

Appendix C

Additional Guidance for Determining Medical Removal Benefits

Citations for not providing medical removal benefits shall not identify the employee other than by job title or department unless, due the size of the establishment, that would identify the employee. Any cost that will continue to accrue until payment, such as back wages, insurance premiums, and the like should be stated as formulas—that is, amounts per unit of time, so that the proper amount to be paid the complainant is calculable as of the date of payment. For example, “The employer did not pay the surgical technician’s regular rate of pay in the amount of \$15.90 per hour, for 40 hours per week, from July 7, 2021, through the date of payment, less the customary deductions when the employee was working remotely due to COVID-19 exposure.”

In order to determine the employee’s regular rate of pay, the CSHO should request copies of the employee’s payroll records and prior year’s W-2 form from the employer and copies of pay stubs and any other relevant documentation from the employee. (The employer and the employee may redact the employee’s social security number from the copied document and if they do not, the CSHO shall keep the record confidential unless it is needed for court.) It is important to realize that circumstances have changed many employees’ incomes since the pandemic began and the CSHO needs to take extra care to determine current wages. Employees with similar job titles and seniority (if possible) should be interviewed regarding their wages to determine actual current income.

CSHOs should cite 29 CFR § 1910.502(1)(5)(ii) where the employer has failed to provide medical removal benefits. The CSHO may consult with a whistleblower protection investigator if needed to help determine how to calculate the amount owed by the employer. If the employee would have received a bonus during this time period or a medical plan, this would be factored into the regular rate of pay. Punitive damages are not to be assessed as part of this section but may fall under Section 11(c). If the employee would have left the job for any other reason than for medical removal under this section, then the counting period for the regular rate of pay will stop at the day of separation.

If the employee experienced adverse action or threat of adverse action as a result of medical removal, then a referral should be made to the Whistleblower Protection Program.