

# How to Get Back the Money You Previously Failed to Withhold



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What should you do if you discover that you didn't deduct enough money from an employee's pay? So called "failures to withhold" can lead to significant penalties and interest, especially if the error affects deductions required by law. Fortunately, you're allowed to correct your mistakes by taking extra deductions from subsequent payments you make to the employee going forward. But you need to be cognizant of and careful to comply with the rules governing how such deductions are made.

## **Different Recovery Methods for Different Deductions Missed**

The methods you can use to recover a failure to withhold, if any, vary depending on which kind of deduction you failed to withhold. There are 4 basic possibilities:

### **1. Failure to Withhold Income Tax**

Failures to deduct enough money for income tax are relatively rare and usually stem from payroll setup errors, such as entering a higher personal income tax credit than was actually claimed by the employee on the TD1. Such failures to withhold can result in penalties and interest at CRA rates.

Unfortunately for employers, the federal tax laws neither require nor authorize employers to recover such amounts via source deductions from subsequent paycheques. Neither do Québec tax laws. Consequently, deducting shortfalls in withholdings from pay doesn't enable you to avoid penalties and interest under tax laws. All it does is expose you to the risk of liability for improper deductions under employment standards laws.

### **2. Failure to Withhold CPP EI, QPP & QPIP**

Unlike income tax, the failure to withhold deductions for CPP, EI, QPP and QPIP can be recovered via subsequent deductions without the employee's consent. However, the employer's right to deduct is subject to 2 key restrictions:

**Deductions Must Be within 12 Months:** Employers can only make deductions from payments made within 12 months of the original failure to withhold. Thus, by the time you

discover the error, it may be too late to make deductions to correct it.

**Only One Deduction Can Be Recovered at a Time:** You can recover only one missed deduction at a time. Let's use the following example to illustrate how these restrictions work:

Example: In 2015, UO Canada Ltd. fails to withhold \$25 in EI premiums from an employee's paycheque over the course of four semi-monthly payments: Jan. 15, Jan. 30, Feb. 15 and Feb. 27. Payroll discovers the mistake on Jan. 18, 2015, as it prepares to issue the 2015 T4s.

It's now too late to get back the \$25 missed on the Jan. 15, 2015 payment. But there may still be time to make deductions to recover the other \$75 in failures to withhold. But remember: Missed deductions must be recovered one at a time. So, the company can get back the \$25 missed on Jan. 30, 2015, from the Jan. 30, 2016 payment; ditto for the \$25 missed on Feb. 15, 2015, which can be recovered from the Feb. 15, 2016 payment, and the \$25 missed on the Feb. 27, 2015, which can be recovered on Feb. 26, 2016.

The Bottom Line: Of the total \$100 in EI deductions that UO Canada failed to withhold, the company can recover only \$75 in subsequent deductions.

### **3. Failure to Deduct for Garnishments**

An employer's authority to make deductions for garnishments is based on the terms of the actual garnishment order. And because orders differ, it's impossible to provide a general rule. However, employers who discover failures to withhold in response to a garnishment should immediately notify the court or administrative body that issued the garnishment order and ask for instructions. It's also a good idea to ask a lawyer to review the initial garnishment order and offer advice.

### **4. Failure to Make Voluntary Deductions**

Nothing in the Canadian employment standards deals explicitly with deductions to correct failures to make voluntary deductions. To determine what, if anything, you can do about a missed voluntary deduction, you must look to the terms of the document that includes the employee's actual consent. Such consent may be contained within the terms of:

- The employee's employment agreement;
- The collective agreement if the employee is represented by a union; and/or
- The group benefits plan to the extent the consent authorizes deductions for the purpose of contributing to such a plan.

If amounts the employer failed to deduct are relatively small, there may be no problem with a one-time deduction to recover the full amount. However, if the undeducted amount is large, employees will probably want to spread out the deductions over time. [[Click here](#) for Model Language you can use to establish an agreement with an employee for future deductions.]