THE KIRWAN LAW FIRM

HOW TO CREATE AND MAINTAIN A FLORIDA "WAGE ACCOUNT"

(A More Brass Tacks Approach)

Summary: Florida is one of the only states that allow a person to protect 100% of their income from garnishment (i.e., protect it from the reach of creditors). But, like most other things in life, there are exceptions to this general rule (some big exceptions) and devil is always in the details. The benefits to having your wages exempt from attachment or garnishment are significant, especially if your income is significant. Below is an article that provides you with instructions on how to actively set in motion the tools and practices necessary to protect your income by use of a "wage account." But please bear in mind that not everyone who earns income in Florida can use a wage account to protect their earnings. I have, therefore, also written another memo entitled "The Florida Wage Exemption; An Overview" designed to give you a general overview of Florida's wage protection laws, how they work, and who can benefit from them. My hope is that it will give you a foundation of knowledge before you start trying to actively protect your income in the real world.

Introduction:

I previously wrote a memorandum entitled "The Florida Wage Exemption" that explains how and why the Florida laws that can protect your income actually work. It also explains that these laws do NOT protect everyone's income from garnishment. I highly recommend reading that memo first because the devil is always in the details and failing to understand these important rules could result in your losing this important asset protection advantage. This memo is designed to assist those individuals who qualify to use a wage in the first place. If you cannot explain WHY you are entitled to use a wage account in Florida (and remember how merely assuming makes an ASS of U and ME), then you are not ready to read this memo.

Setting Up Your Wage Account.
That being said, opening a Wage Account is rather a simple procedure. First, start by opening an account with your local bank. The account can be a checking or a savings account.[1] In the event a physician is married, I typically recommend opening the account jointly between the spouses as “Tenants by the Entireties” to add additional protection. In the case of a single physician, the account would be simply opened in his or her name or the name of their revocable trust. You can also give most accounts "labels" like "Summer Vacation Account." Naming the account something like "Dr. John Doe Wage Account" provides additional evidence that your intent was for wage alone to be deposited into the account. But DO NOT hang your hat on a belief that your intent will carry the day if you fail to properly establish and maintain your wage account. It will not. Likewise, if the "label" is omitted, it does NOT prevent the account from being a "wage account." The label is merely helpful. I also recommend that the account be non-interest bearing to make tracing the account to “earnings” more simplistic. Why simplicity is important will be discussed below.

Maintaining Your Wage Account.
Once the account is opened, from a procedural standpoint, I prefer that you use the wage account as a "conduit" account. For example, assume Dr. Granker gets paid twice a month. His W-2 earnings (i.e., no corporate distributions or dividends) are deposited into his wage account on the 1st and the 15th of day of the month by direct deposit. It's the 1st, and Dr. Granker sees the deposit has been made. His paycheck is $10,000 and he knows that he and his family needs $7,000 from that paycheck to live on. He first transfers $7,000 to his and his wife's joint checking account from which all the bills are paid. The remaining $3,000 is then transferred to a brokerage account owned by Dr. Granker's asset protection trust. This means that the monthly bank statement issued with respect to the wage account each month will be very simple in form (read "easy to read and understand even by a moron"); 2 deposits and 4 withdrawals.

Why is this important? Because we have a legal system, NOT a justice system. At the end of the day, you will have to convince a judge that the account you are claiming to be a wage account is, in fact, just that; meeting all the statutory and case law definitions described earlier in this memo. And sometimes, the judge that ruled against you in the case you lost, the same judge that signed the judgement that is allowing the guy that beat you to take your assets, is the same judge who will have the ultimate say as to how convincing you are in proffering your "yes, I have a wage account" argument. And sometimes, that judge will have a bias towards seeing that his judgement is enforced and that the winning party actually collects something from you. And sometimes the judge will be consciously or unconsciously looking for excuses to rule against you. And what will you be offering to the judge as your proof that you truly have a wage account? Your wage account bank statements.

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[1] There is no special type of account called a “wage account.” It is simply an account in any financial institution into which “earnings” are “credited or deposited .” If you tell your banker that you want to open a wage account, they will most likely have no idea what your taking about.

Now lets assume you <u>don't</u> follow my advice about keeping your wage account bank statements simple. If a judge decides to unfairly assign huge weight to some minuscule item on the wage account bank statement or determines that the statements are confusing because they are seven pages long with lots of purchases at Publix, Target, Best Buy, local restaurants, etc., you very well might lose your motion and 25% of your take home pay. And if you don't want to accept his ruling, then you can appeal, of course. Which means that you will have the "right" to spend six figures of your hard earned cash to try and prove that the judge "abused his discretion" (which, by the way is a much higher standard to have to overcome than the "preponderance of the evidence" burden of proof required at the trial level). And even if you win the appeal, certain issues might be remanded (or sent back to) the same judge (yes, the one you challenged and who probably likes you even less now) to re-rule on. And even if the judges ruling is completely reversed and you win, the judge is not penalized one thin dime or made to suffer in any way. And judges know this which makes them comfortable with abusing their discretion in the first place.

