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Business and Employment Law Update

Second Quarter, 2005

PROCESSING WAGE GARNISHMENTS: AN EMPLOYER'S PERSPECTIVE
By Sallye N. Quinn

If you have employees, no doubt you've been served with a writ of garnishment for wages. Not only can writs be frustrating to employers from an accounting perspective, but the statute governing an employer's compliance with writs can be difficult for lawyers, much less non-lawyer, to understand. However, employers can suffer significant consequences for the failure to properly comply with writs, including being liable for the full amount of the judgment against the debtor-employee. Accordingly, understanding your obligation is crucial. This article sets forth an outline of how employers should respond when served with a wage writ.

How to Respond

You will be served, most likely via certified mail, return receipt requested, with a copy of the writ, three (3) stamped envelopes addressed respectively to the clerk of the court issuing the writ, the attorney for the plaintiff (or the plaintiff if plaintiff has no attorney) and the defendant, and four (4) copies of the First Answer to Writ of Garnishment for Continuing Line on Earnings ("First Answer").

Alternatively, you could be served by the sheriff or anyone qualified to act as a process server in the same manner you would be served a complaint and summons. If you are served in this manner and operate as a corporation, your registered agent is the most likely person to receive these documents.

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In this Update:

EMPLOYER UPDATE: USING CREDIT REPORTS IN HIRING DECISIONS
By Amy Robinson

While a majority of employers typically conduct their own pre-employment reference checks, many are now also opting for additional precautions such as criminal background checks and credit reports to aid in hiring decisions.

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Processing Wage Garnishments, Continued…

The writ is effective upon the date of service and the date of service is the day you should begin calendaring the following important dates:

1) Sixty (60) days after service of the writ: This is the date the writ ends. Unless there is a notation of a continuing lien, i.e. for child support, your obligations end after the 60 days expire.

2) Twenty (20) days after service of the writ: This is the date you must have completed and mailed the First Answer to the plaintiff's attorney/plaintiff, the employee and the clerk of the court.

   The First Answer sets out and directs how you must begin withholding wages, including the amount of the withholding. If nothing is due the employee at the time of completing the First Answer, the calculation is simple: zero. However, that does not relieve you of your obligation to withhold the proper amount during the remaining sixty (60) day period when amounts due the employee will likely come due.

   Continue to withhold any amounts calculated in the First Answer that come due to the employee during the sixty (60) day period. At some point towards the end of the sixty (60) day period, you will receive four (4) copies of a Second Answer to Wirt of Garnishment for Continuing Lien on Earnings ("Second Writ") along with three stamped envelopes addressed respectively to the clerk of the court issuing the writ, the attorney for the plaintiff (or the plaintiff if plaintiff has no attorney) and the defendant. You must complete and answer this Second Answer within twenty (20) days of receiving it and mail it to the plaintiff's attorney/plaintiff, clerk and employee. As such, the final date you must calendar is:

3) Twenty (20) days after receipt of the Second Answer: This is the date you must have completed mailed the Second Answer to the plaintiff's attorney/plaintiff, the employee and the clerk of the court.

What Should You Do With the Money?

Keep the money until the plaintiff's attorney or plaintiff obtains a Judgment and Order to Pay ("Judgment") against you for the total amount withheld during the sixty (60) day period. The plaintiff's attorney or plaintiff will use your response in the Second Answer to obtain this Judgment and the Judgment will order you to pay to the plaintiff's attorney, plaintiff or clerk of court the amount you've withheld. Once you receive this Judgment, pay the amount set forth in the Judgment and your obligations are satisfied. Upon receiving the payment, the plaintiff or plaintiff's attorney will send you a Satisfaction of Judgment against Garnishee ("Satisfaction"). If they fail to provide you with this Satisfaction, give him or her a call and ask when you can expect to see it.

The statute does allow for you to pay the money directly to the plaintiff's attorney or plaintiff during the sixty (60) day period. However, if you chose to pay the money directly to the plaintiff's attorney or plaintiff prior to receiving the Judgment, this does not relieve you of your obligation to provide the First Answer and Second Answer. The plaintiff or plaintiff's attorney will hold the money until the end of the sixty (60) day period and once he or she obtains the Judgment, they will disburse the money and most likely send you a Satisfaction along with the Judgment.

