

## **Tax Protestors: A Unique Challenge For Employers**

Tax protests are as inevitable as taxation itself. Apart from relying on a number of misguided legal arguments, the primary tool that tax-protesting employees use to avoid paying taxes is to restrict their employers' access to the employees' social security numbers. By doing so, tax protesters hope to avoid (a) the automatic payment of taxes through employer withholdings, and (b) alerting the government that they are earning income and not paying taxes. Tax protesters present a unique (and sometimes frustrating) challenge to employers, who are required by law to supply the government with the social security numbers of employees who are U.S. citizens.

### History

The Anti-Defamation League cites two sources for tax protestation in American history: (a) the left-wing anti-war movement of the Viet Nam era, during which protesters sought to decrease funds available for the war effort; and (b) conservative opposition to income taxes, most notably by groups such as *Posse Comitatus* (originating in California and Oregon) and Christian Identity (the banner for white supremacist groups such as the KKK).

The modern anti-tax movement has expanded to include a multitude of scam artists who provide quasi-legal advice and forms to tax protesters for the stated purpose of assisting them in avoiding the payment of taxes, purportedly with no legal consequences. In reality, however, the arguments and instruments employed by tax protesters to avoid taxes have been rejected by the courts so many times that judges will frequently impose immediate monetary sanctions on protesters simply for trying. But this does not mean tax protestation is a dying practice. Indeed, while fewer cases have found their way to the appellate courts, cases continue to be filed, and employers are beginning to face more sophisticated efforts on the part of protesting employees.

### Arguments Against Taxation

Although the arguments forwarded by tax protesters are diverse, the following is a shorthand list of the 10 most-used (and worn out) arguments:

1. *Taxing income violates the First Amendment's right to free speech.* This usually means freedom of religion, and since this issue is more complicated than the others, and can involve a discrimination charge against the employer, it is discussed in further detail below.
2. *Income tax laws apply only to persons located in certain geographic areas, such as Washington D.C. and federal territories.* Protesters routinely suggest that the states they reside in are not "states" under the income tax laws, or that even though they reside within the state, they are not residents of the state.
3. *"Sovereign citizens" are exempt from taxes.* Protestors often insist that the government may only tax entities (such as corporations), and that all other "persons" are sovereign citizens exempt from taxation.

4. *Income taxes are required only of entities with a contractual relationship with the government.* In other words, if you don't do the government's laundry, you are not required to pay taxes to the government.
5. *Income tax laws apply only to federal workers.* Workers in the private sector are not subject to compulsory taxation on income. The next argument is its corollary.
6. *Income tax in the private sector is actually voluntary rather than mandatory.* Employers only *think* they are required to withhold employee income tax. The truth of the matter is that paying taxes is optional!
7. *At any rate, wages cannot be taxed as income because they are part of your person, which is really a depreciating asset.* The possible punch lines here are virtually limitless.
8. For those who have trouble with the arguments above: *The ratification of the 16<sup>th</sup> Amendment can be called into question because (a) there are differences in punctuation between the various state versions of that amendment, and (b) Ohio was a territory when it ratified the amendment, not a state.* If this doesn't convince you, try the next one.
9. *The IRS is not a legitimate government agency, but is instead an acronym for Ignorance Related Slavery.* And last but not least, . . .
10. *Federal notes are not legal tender and cannot be taxed.* (The "Gold Standard" argument.)

All of these arguments have been defeated so often that, when published, the decisions often amount to a single paragraph – just long enough for the court to explain that the arguments are frivolous, and to indicate the extent of the monetary sanction imposed by the court on the protester for unjustifiably clogging up the legal system.

Of course, if a frivolous argument or two were all the government had to contend with, the courts' job would be easy. Unfortunately, however, tax scammers have discovered the internet, and are now running websites advertising various ways that tax protesters can avoid tax withholdings without liability to the IRS, including publishing false information about the requirement to file returns, the employer's duty to withhold, etc. Consequently, dubious arguments that were once posited by a fringe element of our society are now finding a wider audience.

