

Look Carefully at Your Wages: Are They Exempt?

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According to Florida's wage exemption statute, wages received by a family's primary breadwinner, otherwise referred to as head of household, are generally exempt from attachment or garnishment. *See*, Fla. Stat. § 222.11(2). Are such wages exempt if a head of household files for bankruptcy? If a head of household's wages are placed in a separate bank account, commonly known as a wage earner account, those wages received within the six (6) month period prior to a bankruptcy filing are generally exempt, provided that the funds deposited can be traced and properly identified as the head of household's wages. *See*, Fla. Stat. § 222.11(3).

Nevertheless, according to the applicable case law, if a head of household opens a wage earner account, as set forth above, and the wages deposited into the account were received by the head of household as an independent contractor or if the wages deposited into the account were commingled with funds from other sources, then that wage earner account is not exempt. *See*, In re Schlein, 8 F.3d 745, 755 (11th Cir. 1993).

Therefore, if a head of household is deemed an employee, the wage exemption set forth in Fla. Stat. § 222.11 is applicable; however, if a head of household is deemed an independent contractor, the wage exemption set forth in Fla. Stat. § 222.11 is not applicable. If a dispute arises as to whether a head of household is an employee or an independent contractor, the court will consider a number of factors in making its determination.

The Middle District of Florida, in In re Moriarty, 27 B.R. 73, 74 (Bankr. M.D. Fla. 1983), set forth the following factors utilized by the Court in determining whether a debtor is deemed an employee or an independent contractor:

- (1) The existence of an employment contract for the performance by a person of a certain kind of work at a fixed price;
- (2) The obligation to furnish necessary tools and supplies;
- (3) The right to control the progress of the work;
- (4) The time for which the person is employed;
- (5) The method of payment, whether by time or by job; and
- (6) Whether the work is part of the regular business of the employer.

Moreover, the Middle District of Florida held in In re Montoya, 77 B.R. 926, 929 (Bankr. M.D. Fla. 1987) that a debtor was an employee, and thus entitled to the wage exemption, because there was an employment agreement, the employer provided supplies and personnel, the debtor was paid a salary, and the employer had exclusive authority to establish professional policies and procedures. Furthermore, the Middle District of Florida concluded in In re Schlein, 114 B.R. 780, 783 (Bankr. M.D. Fla. 1990) that an employment contract is the best evidence that an employer/employee relationship was formed.

In conclusion, it is not enough to claim wages received by a debtor as exempt, merely because the debtor is the head of household. It is important to note that if the debtor has received wages as an employee the wage exemption is applicable, but if the debtor has received wages as

an independent contractor the wage exemption is not applicable. If there is a dispute as to the debtor's employment status, the court will consider a number of factors in making its ruling. In addition, if a debtor, as head of household, deposits wages in a wage earner account, keep in mind that in order to maintain its exempt status those wages cannot be commingled with funds from any other sources.

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The primary areas of practice of **Iurillo & Associates, P.A.** are Commercial and Bankruptcy Litigation and Debtors' and Creditors' Rights.