Default

The importance of answering the First Answer and Second Answer is set forth in the statutory provision allowing the plaintiff to obtain a default judgment against you for the full amount of the remaining amount of the judgment against the employee. The plaintiff's attorney or plaintiff is required to give you ten (10) days notice of the default judgment. In addition, once the default judgment is entered you have seven (7) days after the plaintiff's attorney or plaintiff mails you the writ to collect the default judgment to have the default judgment reduced to the actual amount of the money you were to have withheld during the sixty (60) day writ period. However, the plaintiff is entitled to attorney fees incurred in responding to your motion to reduce the judgment amount and "additional attorney's fee for other action taken because of the garnishee's failure to answer." Without a doubt, the best way to avoid paying money to the plaintiff and the hassle involved in filing pleadings with the court is to simply answer the First Answer and Second Answer and withhold as required.

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Processing Wage Garnishments, Continued…

Controversy on the Amount Owed

The plaintiff may disagree with the amount you state is to be withheld. If so, the plaintiff must file an affidavit within twenty (20) days of receiving your First Answer or Second Answer. You then have twenty (20) days to respond to the affidavit. The prevailing party on this issue is entitled to attorneys fees.

More than One Writ

What if your employee has more than one writ served at the same time? The priority of writs in that case is determined by the date of service – the first writ served has priority. Once the first writ expires, the next in line kicks in for the time period remaining on that writ. Note that payroll deductions, assignments or garnishments for purposes of child support have priority over continuing lien wage writs and you can only withhold pursuant to lien wage writs if nonexempt wages remain after deduction of amounts owing for these child support obligations.

Can You Skip the Hassle and Fire the Employee?

No. State statute prevents discharge of employees for the reason that a creditor has issued a writ, except where there have been garnishments on three or more indebtednesses within any twelve (12) month period. Note, however, that this statute does not say three (3) writs, but three (3) separate indebtednesses. In addition, an employee can be discharged for reasons not related to the writ.

If you have a more specific question or would like a citation to the specific law referenced in this article, please contact the author.

TRANSFERRING PROPERTY TO A LIMITED LIABILITY COMPANY

By: Sallye N. Quinn

A limited liability company ("LLC") is considered to be the preferred form of entity to hold real estate investments. This is mainly because of the following:

* The liability protection it gives owners. Holding title to real property in an LLC generally protects owners of the LLC from most personal liability that arises from property ownership, such as liability for mortgages, leases, environmental laws, contracts and other types of general commercial liability. Typically, a member of an LLC will only be liability up to the amount of the owner's contribution to the LLC and for a member's own torts. Key to preserving this liability protection is complying with corporate formalities, such as consents, resolutions and signing all documents in the company name.

* Tax advantages available. LLC's are a pass-through tax entities that may allow losses, which are common in the beginning of real estate investment, to flow through to the owners. In addition, upon sale of the property, the gain of the sale will not be subject to double taxation as is the case with traditional C- corporations or upon distribution of the property to its members. In addition "if the members of the LLC are individuals, the gains for certain types of investments may qualify for the preferable long term capital gain rates" according to Kathy Varner of the Bellingham CPA firm Varner System & Herndon.

* Management. The management structure provided for LLC's is very flexible. All members of an LLC can participate in management of the business, if they so chose. Alternatively, the LLC can be managed by a manager who does not need to be a member of the LLC.

* Investment. The flexible structure of and LLC makes it ideal for accommodating property co-ownership and facilities outside investment.

Because of the benefits of holding title to real property in an LLC, many clients chose to transfer property they already own into an LLC, in addition to establishing an LLC for the purposes of new acquisitions. Although the LLC entity itself is simple to establish, there are a number of considerations clients need to consider before transferring property to an LLC.

First, the transfer of the property can trigger the "due on sale" clause of any existing mortgage on the property. Most deeds of trust contain provisions stating that any transfer of the property will cause the debt secured by the deed of trust to be due on the transfer. To avoid this, it is essential to contact your lender to obtain approval of the transfer to the LLC. In my experience, most lenders have a process for approving the transfer and often times have no concerns with the transfer as long as the members of the LLC are the same as the debtors of

Transferring Property, Continued…

the loan. However, most lenders will not release you personally from the debt and often charge a fee for approving the transfer to the LLC.

Second, the transfer can trigger no-assignment provisions of any existing leases. Because the owner of the property is the landlord under any lease, it's unlikely that there is any restriction on assigning the lease to the new owner, i.e. the LLC. However, it's worth a quick review of any applicable leases just to make sure the transfer does not trigger a default.

