

Lawful Collection of Legal Financial Obligations

A Bench Card Prepared by the Access to Justice and Fairness Work Group of the National Task Force on Fines, Fees and Bail Practices

Courts May Not Incarcerate a Person for Nonpayment of Fines, Costs, Fees, Assessments or Restitution Absent a Hearing on Ability to Pay and Determination of Willful Nonpayment

The U.S. Supreme Court has made clear that courts may not incarcerate a defendant/respondent, or revoke probation, for inability or failure to pay a court-ordered financial obligation unless the court first holds a hearing and makes a finding that the failure to pay was willful and not due to an inability to pay. *Bearden v. Georgia*, 461 U.S. 660 (1983). The court may not jail a person unless it finds that the person is able to pay without manifest hardship and has not made good faith efforts to comply. Legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

A jail sentence for failure to pay LFOs is often disproportionately harsh compared to the amount of money owed. Incarceration may cause the person to lose a job, and their dependents their home, and may be more costly to taxpayers than the LFO(s) due. The U.S. Supreme Court has recognized that “punishment and deterrence can often be served fully by alternative means” to incarceration, including an extension of time to pay or reduction of the amount owed. *Bearden*, 461 U.S. at 671–72.

The Court Hearing to Determine Ability to Pay

Since it is unconstitutional to incarcerate a person for failure to pay LFOs without first determining ability to pay, upon notice of nonpayment, do not issue a body attachment, warrant for contempt of court, “*capias*” or “*capias pro finem*” warrant, or probation violation warrant. Issue first an order, summons, or notice for the defendant/respondent/probationer to appear in court and explain any failure to pay. If the court affords proper notice of the hearing date and time, and the person does not appear as directed, the court may issue a warrant directing arrest for failure to appear.

The court must give a defendant/respondent/probationer charged with nonpayment prior, adequate notice:

- of the hearing date and time;
- of the right to have counsel present, which may include the right to court-appointed counsel at no cost for indigent people if incarceration or a suspended jail or prison sentence may result. (In Municipal Court, waiver of public defender application fee is subject to N.J.S.A. 2B:24-17);
- of the total amount claimed due;
- that the court will evaluate the person’s ability to pay at the hearing;
- to bring any documentation or information the court should consider in determining ability to pay;
- that incarceration may result, but *only if the court finds that the person willfully failed to pay and has the ability to pay*;
- that a person unable to pay can request payment alternatives, including reduction of the amount owed, as allowed by New Jersey law; and
- that failure to appear at the hearing may result in issuance of an arrest warrant and incarceration.

At the hearing, the court must provide the defendant/respondent/probationer a meaningful opportunity to explain whether the amount charged as due is incorrect and the reason(s) for any nonpayment (e.g., inability to pay).

The court must consider factors concerning the defendant/respondent/probationer including, but not limited to, the following:

- **Income**, including whether income is at or below 125% of the Federal Poverty Guidelines (FPG), which are available at: <https://aspe.hhs.gov/poverty-guidelines>. For Municipal Court time payments, consider whether income is at or below 250% of the FPG.
- Receipt of benefits from a needs-based, means-tested public assistance program including, but not limited to, TANF, SSI, SSDI, or veterans’ disability benefits. Such benefits are not subject to attachment, garnishment, execution, levy or other legal process. *See, for e.g., 42 U.S.C. § 407; 38 U.S.C. § 5301; Bennet v. Arkansas, 485 US 395 (1998)*;
- **Financial resources, assets, financial obligations, and dependents;**
- Whether the person is homeless or incarcerated, or resides in a mental health facility;
- **Basic living expenses** including but not limited to food, rent/mortgage, utilities, transportation, medical expenses, child support;
- The person’s efforts to acquire additional resources, including any permanent or temporary limitations to secure paid work due to disability, mental or physical health, homelessness, incarceration, lack of transportation, or driving privileges;
- **Other LFOs** owed to the court or to other courts;
- Whether payment of the LFO(s) would result in **manifest hardship** to the person or their dependents; and
- Any other **special circumstances** that may bear on the person’s ability to pay.

Payment Alternatives

If the court finds that a person is unable to pay at the time LFO is imposed, or at the time of an ability-to-pay hearing, the court should consider alternatives including, but not limited to:

- **Reduction of the amount due** as allowed by law;
- **Extension of time to pay**;
- **A reasonable payment plan or modification of an existing payment plan**;
- **Credit for community service - \$10 per hour** for community service;
- **Completion of a relevant, court-approved program** as allowed by law (e.g., **education, job skills, mental health, or drug treatment**); or
- **Waiver or suspension of the amount due** as allowed by law. Even absent authority to waive or suspend LFOs, the amount due may qualify as “bad debt” and be uncollectable by the court.

Follow Best Practices

IMPOSITION of LFOs

- **Assess the defendant’s ability to pay *before imposing*** any discretionary/non-mandatory fines, fees, costs, or state assessments (but do not incarcerate a person solely based on a finding or belief that the person is unable to pay).
- **Consider payment alternatives** that may better promote accountability, deterrence, and rehabilitation.
- **Do not impose probation solely** to collect LFOs from a person who cannot pay at sentencing.
- **Do not contract with for-profit probation companies** that charge supervision fees to probationers.
- **Do not impose added fees, costs, or interest on payment alternatives** (e.g., payment plan, community service), except as provided by law.
- **Provide an Order of LFOs owed, final payment due date, any payment plan terms, and the procedure(s)** the defendant should use to inform the court of future mailing address changes.

COLLECTION of LFOs

- Permit people who owe LFOs to **request an ability-to-pay hearing** if they experience difficulty paying.
- **Make a rebuttable presumption that a person is unable to pay LFOs** if (1) income is at or below 125% of the FPG for the relevant household size; (2) the person is homeless or incarcerated, or resides in a mental health facility; or (3) the person receives benefits from a needs-based, means-tested public assistance program.
- If the court finds, after a hearing, that the person has willfully failed to pay and has the ability to pay, and that there are no alternatives to incarceration, **document in writing the findings and the basis for them.**
- **Impose incarceration as a last resort, only after finding that a person is able to pay but has willfully failed to pay.**
- **Do not extend reporting probation beyond the original probation term solely for nonpayment of LFOs** that a probationer is unable to pay. Do not assess any additional probation oversight fees.
- Ensure that community service and court-approved program requirements are **proportionate and accommodate disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities.**
- **Do not report a “failure to comply with judgment” or “failure to timely pay” for LFO nonpayment, or refer a case to a debt collector, until after a hearing and determination of willful nonpayment or the opportunity for a hearing.**
- **Do not hold “ability-to-pay” hearings with such frequency** that appearing in court will harm a person’s employment, health, family responsibilities, or other obligations.

APPOINTMENT OF COUNSEL

- **Appoint counsel at no cost for *any* indigent defendant/respondent/probationer** facing incarceration for non-payment. Ensure that any waiver of the right to counsel is **knowing, voluntary, and intelligent** following a colloquy.

FAILURE-TO-APPEAR WARRANTS

- **Instruct police to promptly bring to court people who turn themselves in or are arrested on warrants issued for failure to appear** at an LFO hearing, to permit a reasonably prompt ability-to-pay determination and any necessary appointment of counsel. If a judge is unavailable, the warrant will be cancelled, the person released, and a **Notice, Summons, or Order to Show Cause** issued for the next available court date.