

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 1216

INTRODUCER: Senator Bradley

SUBJECT: Wage Theft

DATE: March 6, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Pre-meeting
2.			JU	
3.			CM	
4.			AP	
5.				
6.				

I. Summary:

SB 1216 generally preempts local regulation of wage theft issues and provides a specific civil action in the court system for wage theft claims. Under the bill, “wage theft” is defined as an illegal or improper underpayment or nonpayment of an individual employee’s wages, salaries, commissions, or other similar form of compensation.

This bill substantially amends section 34.01 of the Florida Statutes. The bill creates sections 448.115 and 448.116 of the Florida Statutes.

II. Present Situation:

Wage Theft

“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. Wage theft may occur if:

- An employee is paid below the state or federal minimum wage;
- An employee is paid partial wages or not paid at all;
- A non-exempt employee is not paid time and a half for overtime hours;
- An employee is required to work off the clock;
- An employee has their time card altered;
- An employee is misclassified as an independent contractor; or
- An employee does not receive a final paycheck after the termination of employment.

Employee Protection: Federal and State

A variety of federal and state laws protect employees from wage theft. Federal laws are administered by the United States Department of Labor, and may be enforced by federal authorities or by private lawsuits.¹ The Fair Labor Standards Act (FLSA)² is the federal law most often used to address wage theft. State court actions to recover unpaid wages can be brought under Florida's minimum wage laws or through a common law breach of contract claim.

Federal Protection of Employees: Fair Labor Standards Act

The FLSA establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States. Currently, the federal minimum wage is \$7.25 per hour.³ A state may set the rate higher than the federal minimum but not lower.⁴

The FLSA also requires employers to pay one and one-half times regular wages for any time worked in excess of 40 hours during a workweek.⁵ In addition, it establishes standards for recordkeeping and child labor. The FLSA applies to most classes of workers, but a major exception is that it does not apply to most employees of businesses that have less than \$500,000 in annual business.⁶

The FLSA provides for enforcement in three separate ways:

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

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

State Protection of Employees

State law provides for protection of employees, including anti-discrimination,⁷ work safety,⁸ and a state minimum wage. Article X, s. 24(c) of the Florida Constitution provides that "Employers shall pay Employees Wages no less than the Minimum Wage for all hours worked in Florida."

¹ Links to most federal laws and regulations that affect wage and hour issues are located at www.dol.gov/whd/reg-library.htm (last visited March 6, 2013).

² 29 U.S.C. ch. 8.

³ The U.S. Department of Labor Wage and Hour Division provides information about the minimum wage and minimum wage laws at <http://www.dol.gov/whd/minimumwage.htm> (last visited March 6, 2013).

⁴ 29 U.S.C. s. 218(a).

⁵ 29 U.S.C. s. 207(a)(1).

⁶ 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#who> (last visited March 6, 2013).

⁷ Section 760.10, F.S.

⁸ Sections 448.20-26 and 487.2011-2071, F.S.

If an employer does not pay the state minimum wage, the constitution provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld. If the employee prevails, in addition to the unpaid wages, a court may also award the employee liquidated damages in the amount of the wages withheld and reasonable attorney's fees and costs. Further, any employer that willfully violates the minimum wage law is fined \$1,000 for each violation. The Attorney General is also empowered to bring a civil action to enforce the state's minimum wage laws.

The current state minimum wage is \$7.79 per hour, which is higher than the federal minimum wage.⁹ Federal law requires the payment of the higher of the federal or state minimum wage.¹⁰

Chapter 448, F.S., includes the State Minimum Wage Act, which implements the constitutional minimum wage requirements. Chapter 448, F.S., also prohibits an employer from retaliating against the employee for enforcing his or her rights, and it preserves the rights that an employee has under any collective bargaining agreement or employee contract.¹¹

In addition to remedies under state minimum wage laws, an employee may bring a common law breach of contract claim for unpaid wages. Section 448.08, F.S., allows the court to award attorney's fees and costs to the prevailing party in an action for unpaid wages.

Home Rule and Preemption

Article VIII, ss. 1 and 2, of the State Constitution establishes two types of local governments: counties¹² and municipalities. Local governments have wide authority to enact various ordinances to accomplish their local needs.¹³ Under home rule powers, a municipality or county may legislate concurrently with the Legislature on any subject that 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.¹⁴ Florida law recognizes two types of preemption: express and implied.¹⁵ Express preemption requires a specific legislative statement and cannot be implied or inferred.¹⁶ 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, though courts are careful when imputing intent on behalf of the Legislature to preclude a local government from using its home rule powers.¹⁷ Before finding that implied

⁹ See Department of Employment Opportunity website for information regarding the Florida minimum wage, <http://www.floridajobs.org/minimumwage/FloridaMinimumWageHistory2000-2013.pdf> (last visited March 6, 2013).

¹⁰ 29 U.S.C. §218(a).

¹¹ Section 448.105, F.S.

¹² Florida has both charter and non-charter counties.

¹³ Article VIII of the state constitution establishes the powers of charter counties, non-charter counties, and municipalities. Chapters 125 and 166, F.S., provide the additional powers and constraints of counties and municipalities.

