

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 241 Wage Protection

**SPONSOR(S):** Civil Justice Subcommittee; Goodson

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 982

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 4 N, As CS	Woodburn	Bond
2) Community & Military Affairs Subcommittee	10 Y, 5 N	Shuler	Hoagland
3) Judiciary Committee	10 Y, 6 N	Woodburn	Havlicak

### SUMMARY ANALYSIS

Wage theft is a term used to describe the failure of an employer to pay any portion of wages due to an employee. Federal and state laws provide extensive protection from wage theft through various acts including the Federal Fair Labor Standards Act and Florida's minimum wage laws.

Counties and municipalities have broad home rule powers that allow the local governments to enact ordinances as long as the subject matter is not preempted to the state. Preemption may either be express or implied.

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

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

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### 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. 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 protects employees from wage theft including, but not limited to, the Fair Labor Standards Act and Florida minimum wage laws.

##### Worker Protection: Federal and State

Both federal<sup>1</sup> 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.<sup>2</sup> Examples of federal laws include:

- **The Davis-Bacon and Related Acts**<sup>3</sup> - Applies to federal or District of Columbia construction contracts or federally assisted contracts in excess of \$2,000; requires all contractors and subcontractors performing work on covered contracts to pay their 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**<sup>4</sup> - Applies to federal or District of Columbia contracts in excess of \$2,500; requires contractors and subcontractors performing work on these contracts 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**<sup>5</sup> - Covers migrant and seasonal agricultural workers who are not independent contractors; requires, among other things, disclosure of employment terms and timely payment of wages owed.
- **The Contract Work Hours and Safety Standards Act**<sup>6</sup> - Applies to federal service contracts and federal and federally assisted construction contracts over \$100,000; requires contractors and subcontractors performing work 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**<sup>7</sup> - Applies to federally funded or assisted contracts for construction or repair of public buildings; prohibits contractors or subcontractors performing

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<sup>1</sup> A list of examples of federal laws that protect employees is located at: United States Department of Labor, Employment Laws Assistance, <http://www.dol.gov/compliance/laws/main.htm> (last visited Mar. 24, 2011).

<sup>2</sup> See United States Department of Labor, A Summary of Major DOL Laws, <http://www.dol.gov/opa/aboutdol/lawsprog.htm> (last visited Mar. 25, 2011).

<sup>3</sup> Pub. L. No. 107-217, 120 Stat. 1213 (codified as amended at 40 U.S.C. §§ 3141-48; the Davis-Bacon Act has also been extended to approximately 60 other acts).

<sup>4</sup> Pub. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 351-58).

<sup>5</sup> Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended at 29 U.S.C. §§1801-72).

<sup>6</sup> Pub. L. No. 87-581, 76 Stat. 357 (codified as amended at 40 U.S.C. §§ 3701-08).

<sup>7</sup> 18 U.S.C. § 874.

work on covered contracts 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.

### *Fair Labor Standards Act of 1938*

The Fair Labor Standards Act (FLSA)<sup>8</sup> 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,<sup>9</sup> overtime pay,<sup>10</sup> recordkeeping,<sup>11</sup> and child labor.<sup>12</sup> Over 130 million workers are covered under the act, as the FLSA applies to most classes of workers.<sup>13</sup> The Act entails two types of coverage:

- Enterprises engaged in interstate commerce, producing goods for interstate commerce, or handles, sells, or works on goods or materials that have been moved in or produced in interstate commerce and has an annual volume of sales or business of \$500,000, as well as hospitals, schools, and public agencies;
- Individuals engaged in interstate commerce, the production of goods for interstate commerce, of in any closely-related process or occupation directly essential to such production.<sup>14</sup>

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 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.<sup>15</sup>

Thus, if a covered 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.<sup>16</sup>

The FLSA also establishes a federal minimum wage in the United States.<sup>17</sup> 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.<sup>18</sup>

The FLSA also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;<sup>19</sup>
- Criminal prosecutions by the United States Department of Justice;<sup>20</sup> or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.<sup>21</sup>

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<sup>8</sup> 29 U.S.C. Ch. 8.

<sup>9</sup> 29 U.S.C. § 206.

<sup>10</sup> 29 U.S.C. § 207.

<sup>11</sup> 29 U.S.C. § 211.

<sup>12</sup> 29 U.S.C. § 212.

<sup>13</sup> United States Department of Labor, Employment Law Guide – Minimum Wage and Overtime Pay, <http://www.dol.gov/compliance/guide/minwage.htm> (last visited Mar. 24, 2011).

<sup>14</sup> 29 U.S.C. § 203(r), (s); U.S. DEPT. OF LABOR, WH PUBLICATION 1282, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 2-3 (2010); United States Department of Labor, *supra* note 13.

<sup>15</sup> 29 U.S.C. § 207(a)(1).

<sup>16</sup> 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 Mar. 25, 2011).

<sup>17</sup> 29 U.S.C. § 206.

<sup>18</sup> 29 U.S.C. § 218(a).

<sup>19</sup> 29 U.S.C. § 216(c).

<sup>20</sup> 29 U.S.C. § 216(a).

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.<sup>22</sup> The employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.<sup>23</sup>

### *State Protection of Workers*

State law provides for protection of workers, including in the arenas of anti-discrimination,<sup>24</sup> work safety,<sup>25</sup> and a state minimum wage.<sup>26</sup> Since 2004, the state minimum wage has been established by the Florida Constitution.<sup>27</sup> The implementation language for the constitutional provision is embodied in the Florida Minimum Wage Act, located at s. 448.110, F.S.

