

**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 Commerce and Tourism Committee

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BILL: SB 2106

INTRODUCER: Commerce and Tourism Committee

SUBJECT: Tipped Employees

DATE: February 8, 2012

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	<b>Favorable</b>
2.			RI	
3.				
4.				
5.				
6.				

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**I. Summary:**

SB 2106 creates an optional guaranteed wage for tipped employees in Florida. An employer may elect to guarantee tipped employees a certain wage for tipped employees who meet the eligibility requirements for the tip credit under the federal Fair Labor Standards Act. The election must remain in effect for 1 year from the date of the election and until revoked by the employer. An employer who makes such election does not have to pay the Florida minimum wage for tipped employees.

This bill creates general law not contained in a designated section of the Florida Statutes.

**II. Present Situation:**

**Florida Minimum Wage**

A constitutional amendment to Florida's Constitution took effect on May 2, 2005, which established the state minimum wage, including a wage for tipped employees.<sup>1</sup> The Legislature enacted the Florida Minimum Wage Act in 2005 to implement the constitutional provisions.<sup>2</sup>

The Department of Economic Opportunity (DEO) is required to annually calculate and publish the state minimum wage.<sup>3</sup> Current law requires employers to pay employees a minimum wage at an hourly rate published by DEO for all hours worked in Florida. Only those individuals entitled

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<sup>1</sup> Section 24, Art. X, of the State Constitution.

<sup>2</sup> Chapter 2005-353, L.O.F.

<sup>3</sup> "To implement s. 24, Art. X of the State Constitution, the Department of Economic Opportunity is designated as the state Agency for Workforce Innovation." s. 448.110(2), F.S.

to receive the federal minimum wage under the federal Fair Labor Standards Act and its implementing regulations are eligible to receive the state minimum wage.

### **Florida Minimum Wage Calculation**

DEO must calculate an adjusted state minimum wage rate by increasing the state minimum wage by the rate of inflation for the 12 months prior to September 1. In calculating the adjusted state minimum wage, DEO must use the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for the South Region.<sup>4</sup> Neither the statute nor the Constitution specifically addresses deflation in the computation of the minimum wage.

Currently, Florida's minimum wage is \$7.67 per hour.

Employers of *tipped employees*, who meet eligibility requirements for the tip credit under the Fair Labor Standards Act, may count tips actually received as wages under the Florida minimum wage. However, the employer must pay *tipped employees* a direct wage. The direct wage is calculated as equal to the minimum wage (\$7.67) minus the 2003 tip credit (\$3.02), or a direct hourly wage of \$4.65 as of January 1, 2012.<sup>5</sup>

### **Florida Compliance**

Employees who are not paid the minimum wage may bring a civil action against the employer or any person violating Florida's minimum wage law. "Rights protected include, but are not limited to, the right to file a complaint or inform any person of his or her potential rights pursuant to s. 24, Art. X of the State Constitution and to assist him or her in asserting such rights."<sup>6</sup> However, prior to bringing any claim for unpaid minimum wages, the person aggrieved shall notify the employer in writing of his or her intent to initiate such an action. An employer may ultimately be liable for unpaid wages, liquidated damages, and reasonable attorney's fees and costs to the employee.<sup>7</sup> Such actions may also be class actions.<sup>8</sup>

The Attorney General may also bring an enforcement action to enforce the minimum wage, and may seek to impose a fine of \$1,000 per violation, payable to the state.<sup>9</sup>

Actions must be brought within 5 years of the date the alleged violation occurred.<sup>10</sup>

### **Fair Labor Standards Act**

The Fair Labor Standards Act (FLSA) prescribes standards for minimum wages, overtime pay, recordkeeping, and child labor.<sup>11</sup> It is administered by the U.S. Department of Labor, Wage and

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<sup>4</sup> Section 448.110(4)(a), F.S.

<sup>5</sup> See DEO's "Florida's Minimum Wage," available at [http://www.floridajobs.org/minimumwage/Announcement-FL\\_MinWage2012.pdf](http://www.floridajobs.org/minimumwage/Announcement-FL_MinWage2012.pdf) (last visited 2/6/2012). Florida does not specifically define "tipped employee," but the federal law definition is provided further in the Present Situation. For a review of other states' laws regarding minimum wage for tipped employees see U.S. Department of Labor, Wage and Hour Division, at <http://www.dol.gov/whd/state/tipped.htm> (last visited 2/8/2012).

<sup>6</sup> Section 448.110(5), F.S.

<sup>7</sup> Section 448.110(6), F.S.

<sup>8</sup> Section 448.110(9), F.S.

<sup>9</sup> Section 448.110(7), F.S.

<sup>10</sup> Section 448.110(8), F.S.