¹⁴ *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

preemption exists, a court will first consider whether the legislative scheme is so pervasive as to evidence intent to preempt the particular area.¹⁸ Factors that point to a pervasive legislative scheme include the nature of the subject matter, the need for state uniformity, and the scope and purpose of the state legislation.¹⁹ Second, a court will consider whether strong public policy reasons exist for finding an area to be preempted by the Legislature.²⁰ An example of an area where the courts have found implied preemption is the regulation of public records.²¹

There is no apparent express preemption of wage laws to the federal or state government. It is unclear whether a court would find that the existing laws regarding employee wages are an implied preemption of the subject.

Local Regulation of Wage Theft

Florida's two most populous counties, Miami-Dade County and Broward County, have passed ordinances dealing with wage theft claims. In addition, 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. Alachua County commissioners are also considering whether to enact a wage theft ordinance.²²

Miami-Dade's ordinance,²³ passed in February 2010, was one of the first local wage theft ordinances in the United States. The ordinance is administered by the county's Department of Small Business Development (SBD) and provides a local process for employees to file claims for unpaid wages. The process cannot be used if the employee has made a claim under state or federal law; however, a claim under the ordinance does not preclude later claims under state or federal law. The ordinance only applies to claims for payment of more than \$60 in wages, and claims must be filed within one year after the last day the unpaid work was performed. Claims that are not resolved before the hearing are heard by a hearing examiner who is deemed to be qualified to hear wage theft matters. If the hearing officer determines by a preponderance of the evidence that back wages are owed, the employee must be awarded three times the amount of the wages found to be owed and the employer must pay the county's administrative processing costs and costs of the proceeding. If the employee is not successful, neither party reimburses the county's costs.

From the inception of the ordinance through January 6, 2012, the Department of Small Business Development reports that there have been a total of 1596 wage complaints, claims, or inquiries logged, resulting in a total of \$813,369.71 awarded to employees.²⁴

¹⁸ See *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

¹⁹ See *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

²⁰ *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

²¹ See *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

²² Gainesville Sun, *Residents state their case for wage-theft ordinance*, published January 8, 2013, www.gainesville.com/article/20130108/ARTICLES/130109676 (last visited March 7, 2013).

²³ Miami Dade County, Fla., Code ch. 22.

²⁴ Department of Small Business Development, *Wage Theft Status Report* (Jan. 2012) (on file with the Senate Committee on Judiciary).

Broward County's ordinance took effect on January 2, 2013.²⁵ It provides a process that is similar to Miami-Dade County's ordinance, but that has some significant differences. These differences include:

- A claim cannot be considered unless the employee gave the employer written notice of the failure to pay wages within 60 days of the date the wages were due and the employer had a minimum of 15 days to pay or resolve the claim before it was filed.
- A successful claimant is awarded double the amount of unpaid wages, rather than triple wages as in the Miami-Dade County ordinance.
- In addition to paying the county's costs as is required by the Miami-Dade County ordinance, a losing employer is also required to reimburse the employee for reasonable costs and attorney's fees incurred in connection with the hearing.
- Like the Miami-Dade County ordinance, an unsuccessful claimant is not required to pay either the employer's or the county's costs. However, under the Palm Beach County ordinance the employee must be ordered to pay the employer's reasonable costs and attorney's fees and the county's costs if the hearing officer finds that the claim had no basis in law or fact.

Palm Beach County considered passing a wage theft ordinance since a proposed ordinance was brought before the commissioners in February 2011. Following that time, Palm Beach County supported a Wage Recovery Program administered by the Legal Aid Society of Palm Beach County. The Legal Aid Society program assists employees in collecting unpaid wages through existing civil or administrative remedies. As of November 16, 2012, the Wage Recovery Program had retained 168 clients and has been able to recover \$115,915 in unpaid wages for 59 of those clients.²⁶ On December 4, 2012, the commission passed a resolution condemning wage theft and providing \$100,000 to the Legal Aid Society to expand the Wage Recovery Program.²⁷

III. Effect of Proposed Changes:

The bill generally preempts local regulation of wage theft issues and provides a specific civil action in the court system for wage theft claims.

Section 1 of the bill amends s. 34.01, F.S., to expand the jurisdiction of county courts to include actions for collection of unpaid wages that are brought under the new process created in section 2 of the bill. The expanded jurisdiction includes an exception that allows the county court to have jurisdiction of these cases even if the amount in controversy exceeds \$15,000.

Section 2 of the bill creates s. 448.115, F.S., which provides a new civil claim for wage theft that is brought in the county court and governed by Florida Small Claims Rules. Under the new statute, wage theft is illegal or improper underpayment or nonpayment of an individual employee's wages, salaries, commissions, or similar compensation within a reasonable time from

²⁵ Broward County Code of Ordinances, s. 20½, Non-Payment of Earned Wages.

²⁶ 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 7, 2013).

²⁷ *Id.*

when the employee should have been paid. If there is no established pay schedule, a reasonable time for payment is deemed to be 15 days from the date on which the work is performed.

