

Filing for Bankruptcy

There are two common types of bankruptcy that military members might seek to file:

- A **Chapter 7**, or “clean slate,” bankruptcy permits the wholesale elimination of many debts. In a Chapter 7 bankruptcy most, but not all, debts are discharged, meaning that you are no longer legally obligated to pay them.
- Under **Chapter 13** bankruptcy, you do not directly discharge your debt. Instead, the Bankruptcy Court approves a plan for you to pay your debts in installments over an agreed upon time period.

Generally, consumers who earn more than the median income for their state (approximately \$34,360 for a household of one in Montana¹) will be able to seek Chapter 7 debt elimination only if they meet a “means test.” Under the test, if a filer is able to pay creditors at least \$109.95 a month for five years, he or she may be required to file under Chapter 13, with a judge ordering a repayment plan. “Special circumstances,” such as a serious medical condition or active duty in the military, may sometimes allow someone who fails the means test to still file under Chapter 7.

Certain Other Notable Facts About Bankruptcy

Mandatory Credit Counseling

No individual may be a debtor under Title 11 unless they have, within 180 days prior to filing, received credit counseling from an “approved nonprofit budget and credit counseling agency”, either in an individual or group briefing.

Mandatory Debtor Education

The court may not grant a Chapter 13 discharge unless the debtor has completed an education course in personal financial management as approved by the U.S. Trustee. A debtor can be denied discharge under §727 if the debtor fails to complete the course.

Serial Filings (Chapter 20)

A discharge will not be granted in Chapter 13 if the debtor obtained a discharge in Chapter 7, 11 or 12 within the 4 years prior to the date of filing of the pending case, or in a Chapter 13 case filed within 2 years of the pending case. This provision, though, does not prevent the debtor from filing a Chapter 13 case, and receiving the benefits of the stay, including the ability to cure arrearages on secured claims over a period of time.

Time between Discharge

Under Chapter 7 a debtor cannot receive a discharge if a prior discharge was received within 8 years (rather than 6 years) of the new filing.

Duration of Chapter 13 Plans

¹ <http://iheap.ncat.org/profiles/povertytables/FY2012/mtsmi.htm>

This handout is meant for informational purposes only and does not substitute for the advice of a competent attorney. The discussion of divorce in Montana is only a brief overview. Laws can and do change. If you would like to speak to an attorney, please call the Malmstrom Legal Office at 731-2878.

If the Chapter 13 debtor's income is greater than the state median income, the plan proposed must be for 5 years. On the anniversary date of a confirmed plan, a debtor must file a new statement of income and expenses.

Domestic Support Obligations

Support obligations are a first priority. To the extent such support claims have been assigned to or are directly recoverable by a governmental entity, such claims are subordinated to the support of claims that are not assigned.

Attorneys as "Debt Relief Agencies"

Attorneys must disclose to the public that they "help people file for relief under the Bankruptcy Code." They cannot advise a debtor to incur more debt in contemplation of bankruptcy. They must enter into a written contract, disclose all their costs, and disclose that an attorney is not necessary to file bankruptcy, among other disclosures.

Changes in Treatment of Taxes

Taxes related to a fraudulent return or that the debtor attempted to evade are made non-dischargeable in Chapter 11. The debtor is required to pay administrative tax claims whether or not the government files a "request". The new law requires periodic cash payments of priority tax under Chapter 11 over not more than five years from the petition date and under terms not less favorable than those accorded to the most preferred unsecured non-priority creditors (excluding "nuisance" claim payments). The rate of interest on tax claims is the rate specified under applicable non-bankruptcy law.

Tax Returns Mandatory

The Debtor must provide a copy of their latest tax return at least 7 days before the meeting of creditors or the case shall be dismissed. This information must also be provided to any creditor who requests it. The debtor must file all tax returns from 4 years prior to the Chapter13 filing.

Nondischargeability of Student Loans Expanded

Student loan non-dischargeability now includes for-profit and non-governmental entities.

