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FLORIDA WAGE ACCOUNTS

Florida Statutes Section 222.11 exempts from attachment or garnishment by a creditor 100% of the "earnings" of an individual who is "head of family" unless a person has agreed otherwise in writing. An additional requirement in order for the earnings to gain this exempt status is that the earnings must be "credited or deposited in any financial institution." If these requirements are met, the earnings will be "exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings." If an individual is not a "head of family," only 75% of the earnings will be exempt (assuming the other requirements are met). While this statutory rule appears to be rather straightforward on its face, the case law interpreting the statute has created traps for the unwary.

Definition of Head of Family. The first, and more straightforward, issue to address is the definition of "head of household." The Florida statute defines "head of family" as "any natural person who is providing more than one-half of the support for a child or other dependent." The term dependent is not defined in the statute, however, case law has held that any moral obligation to support another may be sufficient to satisfy the "head of family" requirement. Note that the courts have often required that non-related individuals live in the same home. Given this broad definition, spouses, minor and adult children, parents, and other family members for whom you provide more than 50% of their support would clearly qualify as dependants.

Definition of Earnings. The second, and less straightforward, issue to address is the definition of "earnings." The definition provided by the statute is "compensation paid or payable, in money of a sum certain, for personal services or labor whether denominated as wages, salary, commission, or bonus." Case law interpreting this definition has held that what is protected is "the fruits of someone's labor for the benefit of his family" but not "income from passive sources, such as investment income or return on capital." In short, the intent of the statute appears to have been to protect the classic "employee" who works for another to provide for his or her family.

The first exception to this rule that may not be readily apparent is that a sole practitioner cannot avail him or herself of the wage exemption despite the fact that they earn their money providing personal services. The court in making its analysis focused on whether a person has an "arms length agreement" with the employer. Since a sole practitioner or a person who owns a controlling interest in a corporation or other legal entity cannot make an "arms length agreement," they lose the protection of the wage exemption. The court stated that people who run their own businesses have control over the timing and amount of their compensation and whether the monies they receive are classified as distributions or earnings. While I feel that this conclusion is bad law as it discriminates against heads of family who

market their services directly rather than through employers, it has been upheld in several Florida court cases. Given this state of the law, there are two primary concerns that need to be addressed, both of which are listed below.

1. Ensure that Payments Meet the Definition of Earnings. Your first concern is whether or not the remuneration you are receiving are pure "earnings" within the definition of the wage exemption statute. Since earnings do not include "income from passive sources, such as investment income or return on capital," any income you receive that is akin to business profits rather than "the fruits of your labor" should be segregated and distributed to you separately. Common examples of "business profits" in the physician context are (i) profits derived from the activities of physician assistants, physical therapists, and/or other staff members, and (ii) profits akin to "technical fees" such as fees for X-Rays, Cath labs, etc. (I'll call (i) and (ii) "Non-Earnings") Therefore, if there is a technical fee component to any procedure you perform, you should account for it separately. Note that the fact that you bill on a global basis is not justification for failing to separately account for the "Non-Earnings" portion of the compensation. You may also want to establish an accounting method whereby the "Non-Earnings" portion is used to reduce overhead. Whether or not you choose to do so, in the event any Non-Earning are distributed to you, you should receive a separate check for the "Non-Earning" which should never be deposited into your wage account.

Remember that under the statute earnings are "exempt from attachment or garnishment for 6 months after the earnings are received by the financial institution if the funds can be traced and properly identified as earnings." The primary reason to segregate these distributions is that if the assets flowing to the Wage Account (i.e., the account with the financial institution referenced by the statute) are a combination of "earnings" and "non-earnings," it may be difficult to impossible to accurately "trace" the deposited funds to "earnings." If that were the case, there exists the possibility that none of the assets in the Wage Account would be exempt from creditors.

2. Ensure that Sufficient Evidence Exists to Support Employee Status. The second concern is that if you are deemed to not be an employee of the P.A. you are currently with for purposes of the Wage Exemption Statute, you will not be able to protect your earnings. While it may seem a ridiculous concern, there is case law that resulted in this outcome. In short, the court will take a totality of the circumstances approach to determine whether your relationship with the P.A. is similar to that of an employee or whether the P.A. is merely a conglomeration of separate sole practitioners. Courts consider several factors when determining whether someone is an employee for purposes of the Wage Exemption Statute. Below I have used the court's actual language in the bankruptcy case of In re Montoya, 77 BR 926, to describe these factors and what the courts typically look for.

a. Existence of an Employment Contract. The court starts by explaining the importance of having an employment agreement:

"The first factor is the existence of an employment contract itself. A contract is the best possible evidence of whether the contracting parties intended to form an employee-employer relationship or merely engage the services of an independent contractor. Ware v. Money-Plan Intern, Inc., 467 So.2d

1072 (2d DCA, Fla.1985). In this case the Debtor entered into an Employment Agreement with the P.A. which is quite comprehensive. The P.A. provides the Debtor with facilities, equipment and supplies and pays for his professional liability insurance, occupational license fees and many other expenses which would typically only be paid by an employer in an employee-employer relationship. The Employment Agreement gives the P.A. authority to establish policies and procedures to be followed in treating patients and to determine which patients the Debtor may treat. Additionally, the agreement establishes a fixed salary for the Debtor. The agreement itself is strong evidence that the parties intended to create an employee-employer relationship."