Third, the transfer may make title insurance or other types of insurance, such as commercial general liability policies, ineffective. This is typically solved easily by having the LLC added as an "additional insured" to the policy. In the instance of title insurance, many insurers will do this for minimal or no cost.

Last, the transfer could, but in most cases does not, create excise tax liability. Generally, the members of the LLC are the same as the titled owners and are exempt from any excise tax on liability. However, if you plan on transferring the property to an LLC with new members, it is worth a quick review of the applicable rules to ensure that no excise tax liability will attach.

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Using Credit Reports in Hiring Decisions, continued…

For example, credit reports can be particularly useful if your business requires that employees deal with large volumes of cash or have relatively unfettered access to customer financial accounts, and you need to feel confident about your employees' ability to handle that discretion appropriately.

If your business is considering implementing a pre-employment credit check for applicants, here are a few basic rules to keep in mind:

1. Be sure that your interest in the applicant's credit history is actually related to the position that you are seeking to fill. For example, if you are hiring for a teller or customer representative with a bank or credit union, obtaining a credit report seems reasonable. However, if you are hiring a mechanic for your repair shop, a credit report may be entirely unnecessary.
2. Notify applicants of that you will obtain their credit report. Before you request or obtain an applicant's credit report, you need to provide them with written notice that you intend to obtain the report and use the information it contains in making your hiring decision.
3. Get consent from the applicant. A potential employer is required to get an applicant's consent to obtain a credit report. 15 USC § 1681b(b)(2)(A). But here's the good news: If an applicant refuses to consent, so long as you have a reasonable basis to use that information in making a hiring decision, you can legally decline to hire them on that basis.
4. Provide certification to the credit reporting agency. In order provide an applicant's credit report, agencies will require than a potential employer supply certification that (a) the applicant was provided with written notification that the employer intends to obtain a credit report to use for employment purposes, (b) the applicant provided written consent, (c) the report will not be used illegally, and (d) the employer will abide by the Fair Credit Reporting Act's (FCRA) notification procedures before taking adverse action based on the report.
5. Provide a copy of the report to the applicant before finalizing any decision not to hire. In the event that the credit report contains negative information about an applicant that will affect your hiring decision, you must provide the applicant with a copy of the report and notify them of their rights under the FCRA before making the final decision not to hire them. Those rights are usually provided along with the report, and include (a) the right to obtain a free copy of the report, and (b) the right to dispute the accuracy or completeness of the information.
6. Bankruptcy alone does not justify a refusal to hire. Federal law prohibits private employers from discriminating against applicants because they have filed for bankruptcy, been insolvent prior to or while seeking bankruptcy, or failed to pay a debt that was discharged in bankruptcy.

Using Credit Reports in Hiring Decisions, continued…

See 11 USC § 525. This means that potential employer's may face civil liability where bankruptcy considerations were the *sole basis* for refusing to hire the individual.

While employers should exercise extreme caution when it becomes aware of an applicants bankruptcy, you may not have to entirely ignore that fact in making your hiring decision. Courts have allowed employers to consider bankruptcy along with a variety of other suitability considerations. For example, where an employer based its decision not to hire a salesperson based primarily on the applicant's negative credit record, the court refused to find the employer liable even though the fact that the applicant had filed for bankruptcy may have also factored into the final decision not to hire. *Comeaux v. Brown & Williamson Tobacco Co.* 915 F.2d 1264, 1269 (9th Cir. 1990). The court said specifically:

> In order to maintain a cause of action under section 525(b), a plaintiff must show that one of the reasons for discharge enumerated in section 525(b) provided the *sole* reason for termination. In the instant case, *even if* B & W had made its *final* employment decision after it learned of the bankruptcy, B & W told Comeaux *before* it knew of the Chapter 13 filing that it would not hire him because of his credit history. Thus, knowledge of the bankruptcy was clearly not the sole factor influencing B & W.

We hope that this discussion has provided you with information that is useful to you and your business. As always, we would be happy to answer any questions you have about your particular hiring practices.

E-MAIL POLICIES – A NECESSITY FOR EMPLOYERS

By Amy Robinson

Do you use e-mail or the internet within your company, provide email service for your employees, or otherwise allow them to access the internet while at work? If so, the importance of

Email Policies, continued…

having a formal e-mail and/or internet usage policy in place cannot be overstated. In today's high tech business world, employee use (or misuse) of e-mail and the internet can expose a company to additional liability in a variety of ways. In addition, a company involved in litigation can expect an opposing attorney to demand copies of internal emails, much as they used to demand internal memoranda.

