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Pay Your Employees and Employment Taxes on Time, Even if Your Organization is Facing Financial Difficulty

Nonprofit organizations, like all employers, must pay employees on time and remit all required withholding taxes to the government. When an organization faces economic difficulties, it can be tempting to ask valued staff members to keep working without pay, or to pay employees but not send withheld taxes to the government, in the hopes that funding will arrive soon and the organization will be able to pay everyone back. However, skipping payroll or tax deposits can create significant financial liability for the organization and for its directors, officers, and managers. In some instances, there may also be criminal penalties for knowing violations. This alert explains payment frequency and tax withholding requirements under federal and New York, potential consequences of non-compliance, and practical steps to reduce organizational and personal exposure.

What are wage payment frequency requirements?

Under New York and federal law, how frequently employers are required to pay wages varies depending upon the type of employee. Under the federal Fair Labor Standards Act, covered non-exempt employees usually must be paid the full minimum wage and any statutory overtime due on the regularly scheduled pay day for the workweek in question.¹ The chart on the next page explains the New York requirements.

¹ U.S. Department of Labor, Wage and Hour Division, Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues (Sep. 2019), <https://www.dol.gov/agencies/whd/fact-sheets/70-fisa-furloughs>.

| Employee Type | Frequency of Payment Requirements Under NY Labor Law Section 191 ² |
|---|--|
| Exempt (Executive, Administrative, Professional) with earnings above \$1,300/week (\$67,600 annually) | No requirements |
| Clerical or Other Workers - Employees who are <u>not</u> any of the following: exempt employees earning over \$1,300/week; railroad workers; manual workers; or commissioned salespersons | On regularly scheduled paydays no less frequently than semi-monthly |
| Manual Workers | Manual workers for non-profit entities must be paid in accordance with their agreed terms of employment but not less frequently than semi-monthly. |
| Terminated Employees | All wages due by the regular payday for the pay period when the termination occurred. |

In addition to these laws, employers are also bound by any internal policies or agreements with employees that set forth a schedule of wage payments. As a result, it is important to ensure that those policies and agreements align with minimum frequency requirements under the law and reflect the organization's economic realities.

What are the potential consequences of failing to pay employees on time?

An employer that fails to pay employees on time can end up having to pay more than twice the amount of the wages owed and can even face criminal penalties. The particulars will vary depending on factors including the state in which the employee is located, the employee's job duties and salary level, the nature of the employer's activities, and the reason for the late payment. Under New York and federal law, an employer that fails to pay employees on time can face serious ramifications including: payment of unpaid wages (including owed overtime); interest on unpaid wages; liquidated damages equal to the amount of unpaid wages; the employee's litigation costs and attorney fees; civil penalties; criminal conviction; fines and imprisonment.³

² See NY Department of Labor, Frequency of Pay – Frequently Asked Questions, <https://dol.ny.gov/system/files/documents/2021/03/frequency-of-pay-frequently-asked-questions.pdf>

³ See NYLL §§ 198(1-a), 198(4), 198-a; U.S. Department of Labor Wage & Hour Division, Handy Reference Guide to the Fair Labor Standards Act, <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa>.

What are the potential consequences of failing to collect and remit employment taxes on time?

Under New York and federal law, an employer that fails to collect, account for, or pay over withheld income and FICA taxes may face the following ramifications: financial penalty equal to the amount of unpaid income, Social Security and Medicare taxes; and criminal liability for crimes including willful failure to pay over, attempt to evade or defeat tax, willful failure to file or pay, and criminal tax fraud.⁴

When Can an Officer, Director or Manager Be Held Liable?

Under the federal Fair Labor Standards Act (FLSA), a nonprofit's officers, directors, and managers can be held personally liable for unpaid minimum wages or overtime if they "act[] directly or indirectly in the interest of an employer in relation to an employee."⁵ Under New York state law, employer includes "any person, corporation, limited liability company, or association employing any individual in any occupation."⁶ People who exercise operational control over pay practices can be held personally liable even if they are not handling day-to-day payroll. Courts apply the "economic reality" test, which looks to practical authority rather than job titles: whether the person had the power to hire and fire employees, supervised schedules or conditions of employment, determined rates and methods of pay or signed paychecks, and maintained employment records.⁷

An **executive director** was held liable for unpaid wages where he had interviewed and hired the employee, directed staff communications about payroll, chose and executed the payment method (including signing checks), and handled payroll filings. *In re Petition of Lee H. Stone*, Docket No. PR 22-071 (N.Y. Indus. Bd. of Appeals Mar. 12, 2025).

On the tax side, federal tax law requires employers to withhold employees' income tax and FICA contributions and keep those funds "in trust" for the United States. Using withheld taxes to fund operations – even temporarily – is strictly prohibited. Federal law imposes the Trust Fund Recovery Penalty: any "responsible person" who willfully fails to collect, account for, or pay over employees' withheld income and FICA taxes is personally liable for 100% of the unpaid trust-fund amount.⁸ The statute is "broadly worded" to reach all individuals with duty or authority to ensure taxes are collected and paid. A "responsible person" is defined to include officers or employees of a corporation who are under a duty to collect and pay the tax.⁹ New York's Tax Law contains a parallel responsible-person penalty for state withholding.¹⁰ In practice, this can include a nonprofit's executive director,

An **executive director** was liable for nonpayment of withheld payroll taxes, where the executive director paid other creditors after discovering unremitted payroll-tax checks.

In re Stanley, 146 B.R. 655, 658–59 (Bankr. E.D.N.C. 1992).

