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THE TAX LAWYER

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### Tax Withholding On Family And Medical Leave Act Payments

When employees settle lawsuits, they almost invariably do not want money withheld for taxes. [Don't fail to consider taxes when settling litigation](#). This may be their lawyer's doing, so the lawyer can show the client a larger check not ravaged by payroll tax withholding. But in many cases it is the employee who doesn't want to hand over a large piece to taxes. See [To Withhold or Not to Withhold on Settlements?](#)



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The employee may assume they can always pay any tax due at tax return time. They may not consider self-employment taxes. At 13.3% (temporarily down from 15.3%), the self-employment tax is the equivalent of the **combined** employer and employee shares of Social Security tax.

Most plaintiffs and most defendants know that if something is labeled as “wages” it will probably be subject to withholding and reported on a [Form W-2](#). This is so even if the employee has not rendered any services to get the check. Settlement payments from a suit for back pay (because the employer didn't pay for break time as required by law) would be treated as back pay and subject to withholding. See [Should Employers Withhold on Attorney Fees?](#)

What about payments for amounts due under the Family and Medical Leave Act? A federal court in [Cheetham v. CSX Transportation, et al.](#) ruled that the employer should deduct withholding from damages to a former employee wrongfully terminated under the Family and Medical Leave Act ([FMLA](#)).

The FMLA requires employers with at least 50 employees to provide up to 12 weeks of unpaid leave for: (1) birth, adoption, or foster care placement of a child if the employee is the parent; or (2) a serious health condition involving the employee, the employee's spouse, child, or parent. If an employer violates these rules it owes damages equal to the wages, salary, employment benefits, and other compensation.

Cheetham was owed \$199,000 because of the company's violation, but was it wages? The employer said it was and that it had to withhold taxes. In contrast, Cheetham argued that FMLA damages are not for lost wages or back pay.

The court agreed with the employer. Still, FMLA damages do not *necessarily* constitute wages. See [Longstreth v. Copple](#). For example, damages from an individual supervisor were not wages. But the \$199,000 here was paid by the company so withholding was proper.

Cheetham argued she hadn't actually performed any services. Even so, whether services were performed was not determinative, said the court. See [Social Security Board v. Nierotko](#).

**Bottom Line?** Employers face tough choices when in doubt about withholding. See [Don't Cross IRS On Payroll Taxes](#). Employers failing to withhold may have to pay twice, once to the former employee and once to the IRS as a trust fund recovery penalty under Code [Section 6672](#). See [Failing To Pay Employment Taxes Means Personal Liability](#).

For more, see:

[Officers Of Nonprofits Face Personal Liabilities For Taxes](#)

[9/11 Excuse Not Enough To Escape IRS Tax Bill](#)

[IRS Penalties Despite Dead/Embezzling Accountant!](#)

[Employers Who Violate Tax Law May Go To Jail](#)

[IRS Nightmare: What Employment Taxes?](#)

[Personal Tax Liability When A Business Goes Under](#)

[Supreme Court Deaf To Payroll Tax Woes](#)

[IRS Pursues Payroll Tax Pyramiding](#)

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