

PRACTICE POINTER: WITHHOLDINGS REQUIRED: In a decision issued June 26, 2015, the Second District Court of Appeal held that an employer must make state and federal tax, FICA and state disability withholdings in paying a judgment for past and future wage losses. *Cifuentes v. Costco Wholesale Corp.*; opinion available at Google Scholar).

In its opinion, the court reviewed the 1992 precedent to the contrary in *Lisec v. United Airlines, Inc.*, 10 Cal.App.4th 1500, 1507 (*Lisec*) and IRS and federal appellate decisions. It then explicitly rejected *Lisec's* primary holding. In so doing, the court wrote:

"Under prevailing federal decisional law, an award of back or front pay arises from the employer-employee relationship, and therefore qualifies as wages, even though the plaintiff is no longer employed and the award is not for actual services performed. (E.g., *Gerbec*, supra, 164 F.3d at p. 1026; *Rivera*, supra, 430 F.3d at p. 1260; *Noel*, supra, 697 F.3d at pp. 213-214.) Consistent with this view, the IRS's position is that judgment and settlement payments for back and front pay (other than lost wages on account of personal injury or sickness) are subject to income and FICA tax withholding and are reportable as wages on a form W-2, rather than as non-wage income on a form 1099-MISC." Slip opinion at page 12.

At this stage of the appellate proceedings, the remaining primary issue was whether Costco's decision to withhold sums amounting to more than a third of the judgment was justified under Federal tax law as it had evolved since the decision in *Lisec* 23 years ago. At this point, the case only involved wages, but the plaintiff was not an employee and his termination claim had been dismissed. While discrimination cases can involve non-economic damages such as those for emotional distress, parties to mediations can expect that plaintiffs will want to minimize portions of a settlement allocated to wages while employers will feel required to make all withholdings from those allocated to wages. For that reason, parties to a mediation of an employment case that includes claims for wage loss (past, future or both) are well-advised to specify at the outset whether their initial settlement demand or offer is net of deductions or is a gross sum without withholdings.

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