As the above language indicates, it is not only important to have an employment contract in place, but the employment contract should address certain key issues.

b. Who Furnishes Tools and Supplies. The Montoya court went on to describe the importance of having the P.A. supply the tools and supplies necessary for the employee to carry out his or her job.

"Typically, an independent contractor furnishes his/her own tools and supplies whereas an employer generally furnishes any necessary tools and supplies for employees. in this case, the P.A. is responsible for providing medical facilities, offices, equipment, utilities, supplies and drugs which are necessary for the Debtor to use in the course of his employment. Additionally, the P.A. is responsible for providing all necessary support personnel. The Debtor is not required to purchase any supplies nor employ any other personnel. Thus, the P.A.'s obligation to furnish necessary tools and supplies is further evidence that an employee-employer relationship was created."

c. Right to Control the Progress of the Employee's Work. The court then points out what it considers the most important factor in determining whether a physician will be considered an employee:

"The next factor, and perhaps the most important factor, in determining whether a person is an employee or an independent contractor is the right to control the progress of work. Typically, an employer has a right to control the progress of an employee's work . . . As evidenced by the Employment Agreement in this case, the P.A. has the exclusive authority to establish the professional policies and procedures for treating patients. Through these policies and procedures the P.A. has the right to control the means by which the Debtor may treat his patients. If the Debtor is subject to control as to the means used in treating his patients, he is an employee. . . . Additionally, the Employment Agreement gives the P.A. the right to determine what patients the Debtor may treat. The Trustee has argued that the P.A. has not actually controlled or interfered with the Debtor's treatment of the P.A. patients. However, as stated by the Florida Supreme Court in National Surety Corporation v. Windham, 74 So.2d 549 (Fla.1954) "[i]t is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and a servant." The court held that the "right to control depends upon the terms of the contract of employment." Id. at 550. In this case, the Employment Agreement granted the P.A. the right to control the work of the Debtor regardless of whether the P.A. ever chooses to exercise that right. Thus, the P.A.'s right to control is an additional indicator of the existence of an employee-employer relationship.

d. Method of Payment. Next the court addressed how the physician was compensated.

“Turning next to the method of payment, the Debtor's compensation typifies that of an employee rather than that of an independent contractor. An employee is typically paid by time, whether it be by salary or by hourly rate, whereas an independent contractor is typically paid by the job. In the instant case, the Debtor is paid a straight salary by the P.A. His salary remains constant regardless of how much money the P.A. is paid for his services or whether the P.A. incurs profits or losses. Thus, the Debtor's wages are indicative of that of an employee.”

e. Work Part of Regular Business of Employer. The final factor addressed by the court is whether the work is part of the regular business of the employer.

“In the instant case, the P.A. is a professional association comprised of physicians engaged in the practice of medicine. The P.A.'s sole enterprise is that of providing medical services. Therefore, the Debtor satisfies this test as an employee.”

Significance of the Wage Exemption. The benefits to having your wages exempt from attachment or garnishment are significant, especially given your level of compensation. First, in the event you were ever sued for malpractice, your earnings that were deposited into the wage account after the suit was anticipated or filed against you could be freely transferred to your trust, Debra’s individual name, or another exempt asset (e.g., an account titled as tenants by the entireties, a life insurance contract or annuity, etc.) without that transfer being subject to the fraudulent conveyance laws. Second, if a judgement was obtained by a would be creditor, you would be in a significantly better negotiating position since the judgement creditor would be unable to garnish your earnings. If your wages are not exempt (or if there is a serious concern that they may not be exempt) each transfer made after a potential law suit is identified may be subject to the fraudulent conveyance laws. For this reason, I would recommend not making transfers to your trust of questionably non-exempt earnings but instead using a domestic asset protection device (e.g., an account titled as tenants by the entireties, a life insurance contract or annuity, improving or buying a bigger homestead, etc.), since doing so could be considered bad faith by a court which may have serious repercussions.

Conclusion.
Utilizing the benefits of the Florida wage protection laws is an important part of every person's asset protection plan.