

# Failure to Collect and Pay Over Employment Taxes

## Cross References

- *Giang*, 1st Circuit Court of Appeals, April 22, 2026

The taxpayer in this case immigrated to the United States from Vietnam in 1987 after spending time in a refugee camp in the Philippines. In 2015, she founded Able, a temporary employment business based in Quincy, Massachusetts. Able provided short-term laborers to client companies throughout the state. Many of Able's workers were Vietnamese immigrants. The client companies paid Able, and Able was responsible for paying the workers and handling payroll tax obligations.

The taxpayer personally managed most aspects of Able's operations, including job placements, worker transportation, and payroll coordination. She relied on her daughter who had formal training in accounting to enter payroll data into the accounting system. That accounting system generated worker paychecks, W-2s, and IRS Form 941 quarterly payroll tax reports. The taxpayer also used an outside accountant to prepare tax returns for Able and for her personally, though the outside accountant did not prepare or file Able's Form 941s.

Between 2015 and 2019, the taxpayer made 774 cash withdrawals, over \$3.7 million in total, from bank accounts connected to Able and the taxpayer. The taxpayer testified that she used the cash to pay her workers. She never withdrew more than \$10,000 at once but often made withdrawals just below that threshold, sometimes multiple times per day. The federal Bank Secrecy Act requires banks to report single cash withdrawals of over \$10,000 to the Department of the Treasury.

The taxpayer's cash-accounting practices allowed her to underreport Able's payroll and thus avoid over \$800,000 in employment taxes. Records from Able's bank accounts showed cash withdrawals that far exceeded Able's reported payroll. Several witnesses, including former Able temp workers, testified that Able employees were often paid in cash for additional hours beyond what their paychecks showed and that this extra cash pay was not reported to tax authorities by Able.

A federal grand jury indicted the taxpayer in 2023 for tax evasion. A jury convicted her in 2024 and she was sentenced to 18 months' imprisonment followed by two years of supervised release. She appealed the conviction to the 1st Circuit Court of Appeals.

One issue on appeal had to do with the District Court's lack of instructions to the jury about bias. Before trial, the taxpayer asked for an implicit bias instruction based on model language promulgated by the Massachusetts Supreme Judicial Court. This instruction describes the concept of subconscious biases, urges jurors to deliberate fairly and without prejudice, and includes strategies for avoiding such biases. The purpose of the

instruction is to guard against built-in expectations and assumptions, even if we are not aware of them and even if we believe we do not have them.

The District Court declined to provide that or any other instruction about implicit bias. The taxpayer contended that the District Court erred by refusing to give her requested instruction on implicit bias. This instruction was important because her defense centered on her identity as a Vietnamese immigrant and non-native English speaker. Not giving this instruction to the jury impaired her defense because her identities as a Vietnamese woman, immigrant, and non-native English speaker were central at trial.

The Appeals Court stated it was satisfied that the taxpayer's requested instruction was substantially covered by the District Court's instructions to the jury even though it was not word for word based on the Supreme Court's model instruction. Before sending the jury to deliberate, the court specifically instructed the jurors to disregard any possible prejudice. The court stated: "You must do your duty as jurors regardless of any personal likes or dislikes, opinions, prejudice, or appeals to sympathy. That means you must decide the case based solely on the evidence that is before you."

Another issue on appeal had to do with the District Court's instructions to the jury when it explained the charges against the taxpayer. The taxpayer argued that the jury should have been instructed that employment taxes need not be withheld from subcontractor wages, unlike employee wages.

When instructing the jury on the elements of failing to collect or pay federal employment taxes, the District Court identified the three elements the government would need to prove:

- 1) That the taxpayer had a duty to collect, account truthfully for, or pay over an employment tax,
- 2) That the taxpayer knew she had a duty to collect, account truthfully for, or pay over an employment tax, and
- 3) That the taxpayer willfully failed to collect, account truthfully for, or pay over the employment tax.

The District Court also explained to the jury what employment tax meant. The taxpayer did not say anything in the definition of employment tax was wrong. Instead, she contended that some of the trial evidence suggested the taxpayer thought she was paying her workers as subcontractors, and that the court therefore should have also explained in its instructions that someone who hires subcontractors is not required to pay the same kind of employment taxes on those subcontractors' wages as they must pay on employees' wages. Failing to explain this, the taxpayer argued, prevented the jury from deciding on a material issue because if the taxpayer's workers were subcontractors, she would not have had to withhold and pay the same employment taxes on their pay.

The Court stated a District Court is required to instruct the jury on a defense theory only if the evidence provides some foundation for it. The Court stated the taxpayer's theory is minimally supported by the fact that Able's 2017 Depreciation and Amortization Form lists \$1,185,913 in subcontracted services as a deductible business expense, suggesting that some of the taxpayer's workers may have been subcontractors, not employees.

But all the remaining evidence at trial on that topic contradicts her theory and, thus, justifies the District Court's decision not to give the subcontractor instruction.

The taxpayer testified that she paid her workers a lower hourly rate in cash because she would keep the residual money to pay employment taxes at the end of the year, meaning that she did not think she was paying subcontractors who would be paying those employment taxes themselves.

The taxpayer also testified that she told her workman's comp insurance company that Able did not use any subcontractors. Able's insurance policy report for 2017 clearly stated that Able did not use any subcontractors. And Able's contract with one of its clients stated that all workers are employed by Able and that Able would handle all federal and state payroll taxes. Further, the taxpayer never filed any 1099 forms with the IRS reporting payments to subcontractors, even though her accountant testified that he had discussed 1099 forms with the taxpayer.

And, critically, though both the taxpayer and her daughter testified at some length about Able's business operations, neither testified or even suggested that Able used subcontractors in addition to (or instead of) employees.

The Appeals Court stated the taxpayer had the burden of identifying sufficient evidence from her trial that warranted a jury instruction on her subcontractor theory of defense. Because she failed to meet that burden, the District Court did not err by declining to instruct the jury on subcontractor tax obligations.