But if you give the judge simple wage account bank statements with the same 2 deposits and 4 withdrawals, month after month after month, he has far fewer hooks on which to hang an adverse ruling. After reading this you may think that I am a pessimist, and you are partly correct. I am not at all optimistic that our present legal system will improve any time in the near future. But more importantly, I am a realist. Right or wrong, good or bad, for better or for worse, this is the system you will most likely be dealing with. You very well might pull a wise, honest, and impartial judge and in that case, having your simple bank statement will just make his or her job easier. But if you instead end up with a judge who possess fewer of those noble attributes, the simple bank statements may be your saving grace.

<u>Why You Do NOT Want to Amass Assets in Your Wage Account</u>.
It is important to remember that under Florida's wage protection statute, earnings deposited into a Wage Account are "exempt from attachment or garnishment for **<u>6 months</u>** after the earnings are received by the financial institution **<u>if the funds can be TRACED and properly identified as earnings</u>**." Therefore, the only deposits that should ever be made to that account are deposits of the physician's earnings (i.e., pay checks, including bonus checks). Nothing else should ever be deposited to this account (see the next section on taking distributions and dividends from your practice). Each month when the physician receives the bank statement for the Wage Account, he or she should staple the corresponding pay stubs to the statement and store the bank statement in a safe place. This would ensure that if the exempt nature of your Wage Account was ever called into question, you could easily trace the source of the deposits to pure earnings for personal services as required by the statute.

The assets deposited into this account are exempt from the claims of creditors for a period of six months. Therefore if you make a deposit on January 1 and make a second deposit on February 1, the amount deposited on January 1 must be withdrawn from the Wage Account before June 30, and the amount deposited on February 1 must be withdrawn from the Wage Account by July 31. During this rolling six month period, you should always spend any non-exempt assets first (if any) and convert the exempt earnings deposited into the wage account into another exempt structure (i.e., an asset protection trust, an annuity, etc.). As you can see, this often gets confusing without a spreadsheet to help you keep track of everything.

Given the six month limitation just described combined with the benefits of keeping simple wage account bank statements, I hope you can see why amassing assets in your wage account can lead to problems. I have seen many physicians take a cavalier approach to their wage account. For example, I have seen them say something like "Well, I earn $600,000 a year so I'll just keep a balance of $300,000 in my wage account." Given the "First In, First Out" method for calculating which dollars in a wage account are protected, you can see why a straight $300,000 may not be protected; timing does matter. Worse yet, I have seen physicians say "Well, I earn $600,000 a year so I'll just take $300,000 from my savings account and put them in my wage account." This results in your not having a wage account at all. If the assets are not directly traceable to deposits of "earnings," the likelihood of a judge saying "well since your savings were 'earned' sometime in the past, I'll go ahead and just ignore the whole timing and tracing elements of the statute and give you a pass. In short, use your wage account like a conduit account and do not amass wages therein. It's the rare case where that makes sense.

Dividends and Distributions Do NOT Get Deposited in Your Wage Account.
If you are a physician who is employed by a hospital or medical group in which you have no ownership interest (i.e., you do not own stock, etc. in the company you are employed by), then this section will not apply to you. If you are an owner of or partner in your medical practice, then you need to understand the difference between a "bonus" which can be protected by using a wage account and a "dividend" or "distribution" which, if deposited in your wage account, will not only not be protected but may also destroy the effectiveness of your wage account in protecting your legitimate "earnings."

A "bonus" is paid you under your employment contract for providing services to your employer (i.e., the medical group your patients contract with). A "dividend" or "distribution" is not paid to you for providing services but rather it's a payment of business profits from the corporation, LLC, or partnership (i.e., you medical group) to the individuals who own it (i.e., own stock, membership interests, or partnership interests, in the company). Many physicians with corporations (e.g., businesses whose name ends in "Inc." or "P.A.") or limited liability companies (e.g., businesses whose name ends in "LLC" or "P.L.") that are taxed as corporations, have made an "S" election that resulted in their business being taxed as an S corporation. These physicians often pay themselves a "reasonable salary" and take the rest of their compensation as distributions to avoid paying self-employment taxes (including the 2.9% medicare tax). Even if the practice was a limited partnership or Delaware LLC so the entity received "charging order protection," these distributions can still be taken by a creditor. I have seen some practices where annual distributions are several hundred thousand dollars. Something very interesting to most creditors.

So by taking a smaller salary, physicians with S corporations purposely increase their company's "profits" (and profit distributions); and by doing so, they decrease their protected earnings and increase their unprotected dividends. What many of them do next is take these unprotected distribution checks and deposit them in their wage account. This practically insures that their "wage account" will not be treated as a true "wage account" when it matters most. Please note that the law is full of technical distinctions like this which is why "do it yourself asset protection planning" is not wise.

<u>Conclusion</u>.

Utilizing the benefits of the Florida wage protection laws is an important part of every person's asset protection plan; PROVIDED you pay attention to and play by the rules governing them. If you have any questions regarding this memo or any other aspect of asset protection planning, please contact me.