⁴ See 26 U.S.C. §§ 6672(a), 6671(b); 26 U.S.C. § 7501(a); N.Y. Tax Law § 685(g), (n); 26 U.S.C. § 7202; 26 U.S.C. § 7201; 26 U.S.C. § 7203; and NY Tax Law Article 37 (e.g., §§ 1802–1806).

⁵ 29 U.S.C. § 203(d)

⁶ NYLL § 190 (3)

⁷ In *Barfield v. NYC HHC*, 537 F.3d 132, 140–44 (2d Cir. 2008) the Second Circuit applies an "economic reality" test to decide if an individual is an employer under the FLSA. Factors include the power to hire/fire, supervision and control of work schedules or conditions, setting the rate/method of pay, and maintenance of records.

⁸ 26 U.S.C. § 6671(b), 6672; *Slodov v. U.S.*, 436 U.S. 238 (1978): The Trust Fund Recovery Penalty allows personal assessment of any "responsible person" (e.g., officers/employees with duty to collect, account for, and pay over taxes) who willfully fails to do so (§§ 6671(b), 6672). *Slodov* holds that a person who assumes control after trust-fund taxes were already withheld and dissipated is not liable for those pre-existing amounts when no unencumbered funds were available to pay them—but remains liable for taxes withheld during their tenure or for willfully diverting available funds (436 U.S. at 259–61).

⁹ 26 U.S.C. § 6671(b).

¹⁰ N.Y. Tax Law § 685(g).

treasurer, chief financial officer, payroll manager, or any board member who has influence over financial decisions.

Courts have applied these rules to nonprofit executives and even board chairs who possessed authority over disbursements and continued paying other creditors while payroll taxes remained unpaid. Courts have likewise held board members personally liable.

An **executive director** was found liable for willfully failing to pay taxes where the organization paid others while taxes were known to be unpaid. It was not a defense to personal liability that he was obeying a board directive to keep operating.

Cooper v. United States, 539 F. Supp. 117, 118–22 (E.D. Va. 1982), *aff'd*, 705 F.2d 442 (4th Cir. 1983).

A federal court upheld assessments against **multiple nonprofit officers and directors** who signed checks and exercised control over disbursements. Their delegation to bookkeepers was not a defense to personal liability. The court held willfulness was demonstrated because wages and other creditors were paid while taxes were not.

Carter v. United States, 717 F. Supp. 188, 192–95 (S.D.N.Y. 1989).

What about directors and officers immunity?

Under New York law, uncompensated directors, trustees, and officers of not-for-profit corporations are granted limited immunity from liability for ordinary negligence when performing their duties for the organization. However, this protection does not extend to acts or omissions involving gross negligence or willful misconduct, nor to actions brought by the Attorney General, or actions initiated by the corporation itself against the individual in question.¹¹ Crucially, this is a state-law immunity only: under the Supremacy Clause, state immunity laws cannot erode or limit federal remedies. That means New York statutory immunity cannot be used to defeat federal claims; it applies, if at all, only to New York state-law causes of action.¹²

How can the organization reduce its personnel costs?

When budgets tighten, nonprofits can reduce personnel costs while staying compliant with wage-and-hour and benefits laws by: reducing pay; reducing hours; implementing furloughs; reducing employee benefits; or implementing a reduction in force. Each change should be implemented prospectively (never retroactively), with notice before the next pay period, and in accordance with any employment contracts or union collective bargaining agreements (CBAs). As a matter of best practice, organizations should plan changes with counsel, document the business rationale, and implement the changes on a consistent start date (ideally at the beginning of a new pay period). Organizations should also include decisions in board or committee minutes, coordinate payroll and benefits administration before announcements, and provide clear written notices to employees. Lastly, organizations should revisit classifications and benefit eligibility after changes to confirm ongoing compliance.

¹¹ N-PCL § 720-a(1).

¹² *Dushane v. Leeds Hose Co. #1, Inc.*, No. 1:13-cv-677 (BKS/CFH), 2016 U.S. Dist. LEXIS 202957, 2016 WL 9415489 (N.D.N.Y. Feb. 22, 2016) (Sannes, J.).

For further information, we invite you to consult the following legal alerts on our website:

1. [Employee Management - Rollback Employee Benefits](#)
2. [Employee Management - Understanding Furloughs](#)

How can an organization's leaders reduce personal exposure?

Directors and officers should build a record that wages and payroll taxes are treated as non-negotiable priorities and that they exercised active oversight, because personal liability generally results from control plus willfulness or recklessness under both wage and tax regimes. These compliance practices should be formalized:

- **Adopt a board policy** that wages and trust-fund taxes (withheld income and FICA) must be paid before any other obligations. Require written certification to the board (or audit/finance committee) each pay period that (i) all wages were paid on time and (ii) all payroll tax deposits were filed and funded. Keep those records.
- **Exercise quarterly board oversight** by requiring the chief financial officer or payroll provider to present proof of deposits/filings (receipts or portal confirmations) and note the review in board minutes. Good-faith, proactive oversight helps negate willfulness.
- **Train organization's leaders** on federal and state labor law, particularly the importance of making the corresponding salary payments and withheld taxes.
- **Clarify roles and authority.** Bylaws, resolutions, bank signature cards, and job descriptions should make clear who can obligate payroll and taxes. Diffuse or ambiguous authority increases who can be deemed a "responsible person."

Lawyers Alliance is grateful to our legal fellow, Maria Quintero Rueda, and legal extern, Crystal Barnes, for their work on this Legal Alert.

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