The government's response has been to dam the flood at its source. For example, in one unreported (but much celebrated) case from California, Eduardo Marmolejo Rivera, an attorney, maintained a website that made claims about his ability to provide legal instruments and representation that would allow clients to earn income tax-free with no hassle from the IRS. Besides selling abusive tax schemes, he made fraudulent claims about the requirement to pay taxes, sold opinion letters for use in avoiding criminal charges, represented clients before the IRS, and began a program of recruiting other attorneys to work on the same cause. Then when the government sued Rivera for promoting unlawful tax shelters, he failed to defend himself. The court ultimately prohibited Rivera from further engaging in his unlawful enterprise, and ordered him to give up his list of customers and remove fraudulent statements from his website.

Unfortunately, tax protestor websites treated Rivera as a patriot and a martyr at the hands of a greedy, transgressive government.

### Religious Arguments Against Taxation

As noted above, religious arguments against taxation are complicated because they trigger other laws prohibiting discrimination against employees on the basis of their religion. But what do income and social security taxes have to do with religion? Referring to the Book of Revelation, in which the anti-christ appears bearing the “mark of the beast” in the form of the number 666, some religion-based tax protesters see the assignment of a social security number as marking the individual with the sign of the anti-christ, forcing the individual to compromise his or her religious commitments. They therefore reject the assignment of a social security number on religious grounds, and resist employer efforts to discover the numbers that have been assigned to them.

Anti-war protestors have adopted a different religion-based objection to such taxes. In particular, while some argue against the payment of all income taxes, others argue that they should be allowed to withhold the amount that would otherwise be allocated to the military. Still others argue that they have no problem paying the entire amount of income tax they have been assessed, but that they should be allowed to designate it for non-war expenditures.

The unpublished case of *Kennedy v. Rubin*, 1995 WL 552148, illustrates the latter argument. In that case, Mr. Kennedy was classified as a conscientious objector by the Draft Board in 1967. He did not seek to restrict the assessment or collection of his taxes, but demanded that the government spend what was collected from him in a way that he did not find religiously objectionable. The court rejected that argument, reaffirming the well established principle that a federal taxpayer has no standing to maintain a purely religious objection to federal *expenditures*. From that vantage point the court also had no trouble extending its ruling to religious-based arguments attacking the *collection* of taxes, reasoning that the government levies taxes on all persons, regardless of religion, so religious objections are not a constitutional basis for not paying any part of the taxes. In addition, the court noted that only Congress has the power to tax and spend under the Constitution; individual citizens do not.

### Employee Tactics and Employer Protections

Although courts have uniformly rejected the efforts of tax protesters to avoid taxation, protesters have not given up the fight, and have instead redirected their efforts to their employers using the following tactics:

1. *Lawsuits*. Tax protestors frequently sue their employers for withholding income taxes from the employee’s wages. However, state and federal tax laws make clear that employers are required to withhold taxes as a matter of law. In an effort to stem the tide of employee lawsuits of this type, courts have aggressively punished tax protesters for filing such frivolous cases by imposing monetary sanctions on them and, less frequently, barring them from the courthouse.
2. *Refusing to Provide Social Security Number*. Upon accepting an offer of employment, tax protestors may refuse to give the new employer a social security number, often

claiming that it is against their religion to do so. Employers, faced with a statutory obligation to provide the employee's social security number to the government, often respond by simply terminating the employee, who almost as often responds with a lawsuit alleging religious discrimination. The courts have ruled squarely for the employer in those cases.<sup>1</sup>

3. *Providing a False Social Security Number.* Employers should check the applicant's social security number as part of the applicant intake process to ensure it corresponds to the name on the application. Tools employers can use to verify social security numbers are included at the end of this article.
4. *Creating False Exemption Certificates.* By law, employers are required to withhold income from employees, and the amounts withheld are supposed to follow the "certificate of exemption" (W-4) filled out by the employee. See 26 USC 3402(a) and 3402(f)(2)(A). If the exemption certificate shows no obligation to withhold, under 3402(n) the employer is not required to withhold employee income.

Relying on those rules, tax protestors sometimes falsely claim so many dependents that no income can be withheld, and then refuse to file tax returns, which would confirm or dispel the existence of the employee's exemptions. For example, in *US v. Carlson*, 617 F2d 518 (9<sup>th</sup> Cir., 1980), the employee claimed 99 exemptions on his withholding form even though he was unmarried and had no dependents. When it came time to file a tax return, he asserted his Fifth Amendment right against self-incrimination. The court rejected his claim of privilege, however, stating that the right against self-incrimination could not be used to perpetrate a crime (in this case tax evasion and filing an illegal withholding certificate).

