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Opinion No. 00-125

Constitutionality of 2000 Tenn. Pub. Acts Chapter 909 (HB2688/SB2398)

QUESTION

Does 2000 Tenn. Pub. Acts Ch. 909, Section 1 violate the due process clause of either the United States Constitution or the Constitution of Tennessee by either: (1) authorizing the Department of Human Services to impose a civil penalty on any employer or other payer of income who after prior warning notification by the Department fails to provide identifying information with child support payments made to the centralized collection and disbursement unit or (2) authorizing the Department of Human Services to assert a lien against any employer or other payer of income who after a final determination fails to pay the assessment?

OPINION

No. Neither the civil penalty provisions nor the lien provisions of 2000 Tenn. Pub. Acts Ch. 909, Section 1 violate the due process clause of either the United States Constitution or the Constitution of Tennessee.

ANALYSIS

2000 Tenn. Pub. Acts Ch. 909, Section 1 provides as follows:

> Tennessee Code Annotated, Title 36, Chapter 5, Part 1, is amended by adding the following as a new section thereto:

Section (__). Payments and identifying information required for support payments made to the centralized collection and disbursement unit.

(a) All payments to the centralized collection and disbursement unit by either the obligor parent or a payer on behalf of the obligor parent shall include the following information:

(1) the name, social security number and return address of the obligor parent;

(2) the code identifier for the court for which the payment is being made and the docket number of the case in which the support order was entered; and

(3) for cases involving deductions from compensation of the obligor by an employer or other payer of income by income assignment, the date the payment was deducted from the employee's or other payee's compensation.

(b) As an alternative to compliance with subsection (a), an employer or other payer of support on behalf of an obligor parent may submit a payment document provided by the Department of Human Services on which the employer or other payer shall include the amount of income withholding on each affected employee or other payee, and, if appropriate, shall provide the name and address of any new employer of an affected employee or payee if known to the employer or other payer.

(c) As an alternative to subsection (a), a self-employed obligor parent, or an obligor parent whose employer or other payer of income is unknown to the department, may submit a payment coupon provided by the department to the parent with the payment due.

(d) Any payment made to the centralized collection and disbursement unit that does not comply with the requirements of subsection (a)-(c) shall be subject to a penalty.

(e)(1) If, after prior warning notification by the Department of Human Services of failure to provide the information with the payments as required by this section, any employer, or other payer of income, fails or refuses to comply with the requirements of this section, the violator shall be subject to a civil penalty of one hundred dollars ($100) per individual for whom the required information is not provided upon the first failure to comply, two hundred dollars ($200)

per individual for the second failure to comply and five hundred dollars ($500) per individual for each occurrence thereafter. The warning notification shall specifically state the information required to be submitted and the information omitted by the employer or other payer of income, shall provide a telephone number for questions, and shall set forth the penalties for failure to comply, referencing statutory authority.

(2) If, after prior warning notification by the Department of Human Services of failure to provide the information with the payments as required by this section, any obligor fails or refuses to comply with the requirements of this section, the violator shall be subject to a civil penalty of one hundred dollars ($100) or the amount equaling twenty

-five percent (25%) of the obligor's monthly support obligation, whichever is less, for the first failure to provide the required information, two hundred dollars ($200), or the amount equaling fifty percent (50%) of the obligor's monthly obligation, whichever is less, for the second failure to comply and five hundred dollars ($500) or the obligor's monthly support obligation, whichever is less, for each occurrence thereafter. The warning notification shall specifically state the information required to be submitted and the information omitted by the obligor, shall provide a telephone number for questions, and shall set forth the penalties for failure to comply, referencing statutory authority.

(3) Any employer, payer of income or obligor who conspires not to provide the information required by this section or who conspires to provide false or incomplete information shall each be subject to a civil penalty of five hundred dollars ($500).

(4) These penalties shall be assessed by the Commissioner of Human Services after written notice to the violator. The notice shall provide fifteen (15) days from the mailing date of such notice to file a written request to the department for appeal of the civil penalty.

(5) If an appeal is timely filed with the department by the employer, payer of income or obligor, the department shall set an administrative hearing on the issue of the assessment pursuant to the provisions of the Uniform Administrative Procedures Act, compiled in Title 4, Chapter 5, relative to contested case hearings.

(6) Failure to timely appeal the assessment of the civil penalty shall be final and conclusive of the correctness of the assessment.

(7) Any amount found owing shall be due and payable not later than fifteen (15) days after the mailing date of the determination.

(8)(A) Failure to pay an assessment shall result in a lien against the real or personal property of the employer, payer of income or the obligor in favor of the department. If the violator fails to pay an assessment when it becomes final, the department may collect the amount of the civil penalty by any available administrative enforcement procedures or by court action.

