

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: CS/SB 926

INTRODUCER: Judiciary Committee and Senator Simpson

SUBJECT: Wage Dispute Protection

DATE: March 26, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stearns</u>	<u>Yeatman</u>	<u>CA</u>	<b>Favorable</b>
2.	<u>Munroe</u>	<u>Cibula</u>	<u>JU</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

CS/SB 926 creates s. 448.111, F.S., to govern county and state regulation of wage theft. The bill provides requirements for county ordinances regulating wage theft and authorizes county funding to assist in addressing claims of wage theft. The bill provides an exemption for county ordinances enacted by a certain date, but otherwise preempts further regulation of wage theft to the state.

The bill provides definitions for “legal services organization” and “wage theft.”

**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.<sup>1</sup> The Fair Labor Standards Act (FLSA)<sup>2</sup> 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.<sup>3</sup> A state may set the rate higher than the federal minimum but not lower.<sup>4</sup>

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.<sup>5</sup> 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 doing less than \$500,000 in annual business.<sup>6</sup>

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 may be liable for liquidated damages equal to the amount of the unpaid wages.

### ***State Protection of Employees***

State law provides for protection of employees, including anti-discrimination,<sup>7</sup> work safety,<sup>8</sup> 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."

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 subject to

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<sup>1</sup> Links to most federal laws and regulations that affect wage and hour issues are located at [www.dol.gov/whd/reg-library.htm](http://www.dol.gov/whd/reg-library.htm) (last visited March 13, 2014).

<sup>2</sup> 29 U.S.C. ch. 8.

<sup>3</sup>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 February 28, 2014).

<sup>4</sup> 29 U.S.C. s. 218(a).

<sup>5</sup> 29 U.S.C. s. 207(a)(1).

<sup>6</sup> The U.S. Department of Labor provides lists of the types of employees covered and exempt from the FLSA at <http://www.dol.gov/compliance/guide/minwage.htm#who> (last visited March 13, 2014).

<sup>7</sup> Section 760.10, F.S.

<sup>8</sup> Sections 448.20-26 and 487.2011-2071, F.S.

a fine of \$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 \$7.93 per hour, which is higher than the federal minimum wage.<sup>9</sup> Federal law requires the payment of the higher of the federal or state minimum wages.<sup>10</sup>

Chapter 448, F.S., includes the Florida 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.<sup>11</sup>

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 establish two types of local governments: counties<sup>12</sup> and municipalities. Local governments have wide authority to enact various ordinances to accomplish their local needs.<sup>13</sup> 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 reserves the power to legislate on specific topics exclusively to the state and thereby abrogates the typical broad home-rule powers of local governments.<sup>14</sup> Florida law recognizes two types of preemption: express and implied.<sup>15</sup> Express preemption requires that a statute contain specific language of preemption directed to the particular subject at issue.<sup>16</sup>

In the absence of express preemption a court may still find that the state's regulation of an area of law is so pervasive as to constitute implied preemption.<sup>17</sup> However, courts "are careful in imputing intent on behalf of the Legislature to preclude a local government from using its home rule powers."<sup>18</sup> A court will then consider whether strong public policy reasons exist for finding an area to be preempted by the Legislature.<sup>19</sup> Regulation of public records is an example of an area where the courts have found implied preemption.<sup>20</sup>

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<sup>9</sup> See [http://www.floridajobs.org/minimumwage/Announcement\\_2014.pdf](http://www.floridajobs.org/minimumwage/Announcement_2014.pdf) (last visited March 13, 2014).

<sup>10</sup> 29 U.S.C. §218(a).

<sup>11</sup> Section 448.105, F.S.

<sup>12</sup> Florida has both charter and non-charter counties.

<sup>13</sup> Article VIII of the State Constitution establishes the powers of charter counties, non-charter counties, and municipalities. Chapters 125 and 166, F.S., provide additional powers and constraints on counties and municipalities.

<sup>14</sup> *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006) (citations omitted).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984).

<sup>18</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) (citations omitted).

<sup>19</sup> *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996) (citations omitted).

<sup>20</sup> See *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

Currently, there is no express preemption of the enforcement 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. Alachua County has also passed a wage theft ordinance.<sup>21</sup> 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.<sup>22</sup>

Miami-Dade's ordinance,<sup>23</sup> 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.

