



# Employer Withholding

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## Kentucky Revised Statute Provisions Dealing with Withholding

- **EMPLOYER RESPONSIBLE TO WITHHOLD FROM EMPLOYEES - KRS § 67.780**
- **EMPLOYER RESPONSIBLE TO REPORT TAXES WITHHELD - KRS § 67.783(1)**
- **EMPLOYER LIABILITY FOR FAILURE TO WITHHOLD - KRS § 67.783(2)**
- **LIEN ON EMPLOYER'S PROPERTY - KRS § 67.783(3)**
- **EMPLOYER LIABILITY FOR PAYMENT OF WITHHELD TAX - KRS § 67.785**
- **PERSONAL LIABILITY OF OFFICERS - KRS § 67.785(2)**
- **PERSONAL LIABILITY OF MANAGERS OF LIMITED LIABILITY COMPANIES AND PARTNERS OF REGISTERED LIMITED LIABILITY PARTNERSHIPS (no KRS provision)**



## EMPLOYER RESPONSIBLE TO WITHHOLD FROM EMPLOYEES

- **KRS § 67.780**

Every employer making payment of compensation to an employee shall deduct and withhold upon the payment of the compensation any tax imposed against the compensation by a tax district. Amounts withheld shall be paid to the levying tax district in accordance with KRS 67.783. A tax district may impose minimum and maximum tax liabilities for the tax on compensation.

- ***KRS § 141.310 (STATE PROVISION)***

*Every employer making payment of wages on or after January 1, 1971, shall deduct and withhold upon the wages a tax determined under KRS 141.315 or by the tables authorized by KRS 141.370.*



## EMPLOYER RESPONSIBLE TO REPORT TAXES WITHHELD

- **KRS § 67.783**

(1) Every employer required to deduct and withhold tax under KRS 67.780 shall, for the quarter ending after January 1 and for each quarter ending thereafter, on or before the end of the month following the close of each quarter make a return and report to the tax district the tax required to be withheld under KRS 67.780, unless the employer is permitted or required to report within a reasonable time after some other period as determined by the tax district.

- ***KRS § 141.330 (STATE PROVISION)***

*(1) Every employer required to deduct and withhold tax under KRS 141.310 and 141.315 shall, for the quarterly period beginning on the first day of January of each year, and for each quarterly period thereafter, on or before the last day of the month following the close of each quarterly period make a return and report to the department the tax required to be withheld under KRS 141.310 and 141.315, unless the employer is permitted or required to report monthly or annually.*



## EMPLOYER LIABILITY FOR FAILURE TO WITHHOLD

- **KRS § 67.783(2)**

(2) Every employer who fails to withhold or pay to the tax district any sums required by KRS 67.750 to 67.790 to be withheld and paid shall be personally and individually liable to the tax district for any sum or sums withheld or required to be withheld in accordance with the provisions of KRS 67.780.

- ***KRS § 141.330(3) (STATE PROVISION)***

*(3) Every employer, who fails to withhold or pay to the department any sums required by this chapter to be withheld and paid, shall be personally and individually liable therefore to the Commonwealth; and any sum or sums withheld in accordance with the provisions of KRS 141.310 and 141.315 shall be deemed to be held in trust for the Commonwealth.*



## LIEN ON EMPLOYER'S PROPERTY

- **KRS § 67.783(3)**

(3) The tax district shall have a lien upon all the property of any employer who fails to withhold or pay over to the tax district sums required to be withheld under KRS 67.780. If the employer withholds but fails to pay the amounts withheld to the tax district, the lien shall commence as of the date the amounts withheld were required to be paid to the tax district. If the employer fails to withhold, the lien shall commence at the time the liability of the employer is assessed by the tax district.