(B) The non

-prevailing party shall be liable for all court costs and litigation taxes of the proceedings and shall be liable to the department for the cost of any private, contract or government attorney representing the state and for the time of any of its Title IV-D or contractor staff utilized in litigating the assessment.

(9) Any appeal of the action of the commissioner pursuant to this section shall be made in conformity with § 36-5-1003.

You have asked whether the statute may constitutionally provide that the Commissioner's notice to the employer or other payer of income becomes final if the employer or other payer of income fails to request a hearing within fifteen days from the date of mailing of the notice. As quoted above, subsection (e)(6) of the statute provides that "failure to timely appeal the assessment of the civil penalty shall be final and conclusive of the correctness of the assessment." Your primary concerns are: (1) whether it is constitutional to grant the Commissioner the power to make an assessment of civil penalties without an initial hearing that then becomes final where the employer or other payer of income does not request a hearing, and (2) whether it is constitutional to provide that a lien arises in favor of the Department against the real and personal property of the employer, other payer, or obligor when the assessment is not paid within fifteen (15) days after the mailing date of the determination.

The real question is whether the process set forth in the statute violates the due process rights of an employer, other payer of income, or the obligor. The Constitution of the United States prevents any state from depriving "any person of life, liberty, or property, without due process of law. . .." U.S. Const. Amend. 14, § 1. Likewise, Article I, Section 8 of the Tennessee Constitution states "that no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or

outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." The Tennessee Supreme Court has held that Article I, § 8 of the Tennessee Constitution confers the same protections as the Federal Constitution. *Brown v. Campbell County Bd. of Education*, 915 S.W.2d 407, 413 (Tenn, 1995), *cert. denied*, 116 S.Ct. 1852, 134 L.Ed.2d 952 (1996). The Tennessee Supreme Court has also held that the "law of the land" provision of Article I, Section 8 is synonymous with the "due process of law" provisions of the Fifth and Fourteenth Amendments to the United States Constitution. *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992). Whether any particular procedure satisfies due process requirements under the United States and Tennessee Constitutions depends on the particular facts and circumstances. The United States Supreme Court has stated, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). To determine what standard is used, courts have developed a balancing test to be applied in connection with the protected interest. In *Mackey v. Montrym*, 443 U.S. 1 (1979), the Supreme Court considered the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

443 U.S. at 10, quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

The statute provides for assessment of a civil penalty by the Commissioner of the Department for repeated violations of the requirement to provide identifying information on child support payments. Such an assessment cannot be made until after a prior warning notification by the Department to the employer, other payer of income or the obligor for a previous violation of the statute. 2000 Tenn. Pub. Acts Ch. 909, Section 1, Subsections (e)(1) and (2). Subsections (e)(1) and (2) of the statute specifically provide that the warning notification "shall specifically state the information required to be submitted and the information omitted . . ., shall provide a telephone number for questions, and shall set forth the penalties for failure to comply, referencing statutory authority." Thus, prior to the imposition of an assessment for civil penalties, the employer, other payer of income or the obligor will have been provided with notice of the statutory requirements and potential penalties for further violations. After the assessment is issued, the employer, other payer or obligor has fifteen days to request an administrative hearing in writing from the Department. 2000 Tenn. Pub. Acts Ch. 909, Section 1, Subsection (e)(4). 2000 Tenn. Pub. Acts Ch. 922, Section 25, which is to be codified as Tenn. Code Ann. § 36-5-1001(a)(1)(K) provides an opportunity for an employer or other payer of income to dispute the Commissioner' s assessment in an administrative hearing. The statute provides for an administrative "review of civil penalties for failure to provide proper information for the distribution of child support payments pursuant to § 36-5-120." As mentioned in subsection 9 of Public Chapter 909, an employer or other payer of income also has the right to appeal the Department's decision on the assessment of civil penalties in accordance with Tenn. Code Ann. § 36-5-1003. Tenn. Code Ann. § 36-5-1003(a) provides for judicial review of

administrative actions of the Department by the court having jurisdiction of the underlying child support order. Therefore, it appears that the process created by the statute provides both notice and an opportunity for a hearing as required by constitutional due process considerations.

Further, under the statute, the Department may obtain a lien against an employer or other payer of income's property for any civil penalties assessed that are not paid within fifteen (15) days after the mailing date of the final determination. In *Connecticut v. Doehr*, 501 U.S. 1 (1991), the United States Supreme Court held that a statute authorizing a party to a lawsuit to obtain a lien against the defendant'.[1] Accordingly,
it is the opinion of this Office that the process set forth in 2000 Tenn. Pub. Acts Ch. 909, Section 1 complies with constitutional due process requirements.

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