

Legal Update

May 2010

WAGE GARNISHMENTS AND WAGE ASSIGNMENTS: WHAT EMPLOYERS NEED TO KNOW

By Orley Moskovits Desser

Joe has been a dedicated sales employee for the past two years. You know Joe has been struggling with debt because you have received one wage garnishment and two wage assignments against Joe in the past six months. Joe's overall performance has generally been steady, but you are getting tired of dealing with Joe's financial problems. Can you fire Joe for this reason?

The economic turmoil of the past few years has greatly impacted financial decisions made during better economic times. From car payments to alimony (and a range of other debts), individuals, like Joe, are struggling to either stay out of debt or get out of debt. When employees fail in the latter, creditors may turn to their employers for help, either through wage garnishments or wage assignments. This Legal Update describes the differences between the two and cautions employers against taking an adverse employment action based on an employee's struggle with debt.

Wage Garnishments

Creditors commonly turn to the courts for assistance in collecting debts. When a court grants the creditor's request, the court will issue a summons and written interrogatories to the employer instructing the employer to withhold a certain amount from an employee's paycheck to pay off the employee's debt. Once an employer receives such a summons and interrogatories, the employer must determine the amount of wages subject to the garnishment order and issue a check in that amount as directed by the court order.

The proper amount to be withheld is regulated by the federal Consumer Credit Protection Act ("CCPA"). State laws may also regulate the amount subject to garnishment. If the CCPA and the state law conflicts, the employer must apply the law that grants more protection to the employee.

For example, an Illinois employer needs to take into account both the CCPA and Illinois law to determine the amount that the employer may deduct from an employee's paycheck in compliance with a court-ordered wage garnishment (also known as a court-ordered wage deduction). Under the CCPA, an employer may garnish a maximum per week the lesser of either (a) 25% of the employee's disposable earnings; or (b) the amount by which the employee's disposable earnings for that week exceed 30 times the federal minimum wage in effect at the time the earnings are payable. Illinois law (found in a subsection of the Code of Civil Procedure), however, states that an employer may garnish a maximum per week the lesser of either (i) 15% of the employee's gross earnings; or (ii) the amount

FVLD®

by which the employee's disposable earnings for that week exceed 45 times the federal minimum wage or the Illinois minimum wage, whichever is greater.

An employee's "disposable earnings" means that part of an employee's earnings remaining after deducting any amounts required by law to be withheld (such as federal and state taxes and social security payments). Exceptions to the limits imposed under the CCPA and Illinois law may exist for bankruptcy court orders, child support, alimony, and certain debts due for state and federal taxes.

To determine the proper amount to withhold pursuant to a garnishment order, an Illinois employer must first calculate the maximum amount per the CCPA and the maximum per Illinois law. Whichever calculation results in the least amount deducted from the employee's paycheck is the maximum amount that the employer may deduct from the employee's paycheck. Once the amount is known, the employer must answer and return the interrogatories to the court by the deadline set in the summons. The employer should begin making deductions upon receipt of the summons.

Generally, if an employer receives multiple wage garnishment or deduction orders for the same employee, the employer will have to finish paying the first garnishment before it can begin paying the second garnishment. This is because the employer pays the maximum amount pursuant to the first order and cannot exceed the limits imposed by the CCPA or the state law by simultaneously paying another wage deduction order. If, however, the subsequent garnishment order is for child or spousal support, tax levies or student loans, that subsequent garnishment may take priority over the first wage garnishment order.

Wage Assignments

Unlike wage garnishments (where the court orders the employer to make payroll deductions), a wage assignment is a voluntary agreement between an employee and a creditor to have a portion of the employee's wages assigned to pay off a debt. Since the wage assignment is generally signed at the time the debt is incurred, the employee and creditor can avoid the time and expense associated with court-ordered garnishments.

The CCPA does not govern the amounts deducted pursuant to voluntary wage assignments; however, if the voluntarily assigned debt remains unpaid, it may result in a court-ordered garnishment governed by the CCPA. Some states regulate wage assignments by statute, while others either simply apply the state's law of contracts or prohibit voluntary wage assignments all together.

The Illinois Wage Assignment Act (the "IWAA") governs wage assignments in Illinois. Under the IWAA, Illinois employers are obligated to honor a properly served demand by a creditor for valid wage assignments. The IWAA sets very specific parameters for determining the validity of a wage assignment. For example, to be valid, the wage assignment must include the words "Wage Assignment" in bold, at the beginning of the document (not less than ¼ inch in height) and also one inch below or above the signature line. The document must also be signed by the employee in person and include specific contact information for the employee, the employer, the amount loaned, the rate



of interest, and the dates of payment. The IWAA also specifies the procedure for serving a demand on an employer. For example, one of the service requirements is that the creditor, at least 20 days before serving the demand, send to the employee, with a copy to the employer, a notice of intent to make the demand. An Illinois employer does not have to comply with a wage assignment that does not meet the specific requirements described in the statute.

As with the Illinois law governing court-ordered wage deductions, the IWAA limits the amount an employer may deduct from an employee's wages pursuant to the wage assignment. Under the IWAA, an employer may garnish a maximum per week the lesser of either (1) 15% of the employee's gross earnings, or (2) the amount by which the employee's disposable earnings for that week exceed 45 times the federal minimum wage or the Illinois minimum wage, whichever is greater. Generally, employers should honor multiple wage assignments in the order they were received; however, wage garnishments take priority over wage assignments.

Protection from Adverse Employment Decisions

While an employee's struggle with debt may adversely impact his or her job performance, the indebted employee who is subject to wage garnishments or wage assignments may be protected from an adverse employment decision. The CCPA provides that an employee may be discharged for multiple garnishments, however, state laws may afford greater protection, including restrictions on termination for such multiple garnishments. Again, the law that affords more protection to the employee-debtor will supersede the other.

An employee in Illinois, for example, who is subject to a single wage deduction cannot have his or her employment terminated based on the deduction because Illinois law prohibits employers from discharging an employee based on "any one indebtedness." Multiple garnishment on multiple debts are not protected as long as the second or successive garnishment is related to a debt that is separate and distinct from the debt that formed the basis of the first garnishment. Although the CCPA and Illinois law may not protect an employee from discharge based on multiple garnishments (deductions) on multiple debts, terminating the employee's employment may nonetheless be prohibited under fair employment laws if such termination results in a disparate impact on a protected class.

Unlike Illinois law on wage deductions, the IWAA affords greater protection to employees subject to multiple wage assignment demands. Per the IWAA, no employer may discharge or suspend an employee by reason of the fact that his or her wages have been subjected to any indebtedness, regardless of the number of wage assignments. Of course, if the adverse employment decision is based on an employee's poor performance, and not on the garnishment or assignment, the employer may terminate the employment relationship. Employers should consult with legal counsel before taking any adverse disciplinary action against an employee whose wages are subject to a wage garnishment or assignment.

Back to Joe: Terminating Joe's employment (or taking any other adverse employment action) because you are tired of "dealing" with Joe's financial woes is prohibited. You cannot discharge Joe

FVLD®

based on either the one wage garnishment or the multiple wage assignments. If, however, Joe's performance declines and you can justify terminating his employment based on poor performance, you may send Joe packing. But it is always advisable to first consult with legal counsel.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jon Vegosen 312.701.6860 jvegosen@fvldlaw.com, Glenn Rice 312.701.6895 grice@fvldlaw.com, or Orley Moskovits Desser 312.701.6873 odesser@fvld.com, or your regular FVLD contact.

FVLD®

© 2010, Funkhouser Vegosen Liebman & Dunn Ltd.
All rights reserved.