Broward County's ordinance took effect on January 2, 2013.<sup>24</sup> It provides a process that is similar to Miami-Dade County's ordinance but with 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 after 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.

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<sup>21</sup> Kelcee Griffis, Gainesville Sun, *County commission passes wage-theft ordinance Tuesday*, THE INDEPENDENT FLORIDA ALLIGATOR, April 17, 2013, [http://www.alligator.org/news/local/article\\_7074e0f8-a710-11e2-bf3b-0019bb2963f4.html](http://www.alligator.org/news/local/article_7074e0f8-a710-11e2-bf3b-0019bb2963f4.html) (last visited March 13, 2014).

<sup>22</sup> Andy Reid, *Palm Beach County renews compromise wage theft effort*, SUN-SENTINEL, January 15, 2014, [http://articles.sun-sentinel.com/2014-01-15/news/sfl-palm-beach-county-renews-compromise-wage-theft-effort-20140115\\_1\\_wage-county-commission-low-income-workers](http://articles.sun-sentinel.com/2014-01-15/news/sfl-palm-beach-county-renews-compromise-wage-theft-effort-20140115_1_wage-county-commission-low-income-workers) (last visited March 13, 2014).

<sup>23</sup> Miami Dade County, Fla., Code ch. 22.

<sup>24</sup> Broward County Code of Ordinances, ch. 20½, Non-Payment of Earned Wages.

- 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 Broward 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.

Alachua County's ordinance was implemented on January 1, 2014. It is similar to the Broward ordinance in several respects. It also provides that an employee must contact an employer regarding a claim within 60 days after the date that wages were due to be paid and allow the employer 15 days to respond. The ordinance awards twice the amount of unpaid wages to a successful claimant. However, the Alachua County ordinance requires that a complaint be filed within 180 days after the date that wages were due to be paid (as opposed to one year). The Alachua County ordinance does not provide a minimum dollar threshold that claims must meet in order to be filed.

Palm Beach County has also 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. On January 11, 2014, the commission passed a resolution renewing a contract for \$104,000 with the Legal Aid Society to manage the Wage Recovery Program.<sup>25</sup> According to the society, the program has recovered approximately \$200,000 in back wages.<sup>26</sup>

### **Small Claims Court Costs**

Fees for filing an action in Small Claims Court, which is a part of the County Court, are set by s. 34.041(1)(a), F.S., as follows:

- \$50 for claims less than \$100;
- \$75 for claims from \$100 - \$500;
- \$170 for claims from \$500.01 - \$2500; and
- \$295 for claims of more than \$2,500.

In addition to the filing fee, the claimant must serve the employer with notice of the suit. Process may be served on a Florida defendant by certified mail, which costs approximately \$6. If that is unsuccessful, process must be served by the sheriff or an authorized process server. The cost for service by the sheriff is \$40 as provided in s. 30.231(1)(a), F.S.

### **III. Effect of Proposed Changes:**

#### **Preemption of Local Government Regulation of Wage Theft**

The bill creates s. 448.111, F.S., to preempt, by implication, the authority of counties to adopt wage theft ordinances, except as provided in the bill. However, the bill provides that local

<sup>25</sup> Andy Reid, *Palm Beach County renews compromise wage theft effort*, SUN-SENTINEL (January 15, 2014), [http://articles.sun-sentinel.com/2014-01-15/news/sfl-palm-beach-county-renews-compromise-wage-theft-effort-20140115\\_1\\_wage-county-commission-low-income-workers](http://articles.sun-sentinel.com/2014-01-15/news/sfl-palm-beach-county-renews-compromise-wage-theft-effort-20140115_1_wage-county-commission-low-income-workers) (last visited March 13, 2014).

<sup>26</sup> *Id.*

ordinances governing wage theft which were enacted on or before January 1, 2014, are not preempted. The bill authorizes county ordinances regulating wage theft so long as the ordinances meet certain requirements. If a county determines that local regulation of wage theft is necessary, it must adopt an ordinance with the guidelines in the bill.

### **Guidelines for Local Ordinances on Wage Theft**

A legal services organization is defined in the bill as “an organization that provides free or low-cost legal services to qualified persons and meets the minimum standards established by The Florida Bar for providing such services, including a legal practice clinic operated by an accredited Florida law school.” A legal services organization qualifies as “local” under the bill if it is located within the relevant county or within an adjoining county.

