

Avoiding the Employer Penalty

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Published by Chicago Lawyer (October 2008)

Remarks from the Author

Like you, for the last eight years I benefited from reading my partner Joe DuCanto's "All in the Family" articles. I am honored to carry on the tradition and high standards of excellence Joe established. I plan to work hard and have fun writing this column. I hope you enjoy it. Celia

How to Help Your Client Avoid A Penalty For Failing to Comply With A Notice of Withholding for Child Support

The importance of child support cannot be disputed, and income withholding is one of the most effective ways we can enforce it. The Illinois Income Withholding for Support Act can be very profitable for child support recipients but terribly unforgiving to unwary employers of child support obligors. Take, for example, the employer who withheld child support of \$82 per week from its employee but failed to pay it over in a timely fashion and was penalized \$1,172,100, *In re Marriage of Miller*, 227 Ill.2d 185 (Ill. 2007); or the employer who failed to withhold child support altogether and was penalized \$369,000, *In re Marriage of Gulla*, 382 Ill.App.3d 498 (2d Dist. 2008). These cases illustrate the importance of making sure clients who employ child support obligors know how to comply with notices to withhold income.

Section 35(a) of the Act (750 ILCS 28/35(a)) requires a payor (employer) who has been served with an income withholding notice to deduct the requisite amount of support and pay it over to the State Disbursement Unit within seven business days after the date the amount would have been paid or credited to the obligor. If the employer knowingly fails to withhold or pay any amount withheld within the statutory time period, it shall pay a penalty of \$100 for each day that the

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withheld amount is not paid. This can get expensive since a separate violation occurs each time and the penalty is calculated by multiplying \$100 by the aggregate number of days. *Grams v. Autozone, Inc.*, 319 Ill.App.3d 567 (3d Dist. 2001).

The failure of an employer to comply with the withholding notice on more than one occasion creates a presumption that the employer knowingly failed to pay over the amounts. This is critical because after only two missed or late payments the burden shifts to the employer to overcome the presumption that its conduct was not done knowingly. Overcoming this presumption is virtually impossible unless the employer can prove it did not receive or was not properly served with the notice of withholding or that it took all reasonable and precautionary steps to withhold and pay over the appropriate amount of child support within the statutory timeframe. Employers should not expect the obligee to come forward right away complaining that he or she did not receive the amounts withheld. The obligee knows that maintaining silence will likely trigger the presumption that the employer knowingly failed to withhold and pay over timely, which could result in substantial penalties against the employer and a substantial windfall to the obligee.

Although the penalty provision of Section 35 of the Act seems harsh (in *Miller* it mounted to more than \$1.1 million for failing to pay just \$12,382 in withholdings), harsh is exactly what the legislature intended in order to combat the crisis of delinquent child support and encourage the quick and efficient payment of child support once it has been withheld. So that your clients may avoid such penalty, counsel them in advance on how to comply with a notice of income withholding for child support.

An employer who is served with a notice shall deduct the amount designated no later than fourteen days and pay the amount withheld in seven business days. The check should be made payable to and mailed to the State Disbursement Unit, not the child support obligee directly. Some employers must use electronic funds transfer to pay all amounts withheld, and in certain situations the employer must enroll the child as a beneficiary in the health insurance plan and deduct for that as well. 750 ILCS 28/35(a). Employers are entitled to receive up to \$5 per month from employees for the inconvenience of complying with a withholding notice and may not fire or refuse to hire an employee because of it.

An employer may also have to withhold additional income for past-due child support obligations or allocate available income on a proportionate share basis if it has been served with more than one income withholding notice pertaining to the same employee. 750 ILCS 28/35(c). Employers must be careful in calculating the precise amounts to be withheld since there are limits on how much of an employee's wages can be garnered per week for family support purposes (50% or 60% of the weekly earnings, depending on the circumstances). An employer who withholds more

than is permitted by law or withholds beyond the date specified in the notice of withholding may be liable to its employee for damages; and, if he or she willfully fails to comply with a withholding notice, he or she may be subject to further penalty and personal liability. This is all in addition to any penalty the employer may owe the obligee. Now that's harsh!