

## Policy Models, Specific Policies, and State Examples

The Table Accompanying NCAJ’s “ability to pay report”:

### The Price People Pay: Closing the Access to Justice Gap with Policy Solutions for Unaffordable Fines and Fees

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POLICY MODELS	SPECIFIC POLICIES	STATE EXAMPLES
<p><b>I. Discretion:</b> Judicial Authority to Waive or Reduce Fines and Fees</p>	<p>a. States should give judges <b>authority to waive or modify all</b> fines and fees.</p>	<p><b>Rhode Island</b> requires judges to waive fines and fees completely if a person is indigent and authorizes judges to waive fines or fees in whole or in part "pursuant to a determination of limited or inability to pay." 12 R.I. GEN. LAWS § 12-20-10 (2024).</p> <p><b>Montana</b> provides that a judge may not sentence a person to pay costs or fines “unless the defendant is or will be able to pay them.” MONT. CODE ANN. §§ 46-18-231(3), 46-18-232(2) (2023).</p>
<p><b>II. Timing:</b> A Judicial Duty to Hold Ability to Pay Hearings at Critical Times</p>	<p>a) Judicial duty to determine ability to pay <b>before</b> imposing fines or fees</p> <p>b) Judicial duty to determine ability to pay <b>any time</b> a litigant requests a re-hearing</p>	<p>In <b>Washington</b> State, the Supreme Court has created a clear rule about ability to pay determinations: “[A] trial court has [the] obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes [legal financial obligations].” <i>State v. Blazina</i>, 344 P.3d 680 (Wash. 2015).</p> <p><b>Oklahoma</b> provides that at the time of plea or sentencing the court must inform the person that they may request a cost hearing “if at any time he or she is unable to pay the court financial obligations, at which point the court may waive all or part of the debt owed.” The law further provides that “upon any change in circumstances affecting the ability of a defendant to pay, the defendant may request a cost hearing before the court by contacting the court clerk. The district court for each county and all municipal courts shall provide a cost hearing for any defendant upon request, either by establishing a dedicated docket or on an as-requested basis.” H.R. 2259, 59th Leg., 1st Sess. (Okla. 2023), <i>available at</i> <a href="https://www.sos.ok.gov/documents/legislation/59th/2023/1R/HB/2259.pdf">https://www.sos.ok.gov/documents/legislation/59th/2023/1R/HB/2259.pdf</a>.</p> <p><b>Texas’s</b> law applies to people on community supervision, but provides that “The Office of Court Administration of the Texas Judicial System shall adopt a standardized form that a defendant may use to make a request...for the reconsideration of the defendant’s ability to pay.” TEX. CODE CRIM. PROC. ANN. art. 42A.655(h) (West 2024).</p>

