

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1125 Employers and Employees

SPONSOR(S): Civil Justice Subcommittee; Goodson

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1216

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 2 N, As CS	Cary	Bond
2) Local & Federal Affairs Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Wage theft is a term sometimes used to describe the failure of an employer to pay any portion of wages due to an employee. Federal and state laws provide protection from wage theft through various law including the Federal Fair Labor Standards Act and Florida's minimum wage laws. These laws may be enforced, according to which one is violated, by a civil action brought by the employee, or by government sanctions and fines.

Regarding wage theft, this bill:

- Create a civil cause of action for wage theft.
- Provides that the civil cause of action for wage theft is within county court jurisdiction, regardless of the amount in controversy.
- Allows a local government to create a program to assist persons with wage theft claims.
- Provides that the regulation of wage theft is expressly preempted to the state, with a limited exception for ordinances enacted prior to January 1, 2011 and only as applied to an employer with gross annual sales of less than \$500,000.

This bill does not appear to have a fiscal impact on state or local governments.

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

"Wage theft" is a general term sometimes used to describe the failure of an employer to pay any portion of wages due to an employee. Wage theft encompasses a variety of employer violations of federal and state law resulting in lost income to an employee. Some examples of wage theft include:

- Employee is paid below the state or federal minimum wage.
- Employee is paid partial wages or not paid at all.
- Non-exempt employee is not paid time and half for overtime hours.
- Employee is misclassified as an independent contractor.
- Employee does not receive final paycheck after employment is terminated.

There are a variety of federal and state laws that protect employees from wage theft including, but not limited to, the Fair Labor Standards Act¹ and Florida minimum wage laws.

Worker Protection: Federal and State

Both federal² and state laws provide protection to workers who are employed by private and governmental entities. These protections include workplace safety, anti-discrimination, anti-child labor, workers' compensation, and wage protection laws.

Fair Labor Standards Act of 1938

The Fair Labor Standards Act (FLSA)³ establishes a federal minimum wage and requires employers to pay time and half to its employees for overtime time hours worked. The FLSA establishes standards for minimum wages,⁴ overtime pay,⁵ recordkeeping,⁶ and child labor.⁷ The FLSA applies to most classes of workers.⁸ The FLSA provides that:

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such

¹ 29 U.S.C Ch. 8.

² A list of examples of federal laws that protect employees is located at: <http://www.dol.gov/compliance/laws/main.htm> (Last visited March 7, 2013). Examples include: The Davis-Bacon and Related Acts (requires all contractors and subcontractors performing work on federal or District of Columbia construction contracts or federally assisted contracts in excess of \$2,000 to pay the ir laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area); The McNamara-O'Hara Service Contract Act (The SCA requires contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of \$2,500 to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement); The Migrant and Seasonal Agricultural Workers Protection Act (provides employment-related protections to migrant and seasonal agricultural workers); The Contract Work Hours and Safety Standards Act (requires contractors and subcontractors on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek); The Copeland "Anti-Kickback" Act (prohibits federal contractors or subcontractors engaged in building construction or repair from inducing an employee to give up any part of the compensation to which he or she is entitled under his or her employment contract).

³ 29 U.S.C Ch. 8.

⁴ 29 U.S.C. s. 206.

⁵ 29 U.S.C. s. 207.

⁶ 29 U.S.C. s. 211.

⁷ 29 U.S.C. s. 212.

⁸ The U.S. Department of Labor provides an extensive list of types of employees covered under the FLSA at <http://www.dol.gov/compliance/guide/minwage.htm> (Last visited March 7, 2013).

employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.⁹

If an employee works more than forty hours in a week, then the employer must pay at least time and half for those hours over forty. A failure to pay is a violation of the FLSA.¹⁰

The FLSA also establishes a federal minimum wage in the United States.¹¹ The federal minimum wage is the lowest hourly wage that can be paid in the United States. A state may set the rate higher than the federal minimum, but not lower.¹²

The FLSA also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;¹³
- Criminal prosecutions by the United States Department of Justice;¹⁴ or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.¹⁵

The FLSA provides that an employer who violates section 206 (minimum wage) or section 207 (maximum hours) is liable to the employee in the amount of the unpaid wages and liquidated damages equal to the amount of the unpaid wages.¹⁶ An employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.¹⁷

State Protection of Workers

State law provides for protection of workers, including anti-discrimination, work safety and a state minimum wage. The state minimum wage was passed as a constitutional amendment¹⁸ and the implementation language is located in s. 448.110, F.S.

