the IRS. Workers can put their SSN or their individual taxpayer identification number (ITIN) in the taxpayer identification number box in Part I of the form.

Practice Tip: If a worker does not have a SSN or an ITIN, he can put "applied for" in the space provided for the taxpayer number.

The instructions on the Form W-9 clearly state on page three: "If you are asked to complete Form W-9 but do not have a TIN, write "Applied For" in the space for the TIN, sign and date the form, and give it to the requester." The worker then has 60 days to get an ITIN and provide it to the requestor. For more information about ITINs and how to apply for one, see <http://www.nelp.org/document.cfm?documentID=584>

There is no reason for the employer to delay payment of the settlement amount once it has a completed W-9 Form.

The last step in filling out the Form W-9 is to certify, under penalty of perjury, that the number provided on the form is correct. But, the W-9 instructions clearly state that workers who are not receiving interest and dividends do not need to sign the form. This means that while they are required to provide a correct TIN (either an SSN or an ITIN, or note that you are applying for an ITIN), workers receiving only unpaid wages and other damages may use the Form W-9 without signing the certification.