	<p>c. Judicial duty to <b>suspend payments during incarceration and determine ability to pay after release</b></p>	<p><b>Indiana</b> provides that a court may suspend payment of fines during all or part of a person's sentence (including incarceration). If the court suspends payment, the law provides that "the court shall conduct a hearing at the time the fine is due to determine whether the convicted person is indigent." IND. CODE ANN. § 35-38-1-18(b) (LexisNexis 2023). Better still would be to (a) require suspension of payment during incarceration, (b) suspend all fine and fees, not just fines, and require a new ability to pay determination on all of them, and (c) broaden the ability to pay determination so that judges have an obligation to assess a person's ability to pay even if they are not indigent.</p>
	<p>D. Judicial duty to determine ability to pay <b>before imposing any sanctions</b></p>	<p><b>Delaware</b> has eliminated incarceration as a possible sanction for failure to pay fines and fees. DEL. CODE ANN. tit. 11, § 4105(a) (West 2024).</p> <p><b>Oklahoma</b> requires courts to conduct a cost hearing any time a person becomes delinquent on their payments. Ok. HB 2259 (2023). Ok. H.R. 2259.</p> <p><b>Washington</b> provides that "The court shall not sanction a defendant for contempt based on failure to pay fines, penalties, assessments, fees, or costs unless the court finds, after a hearing and on the record, that the failure to pay is willful." WASH. REV. CODE § 10.01.180(3)(a).</p>
<p><b>III. Procedure:</b> Procedural protections during ability to pay determinations</p>	<p>a) Judicial duty to put ability to pay findings <b>on the record</b></p> <p>b) Judicial duty to make <b>clear findings</b> of fact</p> <p>c) Judicial duty to <b>appoint counsel</b> for party facing potential incarceration or sanction</p>	<p><b>Ohio</b> specifies that "If a court or magistrate determines after considering the evidence presented by an offender, that the offender is able to pay a fine, the determination shall be supported by findings of fact set forth in a judgment entry that indicate the offender's income, assets, and debts, as presented by the offender, and the offender's ability to pay." OHIO REV. CODE ANN. § 2947.14(B) (LexisNexis 2024). The protection would be stronger if it applied to fines and fees.</p> <p><b>Oklahoma</b> law provides that "Any order of the court, whether there be a court reporter in attendance or not, shall be reduced to writing and filed of record in the case. The order shall set forth the findings of the court regarding the defendant's ability or inability to pay the fine and/or costs, the refusal or neglect to do so, if that be the case, the amount of the installments and due dates, if so ordered, and all other findings of facts and conclusions of law necessary to support the order of the court." Okla. R. Crim. Ct. App. 8.7.</p> <p><b>Massachusetts</b> provides an example of a strong right to counsel law when a person faces incarceration for failure to pay: "A court shall not commit a person to a correctional facility for non-payment of money owed if such a person is not represented by counsel for the commitment proceeding, unless such person has waived counsel. A person deemed indigent for the purpose of being offered counsel and who is assigned counsel for the commitment portion of a proceeding solely for the nonpayment of money owed shall not be assessed a fee for such counsel." MASS. GEN. LAWS ch. 127, § 145(b) (2022). A stronger protection still would be the codification of a right to counsel for all fines and fees hearings—or, at least, for every hearing in which sanctions are possible, not just when a person faces incarceration.</p>

<b>IV. Indigency:</b> Waiver of Fines and Fees When a Person Cannot Afford to Pay	a. Waiver of income below <b>bright line financial eligibility standard: 200 percent</b> of the federal poverty line	<b>Illinois</b> provides that "If the court finds that the applicant is an indigent person, the court shall grant the applicant a full assessment waiver exempting him or her from the payment of any assessments." 725 ILL. COMP. STAT. 5/124A-20. It defines "indigent person," in part, as a person whose "available personal income is 200% or less of the current poverty level" (with minimal exceptions for assets). <i>Id.</i> at (a)(2).
	b. Relying on <b>receipt of public benefits as shortcut</b> to determine eligibility for waiver	<p><b>Oklahoma</b> provides that judges should presume that a person is unable to pay if they receive "support from the Temporary Assistance for Needy Families program, Supplemental Nutrition Assistance Program, the Special Supplemental Nutrition Program for Women, Infants, and Children nutrition education and supplemental food program, or any other federal need-based financial support." Ok. H.R. 2259. The provision would be even stronger if it applied to state need-based financial support as well.</p> <p><b>Oklahoma</b> presumes that people are unable to pay if they have been "designated as totally disabled by any federal, state, or tribal disability services program including but not limited to military disability, Social Security Disability Insurance, Supplemental Security Income, or tribal disability benefits." Ok. H.R. 2259.</p>
	c. A duty to presume waiver of fines and fees <b>based on life circumstances</b>	<p><b>Oklahoma</b> requires judges to presume that a person is unable to pay if they receive "subsidized housing support through the Housing Choice Voucher program, the United States Department of Housing and Urban Development, or other state, local, or other federal government housing subsidy program." Ok. H.R. 2259 (2023).</p> <p><b>Washington</b> requires judges to presume that a person is unable to pay if they are "homeless." WASH. REV. CODE § 10.01.160. It also requires judges to presume that a person is unable to pay if they are "mentally ill" or have been involuntarily committed to a public mental health facility. WASH. REV. CODE §§ 10.01.160(3); 10.101.010.</p> <p><b>Illinois</b> gives judges the discretion to waive all fines and fees if payment "would result in a substantial hardship to the person or his or her family." 725 ILL. COMP. STAT. 5/124A-20.</p>