Article X, s. 24(c) of the state constitution provides that, "Employers shall pay Employees Wages no less than the minimum wage for all hours worked in Florida." If an employer does not pay the state minimum wage, the amendment provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld. A court may also award the employee liquidated damages in the amount of the wages withheld and reasonable attorney's fees and costs.

The current state minimum wage is \$7.79 per hour,¹⁹ which exceeds the current federal minimum wage of \$7.25 per hour.²⁰ Federal law requires the payment of the higher of the federal or state minimum wage.²¹ In addition, any worker may sue in contract for unpaid wages. If the worker wins, he or she must be awarded costs and attorney fees.²²

⁹ 29 U.S.C. s. 207(a)(1).

¹⁰ There are several classes of exempt employees from the overtime requirement of the FLSA. For examples of exempt employees see <http://www.dol.gov/compliance/guide/minwage.htm> (Last visited March 7, 2013).

¹¹ 29 U.S.C. s. 206.

¹² 29 U.S.C. s. 218(a).

¹³ 29 U.S.C. s. 216(c).

¹⁴ 29 U.S.C. s. 216(a).

¹⁵ 29 U.S.C. s. 216(b).

¹⁶ 29 U.S.C. s. 216(b).

¹⁷ 29 U.S.C. s. 216(b).

¹⁸ See Article X, s. 24 of the Florida Constitution (adopted in 2004).

¹⁹ See Florida Department of Economic Opportunity website for information regarding the current minimum wage in the State of Florida, at <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notice> (Last visited March 9, 2013).

²⁰ <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited March 9, 2013).

²¹ 29 U.S.C. s. 218(a).

²² See s. 448.08, F.S.

Home Rule and Preemption

Article VIII, ss. 1 and 2, of the state constitution, establish two types of local governments: counties²³ and municipalities. The local governments have wide authority to enact various ordinances to accomplish their local needs.²⁴ Under home rule powers, a municipality or county may legislate concurrently with the Legislature on any subject which has not been preempted to the state.

Preemption essentially takes a topic or field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the state.²⁵ Florida law recognizes two types of preemption: express and implied.²⁶ Express preemption requires a specific legislative statement and cannot be implied or inferred.²⁷ Express preemption requires that a statute contain specific language of preemption directed to the particular subject at issue.

The absence of express preemption does not bar a court from a finding of preemption by implication. A court will look at two factors to determine if the subject matter has been preempted by the Legislature:

- Whether the legislative scheme is so pervasive as to evidence an intent to preempt the particular area; and
- Whether there are strong public policy reasons for finding an area to be preempted by the Legislature.²⁸

In order to determine whether a legislative scheme is pervasive, a court will look at several factors including the nature of the subject matter, the need for state uniformity, and the scope and purpose of the state legislation.²⁹ For instance, the Florida Supreme Court has found implied preemption in the area of public records.³⁰

There is no apparent express preemption of wage laws to the federal and state governments. It is possible that a court could find that the numerous existing laws regarding employee wages are an implied preemption of the subject.

Wage Theft as a Cause of Action

Currently an unpaid or underpaid employee has a cause of action in contract or quasi-contract in all appropriate courts, depending upon the amount in controversy. There is also a cause of action for unpaid minimum wages in s. 448.110, F.S.

This bill provides that an employee who is the victim of wage theft may file an action in the county court in which the work was performed. The bill does not provide for a situation where an employee performs work for the same employer in multiple counties, in which case an employee would likely need to file a separate action in each county in which he or she performed work, as there does not appear to be a court rule that would allow a joinder of claims across multiple counties. The bill amends s. 34.01, F.S., to provide jurisdiction to county courts for such an action.³¹ An action to recover wages under this bill does not include the right to a jury trial and is governed by the Florida Small Claims Rules.³²

²³ There are two different types of counties in Florida; a charter county and a non-charter county.

²⁴ Article VIII of the state constitution establishes the powers of chartered counties, non-charter counties and municipalities. Chapters 125 and 166, F.S., provide the additional powers and constraints of counties and municipalities.

²⁵ *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 851 (Fla. 1st DCA 1996).

²⁹ *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

³⁰ *See Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984) (holding that the legislative scheme of the Public Records Act preempted the law relating to production of records for inspection).

³¹ The legislature provides jurisdiction to the courts. Art. V, Sec. 1(b), Fla. Const., provides, "The county courts shall exercise the jurisdiction prescribed by general law."

³² Fla. Sm. Cl. R. 7.010 *et. seq.*

The claimant must prove wage theft by the preponderance of the evidence.³³ Damages are limited to the actual compensation owed to the employee, and only economic damages may be awarded by the court. If the employee prevails, he or she is not allowed to recover costs or attorney fees.