Hour Division. The current federal minimum wage is \$7.25 per hour. The required minimum cash wage for *tipped employees* is \$2.13 per hour; employers may take a tip credit of up to \$5.12 from the federal minimum wage.<sup>12</sup> There are additional notice requirements that employers must make to *tipped employees* in order to use the tip credit.

Employers electing to use the tip credit provision must be able to show that tipped employees receive at least the minimum wage when direct (or cash) wages and the tip credit amount are combined. If an employee's tips combined with the employer's direct (or cash) wages of at least \$2.13 per hour do not equal the minimum hourly wage of \$7.25 per hour, **the employer must make up the difference.**<sup>13</sup>

It is a violation of FLSA to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the FLSA.<sup>14</sup>

### III. Effect of Proposed Changes:

SB 2106 creates an optional guaranteed wage for tipped employees in Florida. An employer may elect to guarantee tipped employees a certain wage for tipped employees who meet the eligibility requirements for the tip credit under the federal Fair Labor Standards Act (FLSA). Specifically, the wage must equal at least 130 percent of the state minimum wage, rounded up to the next cent.

The election must remain in effect for 1 year from the date of the election and until revoked by the employer. An employer who makes such election is deemed to have met the requirement to pay Florida minimum wage, but must still meet the requirements of the FLSA.

The employer must make the election in writing, and post the dated election on the employer's premises in a conspicuous and accessible place.

An employer who fails to pay an employee the wage guaranteed in the notice or that engages in any discriminatory or retaliatory action against an employee exercising his or her rights under the Florida Constitution is subject to civil actions and fines provided in s. 448.110, F.S. Further, an employer must still meet the requirements of FLSA.

**Section 2** provides an effective date of July 1, 2012.

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<sup>11</sup> 29 U.S.C. 201, et seq. See generally U.S. Department of Labor, Wage and Hour Division, "Compliance Assistance – Fair Labor Standards Act (FLSA)," available at <http://www.dol.gov/whd/flsa/index.htm> (last visited 2/6/2012).

<sup>12</sup> Under FLSA, tipped employees are those who customarily and regularly receive more than \$30 per month in tips. 15 U.S.C. 203(t). See also 29 C.F.R. s. 531.50.

<sup>13</sup> U.S. Department of Labor, Wage and Hour Division, "Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)" (revised March 2011), available at <http://www.dol.gov/whd/regs/compliance/whdfs15.pdf> (last visited 2/6/2012). Emphasis added.

<sup>14</sup> U.S. Department of Labor, Wage and Hour Division, "Fact Sheet #77A: Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)" (revised December 2011), available at <http://www.dol.gov/whd/regs/compliance/whdfs77a.pdf> (last visited 2/6/2012).

**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:**

Section 24, art. X, of the State Constitution, sets forth Florida's minimum wage. It states in part "[f]or tipped Employees meeting eligibility requirements for the tip credit under the FLSA, Employers may credit towards satisfaction of the Minimum Wage tips up to the amount of the allowable FLSA tip credit in 2003."

The section also states that the provision "shall not be construed to preempt or otherwise limit the authority of the state legislature or any other public body to adopt or enforce any other law, regulation, requirement, policy or standard that provides for payment of higher or supplemental wages or benefits."

This bill allows an employer to guarantee a minimum wage for tipped employees that is 130 percent higher than the state minimum wage, and states that an employer making such guarantee is deemed to have met the requirement to pay the Florida minimum wage.

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

None.

**B. Private Sector Impact:**

Indeterminate. Tipped employees may benefit from a higher guaranteed minimum wage. Restaurant industry advocates believe that employers will benefit by being able to pay a lower direct cash wage to tipped employees. However, employers are required to pay the guaranteed minimum wage, and may be liable to make up the difference.

**C. Government Sector Impact:**

Indeterminate. The Attorney General could experience additional complaints of wage violations under the provisions of this bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Employers who elect to pay the guaranteed minimum wage to tipped employees will also be required to make the appropriate payroll withholding for federal tax purposes.

The most recent data from the U.S. Department of Labor, Bureau of Labor Statistics (May 2010) estimates average hourly wages for “food preparation and serving related occupations” as \$10.12 per hour for the group; subgroups include bartenders (\$9.94 per hour), waiters and waitresses (\$9.91 per hour), and dining room and cafeteria attendants and bartender helpers (\$8.79 per hour).<sup>15</sup>

**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.

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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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<sup>15</sup> U.S Department of Labor, Bureau of Labor Statistics, “Occupational Employment Statistics: May 2010 State Occupational Employment and Wage Estimates: Florida,” available at [http://www.bls.gov/oes/current/oes\\_fl.htm#35-0000](http://www.bls.gov/oes/current/oes_fl.htm#35-0000) (last visited 2/8/2012).