<p><b>V. Statutory Guidelines:</b> Judicial considerations for determining how much a person should pay</p>	<p><b>A. Codified factors</b> for courts to consider in determining ability to pay</p>	<p><b>Oklahoma</b> provides that, "In determining the ability of a defendant to pay, the court shall consider the following factors:</p> <ul style="list-style-type: none"> <li>a. individual and household income,</li> <li>b. household living expenses,</li> <li>c. number of dependents,</li> <li>d. assets,</li> <li>e. child support obligations,</li> <li>f. physical or mental health conditions that diminish the ability to generate income or manage resources,</li> <li>g. additional case-related expenses to be paid by the defendant, and</li> <li>h. any other factors relevant to the ability of the defendant to pay." Ok. H.R. 2259. <p>The law further provides that the court may NOT consider the following:</p> <ul style="list-style-type: none"> <li>a. child support income,</li> <li>b. any moneys received from a federal, state, or tribal government need-based or disability assistance program, or</li> <li>c. assets exempt from bankruptcy. Ok. H.R. 2259.</li> </ul> </li></ul>
	<p><b>B. Income brackets</b> to determine reduction amounts and address the cliff effect</p>	<p><b>Illinois</b> provides that "If the court finds that the applicant is an indigent person, the court shall grant the applicant a full assessment waiver exempting him or her from the payment of any assessments." If the person does not meet the indigence standard, the law provides that the court shall grant a "partial assessment" as follows:</p> <ul style="list-style-type: none"> <li>a. Income is 200 to 250% of the poverty level: court must waive 75 percent of total assessment;</li> <li>b. Income is 251-300% of federal poverty level: court must waive 50 percent of total assessment; and</li> <li>c. Income is 301-400% of the poverty level: court must waive 25 percent of the total assessment. 725 ILL. COMP. STAT. 5/124A-20.</li> </ul>
<p><b>VI. Tools:</b> Tools for determining how much a person should pay</p>	<p><b>A.</b> An online ability to pay <b>calculator</b></p>	<p><b>Washington</b> has created an online tool that judges can use to determine fines and fees amounts. <i>LFO Calculator (State of Washington)</i>, WASH. STATE SUP. CT'S MINORITY &amp; JUST. COMM'N, <a href="https://beta.lfocalculator.org/">https://beta.lfocalculator.org/</a> (last visited Mar. 22, 2024).</p>

	<p>B. An online tool to allow litigants to apply for a <b>reduction</b> in fines</p>	<p><b>California</b> has created MyCitations, an online tool that people can use to request a waiver or reduction for traffic tickets. <i>Request a Fine Reduction Tool</i>, CAL. CTS., <a href="https://mycitations.courts.ca.gov/home">https://mycitations.courts.ca.gov/home</a> (last visited Mar. 22, 2024).</p>
	<p>C. <b>Bench cards</b> to determine amounts courts should order or waive</p>	<p><b>Michigan’s</b> bench card provides guidance about how much money should be exempted from fines and fees payments. The bench card refers judges to the Michigan Supreme Court Ability to Pay Workgroup ability to pay calculator, which provides that at minimum judges should allow individuals to keep \$217.50 per week (30 times the federal minimum wage). Mich. Sup. Ct. Ability to Pay Workgroup, <i>Appendix F Payment Plan Calculators</i>, MICH. CTS., <a href="https://perma.cc/6WUR-FFPY">https://perma.cc/6WUR-FFPY</a> (last visited Mar. 22, 2024).</p> <p><b>Montana’</b> new bench card (2024) reminds judges that, under the law, they may not impose fines and fees unless the person is or will be able to pay. It lays out a presumption of inability to pay, which requires waiver of all fines and fees, if the person (a) is eligible for representation by a public defender; (b) receives needs-based public assistance; (c) earns less than 100% of HUD’s “very low income” limit; (d) spent time in a residential mental health facility in the last six months; (e) has a developmental, total, or permanent disability; (f) is a minor; (g) has experienced homelessness in the last 12 months; (h) is “currently in custody, sentenced to custody for at least 6 months, or released from a term of jail/prison within the last 12 months;” or (i) is a full-time student. Montana Bench Card on Fines and Fees (on file with NCAJ, ncaj@fordham.edu)</p>
<p><b>VII. Practitioners’ Tools:</b> Practitioners’ tools to illuminate ability to pay</p>	<p>A. A <b>practitioner-created ability to pay calculator</b> that lowers the burden of proving expenses</p>	<p><b>Iowa’s</b> Alex Kornya, Litigation Director and General Counsel of Iowa Legal Aid, created an online ability to pay calculator that auto-populates with expense assumptions the Internal Revenue Service uses in determining how to collect back taxes. <i>Iowa Ability to Pay Calculator</i>, IOWA LEGAL AID, <a href="https://abilitytopay.org/interview?i=docassemble.ATPCalculator:data/questions/ATP.yml#page1">https://abilitytopay.org/interview?i=docassemble.ATPCalculator:data/questions/ATP.yml#page1</a> (last visited Mar. 22, 2024).</p>
	<p>B. <b>“Hardship is not a number”</b></p>	<p><b>Oklahoma’s</b> Ed Wunch, Criminal Justice Debt Attorney at Legal Aid Services of Oklahoma, has developed a questionnaire that he provides to litigants to help understand the personal dimensions of their hardship. The form asks about receipt of public benefits—which would make a person eligible for waiver under Oklahoma’s indigency standards adopted in 2023—but it goes on to ask questions that could help succinctly to paint a compelling picture of the person’s financial circumstances for the judge.</p>