Jurisdiction of the Cause of Action

Currently, the jurisdiction of the small claims court is any amount up to \$5,000.³⁴ County court jurisdiction is limited to damages under \$15,000.³⁵ Circuit court jurisdiction covers amounts over \$15,000.³⁶ Jury trials are allowed at every level.

The bill provides that an action for wage theft will be brought in small claims court regardless of the value claimed. The bill amends s. 34.01, F.S., which defines the jurisdiction of the county court, to add the cause of action. The cause of action is to be brought in the county where the work was performed, and is governed by the Florida Small Claims Rules.

Presuit Notice Requirement

Currently, s. 448.110, F.S., provides that presuit notice must be given to the employer prior to an action for a minimum wage claim. The employer has 15 days to resolve the claim. The statute of limitations is tolled during the 15 days.

The bill provides for a presuit notice requirement to the employer before a suit claiming wage theft is filed. Prior to filing an action in the county court, the employee must provide notice to the employer of his or her intent to file such action. The notice must provide the total amount the employee is owed and the actual or estimated work days and hours for which compensation is sought. The employer then has 15 days after he or she is served the notice to pay the total amount owed to the employee or otherwise resolve the complaint to the satisfaction of the employee. The employee must file the action within one year of the date that he or she last performed unpaid work. No tolling of the statute of limitations is provided.

Limitations

Section 448.110, F.S., which relates to the state minimum wage, currently provides that the statute of limitations for an action for underpaid wages is the period of time specified in s. 95.11, F.S. There are variables which might change the claim depending upon the type of arrangement the employer and employee have, making the statute of limitations for unpaid wages range from 1 to 5 years, but a typical claim to recover wages must be made within 2 years.³⁷

The bill provides that an action for wage theft must be filed within 1 year after the last date work was performed for all wage theft claims.

Currently, s. 448.08, F.S., provides for an award of attorney's fees and costs in addition to wages in the event of a successful claim for unpaid wages. The bill limits any award for wage theft to economic damages.

Preemption

The bill provides that regulation of wage theft is preempted to the state.

The bill provides that a county, municipality, or political subdivision may establish a non-judicial administrative process to assist in settling wage claim disputes, but the process may not adjudicate the

³³ Black's Law Dictionary, 7th Ed., defines preponderance of evidence is defined as "the greater weight of the evidence," a definition which the Florida Supreme Court favorably cited in *Gross v. Lyons*, 763 So.2d 276, 280 (Fla. 2000).

³⁴ Florida Small Claims Rule 7.160.

³⁵ Section 34.01, F.S.

³⁶ Section 26.012, F.S.

³⁷ Section 95.11(4)(c), F.S.

compensation dispute nor award damages. The local government may submit the demand letter on behalf of the employee and may facilitate a resolution. Should the employer not respond to the employee's satisfaction, the local government may assist the employee in filling out an application to be declared indigent by the court. Alternatively, the local government may pay the filing fee on behalf of the employee.³⁸ The bill does not appear to allow the local government to pay the filing fee on behalf of the employee if it assists the employee in completing an application for indigent status and the application is denied by the court.

A local ordinance enacted prior to July 1, 2011 is exempt from preemption, as long as it does not apply to an employer whose annual gross business revenues are over \$500,000. Any other regulation or ordinance is expressly preempted to the state.

B. SECTION DIRECTORY:

Section 1 amends s. 34.01, F.S. regarding jurisdiction of the county court.

Section 2 creates s. 448.115, F.S. regarding civil actions for wage theft.

Section 3 provides that the bill is effective upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

³⁸ Filing fees for county court range from \$50 to \$295, depending on the amount in controversy and are dictated by s. 34.041, F.S.

2. Other:

Article I, s. 21 of the state constitution requires the state to provide access to the courts. A reduction of a statute of limitations can implicate this provision as to a cause of action that existed prior to the effective date of the bill. An appellate court, upholding a bill that reduced a statute of limitations to 1 year, explained:

Although an amendment to a statute of limitations cannot extinguish an existing claim, it can, consistent with due process, shorten the limitation period applicable to the prior claim if the intent to make the amendment retroactive is clearly expressed, and if a reasonable time is allowed within which to seek enforcement of such claim.³⁹

Article X, s. 24(c) of the state constitution creates a cause of action for unpaid wages related to the minimum wage. That cause of action is different from the one created by this bill. Nothing in this bill can override the constitutional cause of action.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Currently, only Miami-Dade⁴⁰ and Broward⁴¹ Counties are known to have specific wage theft ordinances. These ordinances are similar. Both ordinances provide that a complaint may be filed with the county for wage theft, and the case is heard before a hearing officer. The hearing officer may enter an enforceable conciliation agreement. The ordinances also state that a separate civil action may be filed. Given dates of enactment, the Broward ordinance would be completely preempted and the Miami-Dade ordinance would be largely grandfathered in (the only preemption would be for very large employers).