BANKRUPTCY INFORMATION SHEET

BANKRUPTCY LAW IS A FEDERAL LAW. THIS SHEET PROVIDES YOU WITH GENERAL INFORMATION ABOUT WHAT HAPPENS IN A BANKRUPTCY CASE. THE INFORMATION HERE IS NOT COMPLETE. YOU MAY NEED LEGAL ADVICE.

WHEN YOU FILE BANKRUPTCY

You can choose the kind of bankruptcy that best meets your needs (provided you meet certain qualifications):

Chapter 7 – A trustee is appointed to take over your property. Any property of value will be sold or turned into money to pay your creditors. You may be able to keep some personal items and possibly real estate depending on the law of the State where you live and applicable federal laws.

Chapter 13 – You can usually keep your property, but you must earn wages or have some other source of regular income and you must agree to pay part of your income to your creditors. The court must approve your repayment plan and your budget. A trustee is appointed and will collect the payments from you, pay your creditors, and make sure you live up to the terms of your repayment plan.

Chapter 12 – Like chapter 13, but it is only for family farmers and family fishermen.

Chapter 11 – This is used mostly by businesses. In chapter 11, you may continue to operate your business, but your creditors and the court must approve a plan to repay your debts. There is no trustee unless the judge decides that one is necessary; if a trustee is appointed, the trustee takes control of your business and property.

If you have already filed bankruptcy under chapter 7, you may be able to change your case to another chapter.

Your bankruptcy may be reported on your credit record for as long as ten years. It can affect your ability to receive credit in the future.

WHAT IS A BANKRUPTCY DISCHARGE AND HOW DOES IT OPERATE?

One of the reasons people file bankruptcy is to get a “discharge.” A discharge is a court order which states that you do not have to pay most of your debts. Some debts cannot be discharged. For example, you cannot discharge debts for—

- most taxes;
- child support;
- alimony;
- most student loans;
- court fines and criminal restitution; and
- personal injury caused by driving drunk or under the influence of drugs.

The discharge only applies to debts that arose before the date you filed. Also, if the judge finds that you received money or property by fraud, that debt may not be discharged.

It is important to list all your property and debts in your bankruptcy schedules. If you do not list a debt, for example, it is possible the debt will not be discharged. The judge can also deny your discharge if you do

something dishonest in connection with your bankruptcy case, such as destroy or hide property, falsify records, or lie, or if you disobey a court order.

You can only receive a chapter 7 discharge once every eight years. Other rules may apply if you previously received a discharge in a chapter 13 case. No one can make you pay a debt that has been discharged, but you can voluntarily pay any debt you wish to pay. You do not have to sign a reaffirmation agreement (see below) or any other kind of document to do this.

Some creditors hold a secured claim (for example, the bank that holds the mortgage on your house or the loan company that has a lien on your car). You do not have to pay a secured claim if the debt is discharged, but the creditor can still take the property.

WHAT IS A REAFFIRMATION AGREEMENT?

Even if a debt can be discharged, you may have special reasons why you want to promise to pay it. For example, you may want to work out a plan with the bank to keep your car. To promise to pay that debt, you must sign and file a reaffirmation agreement with the court. Reaffirmation agreements are under special rules and are voluntary. They are not required by bankruptcy law or by any other law. Reaffirmation agreements—

- must be voluntary;
- must not place too heavy a burden on you or your family;
- must be in your best interest; and
- can be canceled anytime before the court issues your discharge or within 60 days after the agreement is filed with the court, whichever gives you the most time.

If you are an individual and you are not represented by an attorney, the court must hold a hearing to decide whether to approve the reaffirmation agreement. The agreement will not be legally binding until the court approves it.

If you reaffirm a debt and then fail to pay it, you owe the debt the same as though there was no bankruptcy. The debt will not be discharged and the creditor can take action to recover any property on which it has a lien or mortgage. The creditor can also take legal action to recover a judgment against you.

IF YOU WANT MORE INFORMATION OR HAVE ANY QUESTIONS ABOUT HOW THE BANKRUPTCY LAWS AFFECT YOU, YOU MAY NEED LEGAL ADVICE. THE TRUSTEE IN YOUR CASE IS NOT RESPONSIBLE FOR GIVING YOU LEGAL ADVICE.