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The Dear Departed: Making Final Wage Payments for Deceased Employees

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The death of an employee is an unfortunate fact of life for businesses. Nonetheless, employers may be ill-prepared for the inevitable issues that arise from the sad event. Of concern are:

- Who can claim wages of deceased employees?
- Is there a limit on wages that can be claimed without probate or a court order?
- Are special forms necessary?
- Do final wage payment rules for terminated employees apply to deceased employees?
- Should taxes be withheld?

Because state law largely controls how the deceased's final wages should be paid, the answers will vary. Therefore, state statutes and experts should be consulted. However, knowing what to look for will help guide employers through the process.

Who Can Claim Wages of Deceased Employees?

While it is clear that wages earned by an employee prior to death must be paid, it may not be obvious whom an employer might (or must) pay. Generally, the payment will either be made to a surviving spouse or the deceased's estate. Traditionally, the payment is made to the deceased's estate. However, many states (especially if there is no will or probate proceedings) specify that outstanding wages — or at least some portion of the wages — can be paid directly to the surviving spouse. If there is no surviving spouse, then the wage payment would be made to adult children, parents, or siblings, usually in that order of preference.[1] Even with probate administration proceedings, some states will still allow or require

1 States with this sort of arrangement include: AL, AZ, CA, CO, CT, DE, FL, GA, HI, IL, IN, KS, LA, MA, MI, MN, MS, NH, NJ, NM, NY, ND, OH, OK, OR, PA, RI, TN, VA, WA, WV, and WI.

payment to the deceased's spouse if the value of property subject to probate administration is under a certain threshold (e.g., $30,000).[2]

Is There a Limit on Wages That May be Claimed Without Probate or a Court Order?

Employers should confirm the amount that may be paid to a surviving spouse outside of estate administration. Most states limit the amount that can be paid directly to the surviving spouse. The statutes range in amounts from $100 to $40,000 of wages.[3] Consequently, amounts over and above the limits should be paid by means of probate administration.

Are Special Forms Necessary

Employers need to know if any special forms are needed to effectuate the payment. Most states do not require special forms for wages paid to the surviving spouse. They either permit or require employers to pay the survivors. Generally, a demand or an affidavit should be furnished to the employer[4] or probate court[5] by the surviving spouse or successor identifying the decedent with a request for payment. The applicable statute will generally provide the necessary wording and monetary limits for the affidavit.

Do Final Wage Payment Rules for Terminated Employees Apply to Deceased Employees?

Employers may be concerned about the timing of payment. The wage and hour laws in many states regulate how quickly employees must be paid final wages after separation. These timeframes often depend on whether the employee voluntarily terminated the employment relationship or was involuntarily terminated by discharge or layoff. Generally, involuntary terminations give rise to a shorter timeframe for paying final wages. However, most state laws are unclear as to the required timing of payments to survivors because the timing may depend on a demand for payment made by the survivor. Nonetheless, a few states do set parameters. The parameters generally are not as pressing as when employees are involuntarily terminated.[6] Consequently, it is unlikely that payment to the surviving spouse or other must be made by the next day or payday.

The states that require wage payments to be made through probate administration often follow the Uniform Probate Code and require that 30 days have passed following the date of death before paying the wages to the estate or successor (personal representative, executor, or administrator) for probate administration.

Should Taxes Be Withheld?

Employers should determine whether to withhold employment taxes on the final wages of a deceased employee. Here, federal law is important. As a general rule, when paying the final amount of outstanding wages in the year of death, only FICA and FUTA taxes need to be withheld. Federal income tax does not

2 States with this sort of arrangement include: CT, IL, IN, KY, NJ, NV, NY, and VA.

3 AZ - $5,000; CA - $15,000; CT – $40,000; DE - $300; GA - $2,500; HI - $2,000; MA - $100; MN - $10,000; NH - $500; NY - $15,000 or $30,000 depending on estate size; OH - $5,000; OK - $3,000; OR - $10,000; PA - $5,000; RI - $150; TN - $10,000; VA - $25,000; WA - $2,500; WV - $800.

4 Affidavit to employer: CA, CO, HI, IL, IN, LA, MN, NV, ND, NH, NM, NY, RI, UT, and WA.

5 Affidavit to probate court: CT and NJ.

6 Hawaii requires payment within 30 days of death. Indiana provides payment should be made when 45 days have passed since death. In Massachusetts, if no petition for administration has been filed within 30 days of the employee's death, then the employer can make the wage payment up to $100. Nevada provides that payment may be made at 40 days after death. Oklahoma provides that wages shall become "due and payable" to survivor upon the employee's death. Oregon also states wages become "due and payable" upon the employee's death. In Rhode Island, payment may be made 30 days after date of the death. The Wisconsin statute provides that payment to surviving spouse be made at least five days after death, but before probate administration.

need to be withheld from the final pay. If the wages are paid in the following year, they are not subject to FICA, FUTA, or federal income tax withholding.[7] In either year, the survivor or estate will receive a Form 1099-MISC with "other income" listed in Box 3 for the gross wage amount. States will generally follow the federal withholding rules; however, employers should double check for any special state requirements.[8]

7 See IRS Publication 15, (Circular E), Employer's Tax Guide For use in 2016 (Dec. 23, 2015).

8 Littler research attorney Vincent Bates assisted with the preparation of this article.