<p><b>VIII. Day Fines:</b> Amount of fine is based on level of income and severity of crime</p>	<p><b>A. Day fines</b></p>	<p><b>Oklahoma</b> is the only U.S. state (whereas there are many jurisdictions in Europe) with a statewide day fines law on the books. It provides that when a judge orders a suspended sentence, they may order a person “to pay day fines not to exceed fifty percent (50%) of the net wages earned. For purposes of this paragraph, ‘day fine’ means the offender is ordered to pay an amount calculated as a percentage of net daily wages earned.” OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(y).</p>
<p><b>IX. Community Service:</b> Services, Education, &amp; Other Activities</p>	<p><b>A. Community service,</b> programming, and education as alternatives to payment</p>	<p><b>Texas</b> provides a broad definition of "community service," which includes attending “a work and job skills training program; a preparatory class for the high school equivalency examination...; an alcohol or drug abuse program; a rehabilitation program; a counseling program, including a self-improvement program; a mentoring program; or any similar activity.” TEX. CODE CRIM. PROC. ANN. art. 45.049. Texas also provides that a court may waive not only fines but also community service in lieu of fines if such community service would pose an “undue hardship.” In considering whether the person would face an undue hardship, the court may consider the person’s “(1) significant physical or mental impairment or disability; (2) pregnancy and childbirth; (3) substantial family commitments or responsibilities, including child or dependent care; (4) work responsibilities and hours; (5) transportation limitations;(6) homelessness or housing insecurity; and (7) any other factor the court determines relevant.” <i>Id.</i> at 43.091.</p>
<p><b>X. Payment Plans:</b> Alternatives to Full Payment Up Front</p>	<p><b>A. Payment plans</b> as an alternative to full payment up front</p>	<p>In <b>Oklahoma</b> anyone can choose to enter into a payment plan. If a person misses a payment, the court schedules a cost hearing to conduct a new ability to pay assessment. Ok. H.R. 2259. <b>Florida</b> caps monthly payments at no more than two percent of a person's annual income or \$25. Just. Admin. Comm’n, CS for H.R. 397 (2022), <a href="https://laws.flrules.org/2022/201">https://laws.flrules.org/2022/201</a>. <b>Delaware</b> bars judges from charging late fees or interest for entering into a payment plan or missing a payment. H.R. 244, 151st Gen. Assemb., Reg. Sess. (Del. 2022), <i>available at</i> <a href="https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocumentEngrossment?engrossmentId=24803&amp;docTypeId=6">https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocumentEngrossment?engrossmentId=24803&amp;docTypeId=6</a>.</p>