

Legal Financial Obligations: Ability to Pay Determinations

A Bench Card for Judges

This benchcard contains important considerations to help courts make decisions about a person's ability to pay legal financial obligations.¹ Depending on your jurisdiction's laws, an ability to pay determination might happen before legal financial obligations are assessed, after a person has failed to pay legal financial obligations, when a person requests an ability to pay hearing, or at all or some combination of these events. Federal law also requires that an ability to pay determination happen before a person is incarcerated for failure to pay legal financial obligations.² Your jurisdiction might also require other elements to be considered as part of an ability to pay determination. This benchcard is meant as a starting point to highlight best practices and common considerations.

1. Give Adequate Notice of the Ability to Pay Hearing

Notice should include the following information:

- a. Hearing date and time;
- b. Total amount claimed due or the potential amount to be charged/assessed;
- c. Reasons for the assessed obligation;
- d. That the court will evaluate the person's ability to pay at the hearing;
- e. That the person should bring all documentation or information they want the court to consider in determining their ability to pay;
- f. If incarceration is a possible outcome it only results only if alternate measures are not adequate to meet the state's interests in punishment and deterrence or the court finds that the person had the ability to pay and willfully refused;
- g. Right to counsel, if applicable;³ and
- h. Right to request payment alternatives, such as community service, a reduction of the amount owed, or payment plans.

2. Meaningful Opportunity to Explain at the Hearing

The person must have an opportunity to explain:

- a. Their financial situation;
- b. Any barriers to payment;
- c. If they believe the amount charged is incorrect; and
- d. Reason(s) for any nonpayment.

3. Factors the Court Should Consider When Determining Ability to Pay

- a. Income, including whether income is at or below 125% of the [Federal Poverty Guidelines \(FPG\)](#);⁴
- b. Receipt of needs-based, means-tested public assistance, including, but not limited to, Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Social Security Disability Insurance (SSDI), or veterans' disability benefits;
- c. Financial resources and assets;
- d. Basic living expenses, including, but not limited to, food, rent/mortgage, utilities, medical expenses, transportation, child support, student loan payments, credit card and medical debt;

¹ Court-ordered legal financial obligations (LFOs) include all discretionary and mandatory fines, costs, fees, state assessments, and/or restitution in civil and criminal cases.

² See *Bearden v. Georgia*, 461 U.S. 660 (1983).

³ Case law establishes that the U.S. Constitution affords indigent persons a right to court-appointed counsel in most post-conviction proceedings in which the individual faces actual incarceration for nonpayment of a legal financial obligation, or a suspended sentence of incarceration that would be carried out in the event of future nonpayment, even if the original sanction was only for fines and fees. See Guidance on the [Right to Counsel in Legal Financial Obligation Cases](#).

⁴ U.S. Dep't of Health & Human Servs., Poverty Guidelines, Jan. 17, 2024, <https://aspe.hhs.gov/poverty-guidelines>.

- e. Costs for dependents;
- f. Whether the person is homeless, incarcerated, or resides in a mental health facility;
- g. 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;
- h. Other LFOs owed to the court or other courts;
- i. Whether LFO payment would result in manifest hardship to the person or his/her dependents; and
- j. Any other circumstances that may bear on the person's ability to pay.

Alternative Sanctions that Courts Should Consider When There Is an Inability to Pay

- a. Reduction of the amount due;
- b. Extension of time to pay;
- c. A reasonable payment plan or modification of an existing payment plan;
- d. Requiring participation in or credit for past completion of community service. (Caution: Hours ordered should be proportionate to the violation and take into consideration any disabilities, driving restrictions, transportation limitations, and caregiving and employment responsibilities of the individual);
- e. Requiring participation in or credit for past completion of a relevant, court-approved program (e.g., education, job training, mental health or drug treatment); or
- f. Waiver or suspension of the amount due.

4. Findings by the Court

The court should make the following findings:

- a. The person received adequate notice of the hearing date/time and purpose of the hearing;
- b. Failure to pay an LFO is at issue; if applicable,
- c. The person was afforded counsel, if applicable;
- d. Specific findings about the person's financial situation and ability to pay based on the evidence presented at the hearing;
- e. The person had an opportunity to present documents or other evidence of inability or failure to pay; and
- f. The court considered alternative sanctions to payment or incarceration if appropriate.

If the Court determines that incarceration must be imposed, the Court should make findings about:

- 1. The evidence the court relied on to conclude that nonpayment was willful; and
- 2. Why alternate measures are not adequate, in the particular case, to meet the state's interest in punishment and deterrence.

This bench card was produced by the National Task Force on Fines, Fees, and Pre-Trial Practices. The Task Force is a joint effort of the Conference of Chief Justices and the Conference of State Court Administrators, sponsored by the State Justice Institute and the Bureau of Justice Assistance, coordinated by the National Center for State Courts.

