



Top Employment Lawyer Is a “Fan of SUB-Pay Plans”

[William Hays Weissman](#) is an employment attorney and a shareholder at [Littler Mendelson P.C.](#), the largest global labor and employment law firm. An attorney with both an M.B.A. and Master of Laws (LL.M.) in Taxation, he specializes in employment taxes and counsels clients on the tax implications of various employer-provided benefits.

William is also a noted advocate of an alternative severance program known as a Supplemental Unemployment Benefit (“SUB-Pay”) Plan. Recently, Total Management Solutions asked William why he recommends SUB-Pay Plans to certain clients.

TMS: What exactly is SUB-Pay?

WHW: SUB-Pay is a form of severance paid to employees that are terminated as a result of a plant closure, mass layoff or similar event. Benefits are tied to the receipt of state unemployment insurance benefits, and allow the employee to receive 100 percent of their prior wages or salary. SUB-pay can be a stand-alone severance benefit or combined with other kinds of severance benefits. It is often funded by setting up a trust, although there are various ways to fund SUB-Pay.

TMS: What is your professional assessment of SUB-Pay Plans?

WHW: SUB-Pay Plans are a strategic legal tax solution for companies that are planning future downsizings due to acquisitions, restructurings, seasonal employment or economic conditions.

SUB-Pay Plans allow companies to supplement a portion of the cost of their severance plans by amounts payable under the receipt of their separated employees’ receipt of state unemployment insurance (“UI”) benefits. SUB-Pay Plans can save companies 7.65%-45% or more in severance costs, and the payments are paid on a periodic basis reducing the cash flow impact to the company.

TMS: What advantages do SUB-Pay Plans offer over traditional severance plans?

WHW: Traditional severance plans typically do not provide tax advantages. In addition, lump-sum severance payments hit a company’s balance sheet and cash reserves immediately and may impose an administrative burden. In contrast, a SUB-Pay Plan is a better overall tax strategy because it reduces severance costs and provides more benefits to laid-off workers due to a FICA tax exemption. And, once a SUB-Pay Plan is established, it can continue to be used indefinitely for any involuntary staff reductions.

The separated employees benefit as well. They receive 7.65% more net income and can receive up to 100% of their pre-layoff wage for the duration of their separation plan. In all, SUB-Pay Plans are a win-win for both the employer and employee.



TMS: In the landmark payroll tax case *United States v. Quality Stores, Inc.*, the U.S. Supreme Court ruled that severance payments employers made to separated employees were “wages” and were taxable under FICA. What impact did the *Quality Stores* case have on SUB-Pay Plans?

WHW: It is important to note that *Quality Stores* addressed garden variety lump sum severance, not SUB-Pay. The Court held that the severance at issue was taxable as wages, deferring to the IRS' interpretation of tax law, consistent with several other recent U.S. Supreme Court decisions. However, the Court also noted that SUB-Pay Plans that were compliant with IRS Revenue Ruling 90-72 remain valid, and as such are still exempt from both FICA taxes and federal and state unemployment insurance taxes. Unfortunately, in most of the news reports covering the case, the value of SUB-Pay Plans was overshadowed by the more than \$1 billion in FICA tax protective refund claims filed by companies across the country that were subsequently not paid as a result of the decision because they were actually lump sum severance payments and not SUB-Pay.

TMS: What legal issues should companies considering SUB-Pay be aware of?

WHW: A SUB-Pay Plan must comply with various IRS Revenue Rulings regarding the funding of the plans and timing of payments, among other considerations. There are also state law requirements, which may differ from the IRS' requirements and may need to be approved by the state.

SUB-Pay Plans can sometimes be complex in nature, but firms such as TMS are experts in developing and administering SUB-Pay Plans and can assist companies with plan design, state compliance and approvals, implementation and ongoing administration.

TMS: Why aren't SUB-Pay Plans a household name?

WHW: I think the philosophy around corporate lay-offs has changed since SUB-Pay Plans were popular several decades ago. SUB-Pay was developed in the 1950s and 1960s as a method for large manufacturers, such as the auto companies, to provide a financial bridge for separated employees until they were reemployed or found new employment. With the era of corporate reengineering in the 1990s, companies were less interested in creating a bridge for employees. The goal was to sever ties cleanly and quickly. As a result, the lump sum severance became standard and SUB-Pay Plans fell out of favor. Today, SUB-Pay Plans are an underutilized corporate tax strategy, but they are still an excellent vehicle to help former employees transition to new employment while receiving 100% of their pre-layoff wage plus a tax savings.

TMS: When do you recommend SUB-Pay Plans to clients?

WHW: I'm a big fan of SUB-Pay Plans, so I often suggest that my clients consider them when facing layoffs. SUB-Pay Plans are particularly beneficial to companies planning future downsizings due to acquisitions, restructurings, seasonal employment or economic conditions. Also, companies who may incur significant FICA taxation on severance payments should consider a SUB-Pay Plan.



About Total Management Solutions

TMS is a trusted advisor to Fortune 1000 and mid-sized US companies, helping them change, manage and administrate their corporate severance plans. Through our SUB-Pay Plans we help companies reduce the high cost, stress and burden associated with implementing employee severance plans resulting from a merger, acquisition, business realignment or economic downturn. With a SUB-Pay Plan, our clients typically save 45% or more of traditional severance costs, while providing more separation benefits to laid-off employees.

With over 25 years of experience, TMS is the pioneer and only company solely dedicated to the design, implementation and administration of SUB-Pay Plans. Each SUB-Pay Plan is customized to meet your company's financial and cultural requirements and is supported by a management team of experts in SUB-Pay Plans, sophisticated technology and unparalleled customer service. Once the SUB-Pay Plan is designed and implemented, TMS manages the day-to-day aspects of the plan administration for you, while our personal service provides displaced employees with full support services from our in-house Client Service Support Center. To learn more, please visit www.subpay.com.