

AMERICAN PAYROLL ASSOCIATION

June 14, 2019

Mara Friesen
Office of the Attorney General
Child Support Division
P.O. Box 12017
Austin, TX 78711-2017
Mara.Friesen@oag.texas.gov

Dear Ms. Friesen,

The American Payroll Association (APA) respectfully requests that your office review and clarify its position on withholding child support from tip income. Our understanding of the rules governing wage garnishments and the federal Consumer Credit Protection Act leads us to believe the information contained in the Child Support Handbook for Employers (version 3.0), as well as Frequently Asked Question (FAQ) 23 found on the website of the Texas Office of the Attorney General, is contrary to federal law (<https://portal.cs.oag.state.tx.us/wps/portal/WageWithholdingFaq#question23>).

23. Should I include the tips that my employee reports to me as part of that employee's "earnings" when I do the calculations to determine the maximum amount that I can withhold from his earnings?

It is the opinion of the Child Support Division that tips reported to the employer as required by federal Internal Revenue Code § 6053, whether pooled or not, are part of an employee's "earnings" under the TFC in that they represent a "payment to . . . an individual, regardless of source and how denominated" that arises as a direct result of employment. As such, reported tips should be included in determining disposable earnings under federal and Texas law. Including tips in an employee's earnings increases the maximum amount that may be withheld for the support of the employee's children.

However, an employer may only withhold amounts over which he has control. If the maximum amount that can be withheld for a particular employee for a given pay period is \$200 (based on employee tips and employer wages), but the employer only has \$150 of the employee's salary remaining after paying the amounts required by law to be withheld, then of course the employer can only withhold the \$150. In this instance, the only "earnings" that will make their way to the employee are his tips.

FAQ 23 cites Internal Revenue Code § 6053, which identifies tips as earnings subject to taxation, as justification for including tip income in disposable earnings subject to garnishment. APA believes a more accurate interpretation would be to say that tip income is to be included *by the court* when determining the noncustodial parent's obligation. Our interpretation corresponds with Texas Family Law Code § 154.062, which holds that the court is to include tip income when calculating the "net resources for the purpose of determining child support liability" – that is, what the employee is obligated to pay on a monthly basis. Neither the Internal Revenue Code nor the Texas Family Code support an argument that it is appropriate for an employer garnishee to

include tips in the calculation of the amount to be withheld from an employee's paycheck.

According to the Department of Labor's Wage and Hour Division (DOL), tips given directly to employees by customers whether in cash or on a credit or debit card are not considered earnings for the purpose of determining disposable earnings for garnishments [W-H Op. Ltr., WH-95, 12-15-70; [DOL Fact Sheet #30](#): The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title III (CCPA)].

The CCPA became law under Congress' constitutional authority to regulate commerce. Specifically, CCPA § 303(c) states, "No court of the United States or any State may make, execute, or enforce any order or process in violation of this section." Section 306 follows with authority given to the DOL to interpret CCPA Title III. Section 307 offers states the ability to be more restrictive of garnishment limits, but not to interpret the law or be less restrictive.

The minimum wage in Texas is \$7.25 an hour. Texas Labor Code § 62.052 provides that employees who customarily and regularly receive more than \$20.00 in tips each month may be paid as little as \$2.13 per hour.¹ The difference of \$5.12 is known as a tip credit. Employers must ensure that tipped employees earn at least the full minimum wage for all hours worked.

The DOL has advised that the only tips that are considered earnings subject to garnishment are amounts of tip credits necessary to reach the minimum wage. That is to say, tips earned that raise an employee's pay from \$2.13 to \$7.25 are considered subject to garnishment. The language in FAQ 23 does not acknowledge this distinction. Including tips above the tip credit reported to the employer when calculating the amount to withhold for a child support order or other garnishment conflicts with federal law.

Fact Sheet #30 states, "If a state wage garnishment law differs from Title III, the law resulting in the lower amount of earnings being garnished must be observed."

APA has no knowledge of the Texas Child Support Division enforcing the law according to the interpretation provided in FAQ 23. However, APA is aware that employers rely on such guidance when programming their payroll systems. An employer that does follow the direction of FAQ 23 may inadvertently violate not only the federal CCPA but also the Fair Labor Standards Act, which holds that, "The employer is prohibited from using an

¹ The federal Fair Labor Standards Act defines "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than \$30 a month in tips," 29 U.S. Code § 203(t).

employee's tips for any reason other than as a credit against its minimum wage obligation to the employee ('tip credit') or in furtherance of a valid tip pool" [DOL [Fact Sheet #15](#), Tipped Employees Under the Fair Labor Standards Act (FLSA)].

APA recommends that the Texas OAG reconsider the information provided in its Handbook, FAQ 23, and any other advice provided to employers, clarifying that the amount of tips subject to garnishment is limited to that portion raising the employee's hourly wage to equal the federal or state minimum hourly wage (whichever is greater).

Further, APA asks the OAG to clarify in its materials to employers that tips earned in excess of the federal or state minimum wage are not subject to garnishment, regardless of whether they are paid in cash or charged to a credit or debit card. Similarly, tips distributed as part of a bona fide tip pool are also to be excluded from the calculation of disposable income.

The American Payroll Association

The APA is a nonprofit professional association, headquartered in San Antonio, Texas, representing more than 20,000 payroll professionals and the needs of their employers in the United States. The APA's primary mission is to educate its members and the payroll industry regarding best practices associated with paying America's workers while complying with applicable federal, state, and local laws. In addition, the APA's Government Relations Task Force works with the legislative and executive branches of government to find ways to help employers satisfy their legal obligations, while minimizing the administrative burden on government, employers, and individual workers.

We welcome the opportunity to discuss the above issues with you further. In this regard, please feel free to contact Corrinne Flores by email at corrinne.flores@adp.com or by phone at 909-971-5858; or Bill Dunn by email at bdunn@americanpayroll.org or by phone at 202-232-6889.

Sincerely,



Corrinne Flores
Chair, GRTF Subcommittee on
Child Support and Other Garnishments



William Dunn, CPP
Director of Government Relations