- ***KRS § 141.330(4) (STATE PROVISION)***

*(4) The Commonwealth shall have a lien upon all the property of any employer who fails to withhold or pay over to the department sums required to be withheld under KRS 141.310 and 141.315. If the employer withholds but fails to pay the amounts withheld to the department, the lien shall accrue as of the date the amounts withheld were required to be paid to the department. If the employer fails to withhold, the lien shall accrue at the time the liability of the employer becomes fixed.*



## Automatic Statutory Lien?

- The lien statute in KRS § 67.78(3) does not contain provisions as to priority.
- Language of Statutory Lien for Real Property Taxes under KRS 91.560 provides:
  - **91.560 Real Property Tax Lien**
  - (1) The fee simple of all lands, in a city of the first class or in a consolidated local government, ... shall be subject, from and after the assessment date each year, to a lien for the city taxes to be assessed thereon for the succeeding year. The lien shall be superior to homestead right and to all encumbrances, whether made before or after that date, except state taxes, and shall take precedence of dower, curtesy, remainders, reversions, and other future estates.
- Lien priority
  - Determined by date of filing of the lien
  - First in time – First in line



## LIEN PERFECTION

- **KRS § 67.783(3)**
  - If employer withholds but doesn't pay, the lien shall commence as of the date the amounts withheld were required to be paid to the tax district.
  - If employer fails to withhold the lien shall commence at the time the liability of the employer is assessed by the tax district.
- Problem of knowing if employer withheld but didn't pay or didn't withhold.
- Problem of third parties knowing lien exist.
- Perfection of Lien
  - Recording of lien gives proper notice to third parties that lien exist against the property.
  - Record or filing notice of lien in the deed room of the county clerk's office in jurisdiction where property is located.
    - Filing lien against John Doe in Jefferson County does not encumber property owned by John Doe in Bullitt County.



## NOTICE OF LOCAL OCCUPATIONAL LICENSE TAX LIEN

NOTICE IS HEREBY GIVEN THAT OCCUPATIONAL LICENSE TAXES, PENALTY, AND INTEREST HAVE BEEN ASSESSED AGAINST THE FOLLOWING NAMED EMPLOYER, WHICH AFTER DEMAND FOR PAYMENT THEREOF REMAINS UNPAID.

ABC INCORPORATED  
1001 ALPHABET AVENUE  
LOUISVILLE, KY 40202

PURSUANT TO THE PROVISIONS OF KENTUCKY REVISED STATES §67.783(3), A LIEN EXISTS IN FAVOR OF THE LOUISVILLE/JEFFERSON COUNTY METRO REVENUE COMMISSION UPON ALL INTEREST IN PROPERTY, EITHER REAL OR PERSONAL, TANGIBLE OR INTANGIBLE, ACQUIRED BY EMPLOYER EITHER PRIOR TO OR SUBSEQUENT TO THE FILING OF THIS NOTICE.

IDENTIFICATION NUMBER:

THE AMOUNT OF OCCUPATIONAL LICENSE TAXES, PENALTY AND INTEREST CONSTITUTES THE AMOUNT OF THE LIEN. TAXES, PENALTY, AND ACCRUED INTEREST FROM THE FILING DATE OF THE LIEN TO DATE OF PAYMNET PLUS EIGHTEEN DOLLARS (\$18.00) FOR LIEN FEES IS REQUIRED BEFORE A LIEN RELEASE CAN BE AUTHORIZED. UPON REQUEST, THE METRO REVENUE COMMISSION MUST DISCLOSE THE SPECIFIC AMOUNT OF TAX, PENALTY, AND INTEREST CALCULATED TO A SPECIFIC DATE TO ANY INTERESTED PARTY LEGALLY ENTITLED TO SUCH INFORMATION. INQUIRIES SHOULD BE MADE TO LEGAL/COLLECTIONS DIVISION, TELEPHONE NUMBER (502) 574-4939

DATE PREPARED: 8/21/05

METRO REVENUE MANAGER: \_\_\_\_\_

LOUISVILLE/JEFFERSON COUNTY  
METRO REVENUE COMMISSION  
101 S. EIGHTH STREET  
LOUISVILLE, KY 40202

**NOTICE OF RELEASE OF OCCUPATIONAL TAX LIEN**

ABC INCORPORATED  
1001 ALPHABET AVENUE  
LOUISVILLE, KY 40202

Lien No. 11111111  
County: Jefferson  
Notice to Claimant

This document must be presented to the county clerk of the county listed above in order to have this notice of lien properly recorded, thereby releasing you from further obligations. You will be required to pay the lien release fee, which is \$9.00.

The indebtedness, set out in the notice of occupational tax lien filed by the Louisville/Jefferson County Metro Revenue Commission, as recorded in Lien Book No. 1, Page No.1, having been paid, the lien and notice thereof is hereby released.

This notice of release has been prepared and executed by the undersigned in the performance of his/her official duties.