Article X, section 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 constitution provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld.<sup>28</sup> A court may also award the employee liquidated damages in the amount of the wages withheld and reasonable attorney's fees and costs.<sup>29</sup>

The current state minimum wage is \$7.25 per hour, which is the federal rate.<sup>30</sup> Federal law requires the payment of the higher of the federal or state minimum wage.<sup>31</sup>

### Home Rule and Preemption

Article VIII, ss. 1 and 2, of the state constitution, establishes two types of local governments: counties<sup>32</sup> and municipalities. The local governments have wide authority to enact various ordinances to accomplish their local needs.<sup>33</sup> 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.<sup>34</sup>

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.<sup>35</sup> Florida law recognizes two types of preemption: express and implied.<sup>36</sup> Express preemption requires a specific legislative statement and cannot be implied or inferred.<sup>37</sup>

The absence of express preemption does not bar a court from a finding of preemption by implication, though courts are careful in imputing an intent on behalf of the legislature to preclude a local government from using its home rule powers.<sup>38</sup> Before finding that implied preemption exists, a court will first consider whether the legislative scheme is so pervasive as to evidence an intent to preempt the

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<sup>21</sup> 29 U.S.C. § 216(b).

<sup>22</sup> 29 U.S.C. § 216(b).

<sup>23</sup> 29 U.S.C. § 216(b).

<sup>24</sup> Section 760.10, Fla. Stat.

<sup>25</sup> Sections 448.20-.26, 487.2011-.2071, F.S.

<sup>26</sup> Art. X, s. 24, Fla. Const.; s. 448.110, F.S.

<sup>27</sup> Art. X, s. 24, Fla. Const.

<sup>28</sup> Art. X, s. 24(e), Fla. Const.

<sup>29</sup> *Id.*

<sup>30</sup> Agency for Workforce Innovation, Florida's Minimum Wage, <http://www.floridajobs.org/minimumwage/index.htm> (last visited Mar. 24, 2011).

<sup>31</sup> 29 U.S.C. § 218(a).

<sup>32</sup> There are two different types of counties in Florida; a charter county and a non-charter county.

<sup>33</sup> Article VIII of the Florida 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.

<sup>34</sup> *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

particular area; and whether there are strong public policy reasons for finding an area to be preempted by the Legislature.<sup>39</sup> An example of an area where the courts have found implied preemption is the regulation of public records.<sup>40</sup>

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

### Local Wage Theft Ordinances

Miami-Dade County has enacted an ordinance regulating wage theft.<sup>41</sup> The ordinance is enforced by the county's Department of Small Business Development (SBD).<sup>42</sup> Between the time of the ordinance's passage in February, 2010 and November, 2010, the Miami SBD logged 423 wage complaints and collected nearly \$40,000 from employers.<sup>43</sup> The Florida Retail Federation has filed suit to challenge the constitutionality of the Miami ordinance.<sup>44</sup> The Palm Beach County Commission has considered enacting a similar ordinance, but has postponed a final vote pending the outcome of the Miami-Dade Case.<sup>45</sup>

### Effect of the Bill

The bill provides that "as a matter of public policy that it is necessary to declare the theft of wages and the denial of compensation for work completed to be against the laws and policies of this state." The bill defines the term "wage theft." The bill also provides examples of current federal and state laws that protect employees from wage theft and provides that it is the intent of the bill to provide uniformity and to void all ordinances and regulations pertaining to wage theft that have been enacted by a governmental entity other than the state or federal government.

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

## B. SECTION DIRECTORY:

**Section 1:** Creates s. 448.111, F.S., providing for preemption of wage theft to the state.

**Section 2:** Provides an effective date of July 1, 2011.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

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<sup>39</sup> *Tallahassee Mem'l Reg'l Med. Ctr, Inc. v. Tallahassee Med. Ctr, Inc.*, 681 So.2d 826, 831 (Fla. 1st DCA 1996).

<sup>40</sup> *See Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984).

<sup>41</sup> Miami-Dade County Code of Ordinances, Chapter 22.

<sup>42</sup> CYNTHIA S. HERNANDEZ, RESEARCH INSTITUTE ON SOCIAL AND ECONOMIC POLICY, WAGE THEFT IN FLORIDA: A REAL PROBLEM WITH REAL SOLUTIONS 3 (2010).

<sup>43</sup> *Id.*

<sup>44</sup> Jennifer Sorentue, *Palm Beach County Commission Postpones Vote on Wage Theft Law but Directs Staff to Study and Report*, THE PALM BEACH POST, Feb. 1, 2011, <http://www.palmbeachpost.com/news/palm-beach-county-commission-postpones-vote-on-wage-1224613.html>.

<sup>45</sup> *Id.*

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

One local government is known to have enacted a wage theft ordinance.<sup>46</sup> This bill will invalidate that ordinance.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 7, 2011, the Civil Justice Subcommittee adopted one amendment. The amendment:

- Defined the term "wage theft" to mean the underpayment or nonpayment of wages earned through lawful employment.
- Removed an unnecessary reference to the payment of "fair compensation."

The bill was then reported favorably.

This analysis is drafted to the committee substitute.

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<sup>46</sup> Miami-Dade County Code of Ordinances, Chapter 22.