A claim for wage theft under s. 448.115, F.S., must be brought in the county where the unpaid work was alleged to have been performed within one year of the last date of performance. Prior to filing a claim, the employee must give the employer written notice of the particulars of the allegations and of the intent to file a claim. The claim cannot be filed unless the employer fails to pay the amount of unpaid compensation or otherwise resolves the claim to the employee's satisfaction within 15 days of service of the notice.

The claim is generally governed by Florida Small Claims Rules. However, the amount claimed can exceed the small claims threshold of \$5000 and neither party has the right to a jury trial. If the employee proves the claim by a preponderance of the evidence, he or she is entitled to damages in the amount of the compensation that is due. The court cannot award any other damages, and the bill prohibits award of attorney fees or costs to a prevailing employee as otherwise permitted by s. 448.08, F.S. However, the court can award attorney fees and costs to the employer under s. 448.08, F.S., if the employee does not prove the claim.

Attorney General Civil Action: The bill also provides that the Attorney General can bring a civil action for wage theft. In such an action, the Attorney General can seek an injunction against the employer. The Attorney General can also seek imposition of a civil penalty of no more than \$1000 per violation against employers who have willfully engaged in wage theft.

Local Government Administrative Process: The bill allows local governments to establish an administrative program to help an employee recover unpaid wages. The process must give the parties an opportunity to negotiate a resolution of the claim, but it cannot include adjudication of the dispute or an award of damages. The program can provide for the payment of the filing fee for a county court action or assistance with filing an application for determination of civil indigent status under s. 57.082, F.S.

Preemption of Local Ordinances: With one exception, the bill preempts any local regulation addressing claims for unpaid compensation other than establishment of an administrative process as described above. The exception is that the Miami-Dade County wage theft ordinance, which can be applied if the employer from whom compensation is sought has an annual gross volume of sales or business transacted of less than \$500,000. This would allow employees who could not file an action under the FLSA because of their employer's size to file a claim under the ordinance.

Section 3 of the bill creates s. 448.116, F.S., which precludes local governments from adopting or enforcing a law governing a condition of employment or creating a process for resolving disputes regarding conditions of employment. "Condition of employment" is defined in the new statute to include preemployment screening, job classification, job responsibilities, hours of work, wages, payment of wages, leave, and employee benefits. There are two exceptions to this preemption: it does not include the local government's regulation of its own employees, and it does not apply to the extent it conflicts with the minimum wage law set forth in s. 218.077, F.S. The statewide preemption in this section appears to be in conflict with provisions included in Section 2 of the bill.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

As noted in the discussion of the effects of the bill, the Florida Constitution sets forth certain requirements and remedies regarding minimum wage claims. This bill cannot be interpreted to preclude an employee from exercising those state constitutional rights, which are currently implemented in ch. 448, F.S.

The provision in section 2 of the bill providing that there is no right to a jury trial in actions brought under new s. 448.115, F.S., also raises constitutional concerns. Article I, Section 22 of the Florida Constitution provides: “The right of trial by jury shall be secure to all and remain inviolate. . . .” It has long been established that there is a right to trial by jury in legal actions, but no such right in equitable actions.²⁸ An action to recover unpaid wages could be legal (such as when the claim is based upon a contract) or equitable (such as when the claim is based upon unjust enrichment). Because the bill does not appear to create an exclusive remedy for wage theft claims, it may not be constitutionally impermissible to prohibit jury trials to the extent that the employee/plaintiff has an option to pursue another remedy that includes a right to trial by jury. However, the employer/defendant would not have such an option. A possible resolution of this concern would be to provide that the newly-created cause of action could only be utilized if the employer agrees to waive the right to trial by jury.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill will have an impact on both employees seeking payment of allegedly unpaid compensation and employers who are sued for payment of unpaid wages. For employee/

²⁸ Although there is no longer a distinction between law and equity, courts consider the history of the type of action when determining the right to a trial by jury. *Cerrito v. Kovitch*, 457 So.2d 1021 (Fla. 1984). See also *B.J.Y. v. M.A.*, 617 So.2d 1061 (Fla. 1993); 5 Fla. Prac., Civil Practice s. 14:2 (2012 ed.).

claimants in Broward County and employees of large companies who work in Miami-Dade County, it would remove the option to seek payment under those counties' wage theft ordinances. Since those ordinances appear to require little cost to the employee, they would presumably incur greater costs under the new statute and their recovery would be limited to the actual amount of unpaid compensation.²⁹ Conversely, employers defending actions in those counties would not be faced with paying double or triple the amount of unpaid compensation or costs of the proceeding. It is reasonable to expect that the statute would have the net effect of reducing wage theft claims in Broward and Miami-Dade counties. However, it provides a new means of redress for employees in all other counties of the state, and would likely result in an increase in claims.

C. Government Sector Impact:

Because the bill creates a new civil action for redress of wage theft claims in county court, there will be an increase of costs to the judiciary to the extent that the new procedure is utilized by aggrieved employees who would not have otherwise pursued their claims in court.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²⁹ Filing an action in county court typically costs \$300, but the bill allows counties to create programs to pay this cost.