

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
BENCH CARDS FOR:) Administrative Order
) No. 2017 - 81
)
ABILITY TO PAY AT SENTENCING IN)
CRIMINAL AND CIVIL TRAFFIC CASES))
)
AND)
)
)
A.R.S. § 13-810 ORDER TO SHOW)
CAUSE HEARING (OSC), LAWFUL)
COLLECTION OF LEGAL FINANCIAL)
OBLIGATIONS)
_____)

The Fair Justice for All Task Force was established by Administrative Order No. 2016-16. On October 17, 2016, the Arizona Judicial Council supported all of the recommendations of the Fair Justice for All Task Force, including the publication of a Bench Card for Ability to Pay at Time of Sentencing in Criminal and Civil Traffic Cases and a Bench Card for ARS § 13-810 Order to Show Cause Hearings (OSC), Lawful Collection of Legal Financial Obligations.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the attached Bench Card for Ability to Pay at Time of Sentencing in Criminal Cases and Civil Traffic Cases and a Bench Card for ARS § 13-810 Order to Show Cause Hearings (OSC), Lawful Collection of Legal Financial Obligations are approved for use in Arizona courts.

IT IS FURTHER ORDERED that the Administrative Director of the Administrative Office of the Courts shall have the authority to issue Administrative Directives as necessary to amend the attached bench cards.

Dated this 5th day of July, 2017.

SCOTT BALES
Chief Justice

BENCH CARD FOR ABILITY TO PAY AT TIME OF SENTENCING IN CRIMINAL CASES AND CIVIL TRAFFIC CASES

Court-ordered legal financial obligations (LFOs) include all local or state, discretionary or mandatory fines, penalties, costs, fees, surcharges, assessments, restitution and other court ordered financial sanctions. These sanctions may be ordered in criminal cases and civil traffic cases.

Assessment of a defendant's ability to pay may be conducted by court personnel, performing verification through appropriate tools or by the judicial officer posing questions to the defendant.

In criminal cases, a court must impose "the full amount of the economic loss to the victim as determined by the court and in the manner as determined by the court or the court's designee," as required by ARS §§13-603(C), and 13-804(C)&(E). Restitution is exempt from any payment alternatives imposed for other types of financial obligations, but may be the subject of a time payment plan.

Step 1 – Application of Credits

- A. Apply Credit for Time Served if applicable. (§31-145).
- B. Apply Credit for Community Restitution if applicable and when allowed. (§13-824)

Step 2 – Defendant Self-Declaration

- A. "Can you pay this in full today?"
- B. "How much can you pay today?"

Step 3 – Determination of Eligibility for Fine Reduction

- A. Affidavit by defendant to claim a hardship.
- B. Confirmation of hardship by:
 - 1. Proof that defendant receives income-based public assistance
 - 2. DES eligibility check
 - 3. Automated income check
 - 4. Defendant's affidavit or response to questions under oath

Step 4 – Granting a Hardship Mitigation¹

At sentencing, the judge may impose a fine amount that is less than the court's presumptive fine amount, when the judge deems it to be appropriate and as allowed by law. Consider income as a percentage of the Federal Poverty Level (FPL) based on household size. Consider:

- A. At least 25% mitigation if the household income is between 200% and 130% of FPL;
- B. At least 50% mitigation if the household income is less than 130% of FPL, or receipt of income-based public assistance.

Step 5 – Payment

- A. Initial payment (what can be paid today)
- B. Establishment of payment plan for the balance owed
- C. Community restitution in lieu of monetary payment, if permitted by ARS §13-824

2017 Federal Poverty Level (FPL) Income Based on Family Size

Family Size	130% of FPL	200% of FPL	Family Size	130% of FPL	200% of FPL
Individual	\$15,678	\$24,120	Household of 4	\$31,980	\$49,200
Household of 2	\$21,112	\$32,480	Household of 5	\$37,414	\$57,560
Household of 3	\$26,546	\$40,840	Household of 6	\$42,848	\$65,920

¹ The fine and surcharges should be reduced proportionately unless a mandatory fine or sanction is included, then the amount may not be reduced to an amount less than the mandatory fine or sanction. Additional restrictions on surcharges may apply, see the *Penalty Assessment and Surcharge Guide*. <http://www.azcourts.gov/Portals/27/SurchrgGuide012015.pdf>

The Operating Under the Influence statutes of A.R.S. §§ 5-395.01, 28-1389 and 28-8292 prohibit the waiving of a fine or assessment pursuant to those articles or a surcharge imposed pursuant to section 12-116.01 or 12-116.02.

BENCH CARD FOR ABILITY TO PAY AT TIME OF SENTENCING IN CRIMINAL CASES AND CIVIL TRAFFIC CASES

The court may examine the following factors to help determine ability to pay:

- a. Whether the defendant receives income-based public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state-based benefits provided through the Arizona DES. (All such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);
- b. Income, including whether income is at or below 130% or between 130% and 200% of the Federal Poverty Level (FPL) (current guidelines available at <https://aspe.hhs.gov/poverty-guidelines>);
- c. Financial resources, assets, financial obligations, and number of dependents;
- d. Whether the defendant is homeless, incarcerated, or resides in a mental health facility;
- e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
- f. The defendant'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;
- g. Other LFOs owed to the court or other courts;
- h. Whether a LFO payment would result in hardship to the defendant or his/her dependents; and
- i. Any other special circumstances that may bear on the defendant's ability to pay.