It is particularly important to determine whether your policy addresses these important issues:

1. Your company's anti-harassment, anti-discrimination policies should extend to email and internet usage.
2. Employees should be made aware that use of the internet and company-provided email is a privilege, one that comes with no expectation of privacy.
3. Some of our employers have opted to monitor employees to discover and prevent inappropriate use of e-mail and the internet in the workplace. If you do so, your policy should include reference to those measures.
4. We also suggest that employees agree to observe copyright laws when using the internet.

Here are some examples of provisions that address the above concerns:

- *Restrictions of Internet Use. Employees may not use Company's e-mail system or internet access in any way that may be seen as insulting, disruptive, or offensive by other persons, or harmful to morale. This includes, but is not limited to: sexually explicit messages, cartoons, or jokes; unwelcome propositions or love letters; ethnic or racial slurs; or any other statements, images, or language that can be construed to be harassment or disparagement of others based on their sex, race, sexual orientation, age, national origin, disability, or religious or political beliefs.*
- *Personal Use of E-Mail. E-mail is intended to be used for official company business. Incidental and occasional personal use of e-mail is allowed, but these messages will be treated the same as other messages. Since personal messages can be accessed by company management without prior notice, employees*

should not use e-mail to transmit any messages they would not want read by a third party. In any event, e-mail is not to be used for commercial ventures, religious or personal causes, or outside organizations or other similar, nonjob-related solicitations.

[NOTE: You can express a total prohibition on personal use of email, but you must be able and willing to enforce whatever policy you adopt. Given the practical difficulties with preventing any and all personal use of e-mail, most employers opt to permit incidental personal use so long as business operations are not impacted.]

- *Violation of the Electronic Mail and Internet Usage Policy. Violation of any of the terms of this policy may include disciplinary action, up to and including termination. The measure of discipline will correspond to the gravity of the offense as weighed by its potential effect on the company and fellow employees. (Refer to Discipline Policy)*
- *Management's Right to Access Information. E-mail and internet access has been provided by the company to facilitate business communications. Although employees may have individual passwords to parts of the system, it belongs to the company and the contents of e-mail communications are accessible at all times by company management for any business purpose. The company has the right, but not the duty, to monitor any and all aspects of its computer system, including, but not limited to, monitoring sites employees visit on the Internet, reviewing material downloaded or uploaded by employees, and reviewing e-mail sent and received by employees. Employees therefore waive any right to privacy in anything they create, store, send, or receive on company owned or provided computers or via company-provided Internet access.*

These generic provisions have been prepared to address many of the common issues faced by our clients. We encourage you to seek the advice of counsel if you have any questions with regard to the effectiveness of your policy or need a policy drafted.

Contributors to this publication are Kirsten Barron, Sallye Quinn, Amy Robinson, attorneys in Brett & Daugert's Business Department. We provide business, corporate, employment and real estate legal advice to our clients.

A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

Several weeks ago, I received an urgent message from one of Brett & Daugert's very good clients – and there are many. It was a message that was hand carried by Shawn Fuller, our wonderful receptionist, who stood in front of my desk until I finished another call. I knew that someone was very concerned about something.

It turns out that my client had heard a rumor that the Bellingham City Council had met over the weekend and was preparing to adopt an emergency building moratorium on any development in excess of twenty (20) units. My client indicated he had heard the ordinance would be adopted at the City Council meeting that night. Just my kind of issue – urgent and exciting!! I started out by telling my client that it was unlikely the Council had met over the weekend due to the requirements of Washington's Open Public Meetings Act; however, I would look into it.

We were able to do some quick research on the City's authority to adopt ordinances, including emergency ordinances. We concluded that the City did not have the authority to adopt this type of ordinance in that way. But just because an entity does not have the authority to do something does not mean that it will not try.

We checked the City Council's agenda for that night on the website and no such ordinance was scheduled to be considered. Better yet, we called City employees who confirmed that there was no such item on the agenda for that night. About an hour after we received the call we were able to call the client and inform them that there would be no emergency building moratorium in the City – at least for that night.

We are here to support our clients and help them achieve their goals. This is one way we do so one which we particularly enjoy. Sometimes we are able to look at the law and the players and help our clients get information they need to keep their business on track.

As we go into the summer, we know we will hear from our clients less than usual as you are engaged in more enjoyable activities - vacations, enjoying this unbelievable beautiful place in which we live and the like. We hope you have a great summer and while we hope you do not need us, we are here if you do.