The bill defines “wage theft” as “an illegal or improper underpayment or nonpayment of an individual employee’s wage, salary, commission, or other similar form of compensation within a reasonable time after the date on which the employee performed the work to be compensated.”

The bill gives local governments two options for wage theft ordinances, a legal services organization process or an administrative process.

#### ***Legal Services Organization Process***

Under the legal services organization process, the county may partner with a local legal services organization to establish a local process to resolve wage theft claims. The legal services organization must be located in that county or in an adjoining county. An individual who believes that he or she has experienced wage theft may contact the legal services organization to determine the validity of the claim. The legal services organization must notify the employer and give the employer an opportunity to resolve the matter most appropriate to each wage theft claim. The legal services organization must negotiate the matter informally and expeditiously. The informal resolution of the wage theft claim may result in attorney fees and costs assessed from the employer. The legal services organization must file court actions as deemed appropriate and must refer unresolved claims to local pro bono or other counsel for resolution.

The county must establish a reporting mechanism in which it receives regular reports on the legal services organization’s work on wage theft cases. The county may require periodic reports.

#### ***Administrative Process***

Under the administrative process option, the county may establish an administrative process that gives the employer and the aggrieved employee an opportunity to negotiate a resolution of the wage theft claim. The county must establish a system that closely tracks the requirements in the bill. The administrative process must include a complaint process in which an employee may allege a wage theft claim and the employer given written notice of the claim. The notice to the employer must include the allegations made in the wage theft complaint and the rights and obligations of the parties, including the rights of both parties to a conciliation process and to a hearing before a county hearing officer. Under the administrative process, a claimant for wage theft has 1 year from the date the action accrued to file a complaint. The employer has the right

to file an answer to the complaint. The hearing officer who will resolve the complaint must have either a legal background or specialized training in the subject matter.

The final determination of a hearing officer on a wage theft complaint is subject to appeal to a court. A hearing officer may not be appointed unless the matter is not resolved through conciliation between the aggrieved employee and the employer. The bill requires the hearing officer to order the employer to pay wage theft restitution if a preponderance of evidence demonstrates a wage theft violation occurred. The regulation of wage theft through local ordinance is limited to requiring that employers pay their employees for work performed at the agreed upon rate of pay plus any penalties set forth in the bill and establishing a fair procedure and program to review and enforce wage agreements. The process must provide that the employee has the option to recover a wage theft claim through the process in the employee's county of employment or in a civil action, but not both. The county must establish a reporting mechanism through which the county receives regular reports on the number of wage theft cases. The county may require periodic reports.

### ***Employer's Liabilities***

An employer is liable under the administrative process for liquidated damages which are limited to twice the amount a respondent employer is found to have unlawfully failed to pay the complainant employee. As part of the resolution of a wage dispute the employer may also be ordered to pay administrative costs up to \$1,500 or have such costs waived at the discretion of the hearing officer if he or she finds that the employer acted in good faith or the nonpayment was not intentional or not wage theft. An employer found to have committed a second instance of wage theft is liable for a fine of \$1,000 and a fine of \$2,000 for a third instance.

The bill authorizes counties to dedicate county funds to assist the legal services organization process or the administrative process in addressing claims of wage theft.

The bill takes effect upon becoming a law.

## **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 State 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.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill will facilitate the resolution of wage disputes. However, an employer who is found in an administrative process to have not properly paid an employee will be subject to fines and charged the administrative costs of the process.

C. Government Sector Impact:

To the extent that the bill will increase the number of wage theft claims in courts, the bill may increase costs to the judiciary as a result of the increased number of claims. It is unknown how many additional claims will be filed therefore, the net impact on judicial workload cannot be predicted according to the Office of the State Courts Administrator.<sup>27</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 448.111 of the Florida Statutes.

**IX. Additional Information:**

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Judiciary on March 25, 2014:**

The underlying bill allowed counties to adopt a wage theft ordinance that would authorize only a legal services organization process to address wage theft claims. The committee substitute allows a county to pursue the legal services organization process or an administrative process.

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<sup>27</sup> Office of the State Courts Administrator, *2014 Judicial Impact Statement, SB 926* (March 11, 2014).



B. Amendments:

None.

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

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