BENCH CARD FOR ARS §13-810 ORDER TO SHOW CAUSE HEARINGS (OSC), LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

Court-ordered legal financial obligations (LFOs) include all local or State, discretionary and mandatory fines, costs, fees, surcharges, assessments, restitution and other court ordered financial sanctions in criminal cases. Willful failure to comply with court-ordered LFOs may result in incarceration, except in civil traffic cases.¹

A court may not incarcerate a defendant for nonpayment of a court-ordered legal financial obligation unless the court holds a hearing and makes one of the following findings:

1. The failure to pay was willful and not due to an inability to pay; or
2. The failure to pay was due to an intentional failure to make bona fide efforts to pay.

To make the determination of willfulness, the court should:

1. Confirm that adequate notice of the hearing to determine ability to pay was provided.

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due;
- c. That the court will evaluate the defendant's ability to pay at the hearing;
- d. That the defendant should bring any documentation or information the court should consider in determining ability to pay;
- e. That incarceration may result if the court finds that the defendant had the ability to pay and willfully refused; and
- f. That a defendant unable to pay can request payment alternatives, including, but not limited to, community restitution or a time payment plan.

2. Provide meaningful opportunity to explain at the hearing.

The defendant must have an opportunity to explain:

- a. Whether the amount due is incorrect; and
- b. The reason(s) for any nonpayment (e.g., inability to pay).

3. The following are factors the court should consider to determine willfulness:

- a. Whether defendant is receiving income-based public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), veterans' disability benefits, or other state based benefits provided through the Arizona DES. (All such benefits are not subject to attachment, garnishment, execution, levy, or other legal process);
- b. Income, including whether income is at or below 130% of the Federal Poverty Level (FPL)²;
- c. Financial resources, assets, financial obligations, and dependents;
- d. Whether the defendant is homeless, incarcerated, or resides in a mental health facility;
- e. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, and child support;
- f. The defendant'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;
- g. Other LFOs owed to the court or other courts;
- h. Whether LFO payment would result in hardship to the defendant or his/her dependents; and
- i. Any other special circumstances that may bear on the defendant's ability to pay.

2017 FPL Income Based on Family Size

<i>Family Size</i>	<i>130% of FPL</i>	<i>Family Size</i>	<i>130% of FPL</i>
<i>Individual</i>	<i>\$15,678</i>	<i>Household of 4</i>	<i>\$31,980</i>
<i>Household of 2</i>	<i>\$21,112</i>	<i>Household of 5</i>	<i>\$37,414</i>
<i>Household of 3</i>	<i>\$26,546</i>	<i>Household of 6</i>	<i>\$42,848</i>

¹ Order to Show Cause hearings under ARS §13-810 are not used in civil traffic cases.

² U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 26, 2017, <https://aspe.hhs.gov/poverty-guidelines>

BENCH CARD FOR ARS §13-810 ORDER TO SHOW CAUSE HEARINGS (OSC), LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS

4. At the hearing, the court should find on the record:

- a. A determination of willfulness or intentional failure to make bona fide efforts to pay.
- b. Any fine payment alternatives imposed in 5 below.

5. Consider alternative sanctions for both those who have been found willful and not willful of nonpayment pursuant to ARS §13-810(D)&(E).

The options for those defendants who willfully failed to pay, or intentionally failed to make a good faith effort to pay, after a finding of contempt include:

- a. Order the defendant to perform community restitution;
- b. Enter a criminal restitution order pursuant to ARS §13-805;
- c. Enter a writ of criminal garnishment pursuant to ARS §13-812. This does not discharge a defendant who is incarcerated for nonpayment until the amount owed or a portion of the amount owed is paid;
- d. Order defendant incarcerated in the county jail until the LFO or a specified portion of it is paid.
- e. Refer for probation revocation conducted under Rule 27 of the Rules of Criminal Procedure. Probation revocation cannot be determined at a §13-810 OSC hearing.

The options for those defendants who were not willful in nonpayment, or have made a good faith effort to pay include:

- a. Re-establish any original agreement regarding the payment of the LFO;
- b. Modify the manner in which the amount owed is to be paid. This may include an extension of time to pay, the establishment or the modification of a time payment plan, ordering community restitution or allowing credit for community restitution when permitted by ARS §13-824;
- c. Enter a criminal restitution order pursuant to ARS §13-805;
- d. Enter a writ of criminal garnishment pursuant to ARS §13-812. This does not discharge a defendant who is incarcerated for nonpayment until the amount owed or a portion of the amount owed is paid.

Courts must impose “the full amount of the economic loss to the victim as determined by the court and in the manner as determined by the court or the court’s designee,” as required by ARS §§13-603(C) and 13-804(C)&(E). Restitution is exempt from any payment alternatives imposed for other types of financial obligations, but may be the subject of a time payment plan.