Employers are not normally in the IRS's crosshairs when a false exemption certificate is submitted and inappropriate withholdings are made based on that certificate. However, employers are bound by IRS directives in cases of suspicious exemption certificates. Thus, if the IRS responds to a suspicious withholding form by requiring the employer to withhold at a higher rate than the W-4 otherwise indicates, the employer is required to follow those instructions. *Stefanelli v. Silvestri*, 524 F Supp 1317 (D Nev, 1981).

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<sup>1</sup> "[A]ll employers are required to withhold certain income taxes and social security taxes and make a report as to each individual employee to the Internal Revenue Service. These reports require identification of the employee by the employee's social security number. See 26 USC 6109; 26 CFR §§31.601(b)-2, 31.6109-1." *Hovda v. Gregoire*, 95 F3d 1157 (9<sup>th</sup> Cir 1996). "It is not unconstitutional to require a taxpayer to provide a social security number, because the government's compelling interest in identifying taxpayers outweighs the incidental effect on the practice of religion." *Freis v. Soboroff*, 81 Cal App 4<sup>th</sup> 1102 (2000). "Even if we were to somehow conclude that plaintiff could only be fired for cause, . . . an employer is not required to retain an employee who refuses to cooperate in allowing the employer to comply with federal and state laws." 2002 WL 1797229 (Cal App 2 Dist).

5. *Providing Employer with False Forms.* Tax protestors regularly download and supply employers with forms they believe will exempt them from withholding or the use of their social security numbers. For example, rather than providing a social security card, the employee may try to submit a “Statement of Citizenship,” which can be confused with INS Forms N-560 or N-561, the official INS certificates of US citizenship (forms that are suitable for verifying employment eligibility under 8 USC § 1324a(b) and 8 CFR § 274a.2(b)(1)(v)(A)(2)). Employers should also look out for an “Affidavit of Constructive Notice,” which is sometimes submitted to suggest the employee is exempt from withholding taxes.
6. *Demanding Payment of Wages in Cash.* Simply put, if a worker wants to be paid in cash, the worker is asking the employer to break state and federal laws requiring withholding and payment of taxes. Furthermore, while paying workers in cash may allow the employer to illegally evade employment taxes, it also prevents the employer from safely deducting employee expenses. Do not do it.
7. *Working as an Independent Contractor.* As with employees, employers are required to report non-wage income paid to independent contractors. However, those contractors will sometimes claim that they do not have a social security number or tax identification number, and that the employer has no lawful obligation to report the contractor’s income. If a contractor asks your business not to file a 1099 or refuses to provide a social security or tax identification number, the contractor is probably evading taxes for which you can be held liable.

## Conclusion

Employers are generally immune from liability for (i) requiring that an employee provide a social security number or other proof of eligibility to work in the US; and (ii) withholding appropriate income for tax purposes (including withholding the minimum percentage required by law in the absence of information essential to making a more accurate determination of the amount that should be withheld). In addition, employers may terminate an employee for lack of cooperation in providing any of the required information. In the end, while tax protestors may economically disrupt your business, the best solution is early prevention through insistence on proper hiring documentation and procedures, whether the applicant is a prospective employee or independent contractor.

Toward that end, the Social Security Administration offers employers four methods for verifying employee social security numbers:

- *Internet.* You may verify up to 10 names and numbers (per screen) online and receive immediate results, or upload batch files of up to 250,000 names and numbers and usually receive results by the next business day. Visit [www.socialsecurity.gov/employer](http://www.socialsecurity.gov/employer) and select the link titled “Verify Social Security Numbers Online.”
- *Telephone.* Verify up to five names and numbers by calling 1-800-772-6270 or 1-800-772-1213.

- *Paper.* Verify up to 300 names and numbers by submitting a paper request to the Wilkes-Barre Data Operations Center.
- *Magnetic media.* Verify between 51 and 250,000 names and numbers by submitting magnetic tape or diskette to the Social Security Administration.

Some verification methods require registration. For more information, call 1-800-772-6270.