Louisville/Jefferson County  
Metro Revenue Commission



# EMPLOYER LIABILITY FOR PAYMENT OF WITHHELD TAX

- **KRS § 67.785**

(1) An employer shall be liable for the payment of the tax required to be deducted and withheld under KRS 67.780.

- ***KRS § 141.340 (STATE PROVISION)***

*(1) An employer shall be liable for the payment of the tax required to be deducted and withheld under KRS 141.310 and 141.315, and shall not be liable to any person for the amount of any such payment.*



## EMPLOYER

- **KRS § 67.750(5) Definitions**

(5) "Employer" means employer as defined in Section 3401(d) of the Internal Revenue Code;

- **§ 3401 of the Internal Revenue Code**

*An **employer** may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group or entity.*

- John Doe owns Doe Enterprises Inc. The employer is Doe Enterprises Inc. not John Doe.



## PERSONAL LIABILITY OF OFFICERS

- **KRS § 67.785 (2)**

(2) The president, vice president, secretary, treasurer or any other person holding an equivalent corporate office of any business entity subject to KRS 67.780 shall be personally and individually liable, both jointly and severally, for any tax required to be withheld under KRS 67.750 to 67.790 from compensation paid to one or more employees of any business entity, and neither the corporate dissolution or withdrawal of the business entity from the tax district nor the cessation of holding any corporate office shall discharge that liability of any person; provided that the personal and individual liability shall apply to each or every person holding the corporate office at the time the tax becomes or became obligated. No person shall be personally and individually liable under this subsection who had no authority to collect, truthfully account for, or pay over any tax imposed by KRS 67.750 to 67.790 at the time that the taxes imposed by KRS 67.750 to 67.790 become or became due.



## PERSONAL LIABILITY OF OFFICERS

- **KRS § 141.340(2) (STATE PROVISION)**

*(2) The president, vice president, secretary, treasurer or any other person holding an equivalent corporate office of any corporation subject to KRS 141.310 or 141.315 shall be personally and individually liable, both jointly and severally, for any tax required to be withheld under this chapter from wages paid to one (1) or more employees of any such corporation, and neither the corporate dissolution or withdrawal of the corporation from the state nor the cessation of holding any such corporate office shall discharge the foregoing liability of any such person; provided that the personal and individual liability shall apply to each or every person holding such corporate office at the time such tax becomes or became obligated. No person shall be personally and individually liable under this subsection who had no authority to collect, truthfully account for, or pay over any tax imposed by this chapter at the time that taxes imposed by this chapter become or became due. "Taxes" as used in this section shall include interest accrued at the rate provided by KRS 131.138, all applicable penalties and fees imposed under KRS 131.180, 131.410 to 131.445, and 131.990.*



## PERSONAL LIABILITY OF MANAGERS OF LIMITED LIABILITY COMPANIES AND PARTNERS OF REGISTERED LIMITED LIABILITY PARTNERSHIPS

- Provision not contained in occupational taxation statutes. Suggested future amendment.
- ***KRS § 141.340(3) (STATE PROVISION)***

*(3) Notwithstanding any other provisions of this chapter, KRS 275.150, or KRS 362.220(2) to the contrary, the managers of a limited liability company and the partners of a registered limited liability partnership or any other person holding any equivalent office of a limited liability company or a registered limited liability partnership subject to KRS 141.310 or 141.315 shall be personally and individually liable, both jointly and severally, for any tax required to be withheld under this chapter from wages paid to one (1) or more employees of any such limited liability company or registered limited liability partnership. Dissolution, withdrawal of the limited liability company or registered limited liability partnership from the state, or the cessation of holding any office shall not discharge the liability of any person. The personal and individual liability shall apply to each and every manager of a limited liability company and partner in a registered limited liability partnership at the time the taxes become or became due. No person shall be personally and individually liable under this subsection who had no authority to collect, truthfully account for, or pay over any tax imposed by this chapter at the time that the taxes imposed by this chapter become or became due. "Taxes" as used in this section shall include interest accrued at the rate provided by KRS 131.183, all applicable penalties imposed under this chapter, and all applicable penalties and fees imposed under KRS 131.180, 131.410 to 131.445, and 131.990.*