In March 2011, the Florida Retail Federation (FRF) filed suit to challenge the constitutionality of the Miami-Dade County ordinance.⁴² The FRF alleged that the Miami-Dade ordinance: created a court outside of the unified court system created by Florida Constitution;⁴³ violated the separation of powers⁴⁴ by allowing the executive branch⁴⁵ to perform a judicial function; and violated the right to a jury trial⁴⁶

³⁹ *Polk County BOCC v. Special Disability Trust Fund*, 791 So.2d 581 (Fla. 1st DCA 2001).

⁴⁰ Chapter 22, Miami-Dade County Code of Ordinances, adopted February 18, 2010. Chapter 22. sec. 3 of the Miami Dade County Code provides: "For any employer to fail to pay any portion of wages due to an employee, according to the wage rate applicable to that employee, within a reasonable time from the date on which that employee performed the work for which those wages were compensation, shall be wage theft; and such a violation shall entitle an employee, upon a finding by a hearing examiner appointed by Miami-Dade County or by a court of competent jurisdiction that an employer is found to have unlawfully failed to pay wages, to receive back wages in addition to liquidated damages from that employer."

⁴¹ Chapter 20 1/2, Broward County Code of Ordinances, adopted October 23, 2012.

⁴² *Fla. Retail Fed'n, Inc. v. Miami Dade County*, No. 2010-42326-CA-01 (Aug. 4, 2010).

⁴³ Article V, sec. 1, Fla. Const., creates a supreme court, district courts of appeal, circuit courts, and county courts, and then proclaims, "No other courts may be established by the state, any political subdivisions or any municipality." The *Florida Bar Journal* published a commentary entitled *Judicial Reform – Now or Never* by one of the drafters of art. V, sec. 1, in which former state Rep. Talbot "Sandy" D'Alemberte wrote, "The abolition of municipal courts has received considerable comment. The legislature thought that municipal courts, for the most part, are not independent of the city councils which appointed them; thus they are unable to dispense impartial, objective justice." *Florida Bar Journal*, vol. 46, no. 2, Feb. 1972.

⁴⁴ Article II, sec. 3, Fla. Const., prohibits a person belonging to one branch from exercising any powers appertaining to either of the other branches.

⁴⁵ For the purpose of Separation of Powers analysis, a local government is considered a part of the executive branch. See *City of Miami v. Wellman*, 976 So.2d 22, 26 (Fla. 3rd DCA 2008).

⁴⁶ Art. I, sec. 22, Fla. Const., provides the right to a jury trial for all cases that traditionally afforded a jury trial at the time the original Florida constitution was adopted in 1845.

because an issue involving back pay is a legal issue that entitles the defendant to a jury trial,⁴⁷ which the ordinance does not allow. The trial court dismissed the case without specifically addressing any of these issues.⁴⁸

Palm Beach County has passed a resolution condemning wage theft and has created a program for wage theft claimants to be represented by the Legal Aid Society of Palm Beach County.⁴⁹ Alachua County commissioners are also considering whether to enact a wage theft ordinance.⁵⁰

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2013, the Civil Justice Subcommittee adopted one amendment removing the section pertaining to the Attorney General and eliminating the provision that prohibited a jury trial for a wage theft claim. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

⁴⁷ Generally, cases involving legal, as opposed to equitable, relief are afforded a jury trial, according to *Metropolitan Dade County Fair Housing and Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc.*, 511 So.2d 962 (Fla. 1967). Back pay is considered to be a legal issue which should be afforded a jury trial according to *O'Neal v. Florida A & M Univ. ex rel. Bd. of Trustees for Florida A & M Univ.*, 989 So.2d 11 (Fla. 1st DCA 2008).

⁴⁸ *Florida Retail Federation v. Miami-Dade County*, Case No. 10-42326CA30, decided on March 23, 2012, on file with Civil Justice Subcommittee staff.

⁴⁹ See Legal Aid Society of Palm Beach County, Inc., Wage Recovery Project November 16, 2012 Update, included in Palm Beach County Board of County Commissioner Agenda Item Summary Packet for Agenda Item 4A-2 at December 4, 2012 meeting. The packet is available online at <http://www.ordinancewatch.com/files/72011/LocalGovernment79272.pdf>, (last visited March 9, 2013).

⁵⁰ Gainesville Sun, Residents state their case for wage-theft ordinance, published January 8, 2013, <http://www.gainesville.com/article/20130108/ARTICLES/130109676> (last visited March 9, 2013).