## RESPONSIBLE PARTY

- **KRS § 67.785 (2)**

(2) The president, vice president, secretary, treasurer or any other person holding an equivalent corporate office of any business entity subject to KRS 67.780 shall be personally and individually liable, both jointly and severally, for any tax required to be withheld under KRS 67.750 to 67.790 from compensation paid to one or more employees of any business entity, and neither the corporate dissolution or withdrawal of the business entity from the tax district nor the cessation of holding any corporate office shall discharge that liability of any person; provided that the personal and individual liability shall apply to each or every person holding the corporate office at the time the tax becomes or became obligated. **No person shall be personally and individually liable under this subsection who had no authority to collect, truthfully account for, or pay over any tax imposed by KRS 67.750 to 67.790 at the time that the taxes imposed by KRS 67.750 to 67.790 become or became due.**



## RESPONSIBLE PARTY

- **CONTROL** - key factor in determination of responsible party
  - Authority to sign checks and actual signing of checks
  - Authority to operate business on a day-to-day basis
  - Authority to control the finances of company
- **Conducting audit or investigation**
  - Review various books and records of the corporation
    - Articles of incorporation, minute book and bylaws
      - Shows who had authority to act on behalf of corporation
    - Bank records
      - Shows who had authority to sign corporate checks
    - Canceled checks and bank statements
      - Shows who actually signed checks
    - Payroll records and tax returns
      - Shows who had the responsibility for filing those returns
- **Individual liability should not be pursued against an officer who was not actively involved in the corporation at the time the liability was not being paid.**

## FEDERAL CASES ON RESPONSIBLE PERSON

- IRS § 7215 refers to “person” and does not use the term “employer”
- “**Person**” includes all those with significant control over the financial decision-making process within a corporation. Thus, if a defendant had such control, then the defendant is a person who has the legal duty to collect, truthfully account for, and pay over the withholding taxes of the employer’s entity. ***United States v McMullen***, 516 F.2d 917, 921 (7th Cir.)
- Discussion on who is a person required to collect, truthfully account for, and pay over withholding taxes. ***Pacific National Insurance v United States***, 422 F.2d 26, 29-32
- **Signature on checks**  
The court in ***McMullen*** further stated that the fact that the defendant’s signature did not appear on some payroll checks was immaterial and was no basis for not admitting these checks into evidence – “responsibility of withholding taxes does not turn on the ministerial act of signing checks but on authority to control the disposition of funds.”



## DUE PROCESS REQUIREMENTS

- 5TH & 14TH Amendments to United States Constitution
- Prohibit the government from unfairly or arbitrarily depriving a person of life, liberty or property
- *“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections... The notice must be of such nature as reasonably to convey the required information.”*  
Mullane v Central Hanover Bank & Trust Co., 339 US 306 (1950)



## NOTICE AND RIGHT TO BE HEARD

- Employer is company. Not corporate officers, managers or members.
- Provide notice to employer of the tax periods that have not been filed or amounts not paid.
- Provide notice to employer that assessment will be done for unfiled periods if returns are not filed.
- Provide notice of assessment and time period for objections to assessment
- Inform employer that pursuant to KRS § 67.783 the taxing district shall have a lien upon all property of any employer who fails to withhold or pay over the employee withholding amounts. Provide period of time in which the lien will be filed if amounts are not paid.
- File lien with county clerk's office in county where employer owns property or may own property.
- If seeking amounts from corporate officers, managers or members file civil suit and set out personal liability under KRS § 67.785(2). Obtain judgment and file judgment lien.

## EMPLOYEE LIABILITY

- **KRS § 67.785 (3)**

(3) Every employee receiving compensation in a tax district subject to the tax imposed under KRS 68.180, 68.197, 91.200, or 92.281 shall be liable for the tax notwithstanding the provisions of subsections (1) and (2) of this section.

- If amounts were withheld but not paid over by employer, employee would not be liable.



## CRIMINAL LIABILITY

- **KRS § 67.790**

(5) In addition to the penalties prescribed in this section, any business entity or employer who willfully fails to make a return, willfully makes a false return, or willfully fails to pay taxes owing or collected, with the intent to evade payment of the tax or amount collected, or any part thereof, shall be guilty of a Class A misdemeanor.

- **Elements of Crime**

- Willfully fails
- Intent to evade payment

- **Not strict liability**

- Employer's intent
- Circumstances outside of Employer's control