

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 Rules

BILL: CS/CS/SB 926

INTRODUCER: Rules Committee; Judiciary Committee; and Senator Simpson

SUBJECT: Local Regulation of Wage Theft

DATE: April 3, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stearns	Yeatman	CA	Favorable
2.	Munroe	Cibula	JU	Fav/CS
3.	Stearns	Phelps	RC	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 926 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 wage, salary, commission, or other similar form of compensation.

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 doing 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 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,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."

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

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 13, 2014).

² 29 U.S.C. ch. 8.

³The 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).

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 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).

⁷ Section 760.10, F.S.

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

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 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.⁹ Federal law requires the payment of the higher of the federal or state minimum wages.¹⁰

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.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 establish 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 reserves the power to legislate on specific topics exclusively to the state and thereby abrogates the typical broad home-rule powers of local governments.¹⁴ Florida law recognizes two types of preemption: express and implied.¹⁵ Express preemption requires that a statute contain specific language of preemption directed to the particular subject at issue.¹⁶

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.¹⁷ However, courts "are careful in imputing intent on behalf of the Legislature to preclude a local government from using its home rule powers."¹⁸ A court will then consider whether strong public policy reasons exist for finding

⁹ See http://www.floridajobs.org/minimumwage/Announcement_2014.pdf (last visited March 13, 2014).

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 additional powers and constraints on counties and municipalities.

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

¹⁵ *Id.*

¹⁶ *Id.*

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

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

an area to be preempted by the Legislature.¹⁹ Regulation of public records is an example of an area where the courts have found implied preemption.²⁰

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.²¹ 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.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.

Broward County's ordinance took effect on January 2, 2013.²⁴ 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.

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

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

²¹ 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 (last visited March 13, 2014).

²² 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 (last visited March 13, 2014).

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

²⁴ Broward County Code of Ordinances, ch. 20½, Non-Payment of Earned Wages.

- 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 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.²⁵ According to the society, the program has recovered approximately \$200,000 in back wages.²⁶

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.

²⁵ 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 (last visited March 13, 2014).

²⁶ *Id.*

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 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 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 bill, wage theft is the illegal or improper underpayment or nonpayment of an individual employee's wage, salary, commission, or similar compensation within a reasonable time from the date the employee should have been paid. If there is no established pay schedule, a reasonable time for payment is deemed to be two weeks 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. The filing fee for wage theft claims may not exceed \$50. Prior to filing a claim, the employee must give the employer oral or written notice of the particulars of the allegations and of the intent to file a claim. The employer has seven days after receiving notice to pay the total amount of unpaid compensation or otherwise resolve the action to the satisfaction of the claimant before the claim can be filed.

The claim is generally governed by Florida Small Claims Rules. However, the amount claimed can exceed the small claims threshold of \$5,000. A claimant must prove wage theft by a preponderance of the evidence. Damages are limited to twice the amount of compensation owed. The court may not award noneconomic or punitive damages or attorney fees.

Local Government Administrative Process: The bill allows local governments to establish an administrative, nonjudicial process 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: The bill preempts any local regulation of wage theft enacted on or after January 1, 2014, that exceeds the provisions of the bill. However, a local ordinance enacted before January 1, 2014, may be amended, revised or repealed. Any other local regulation for the recovery of unpaid compensation is expressly prohibited and preempted.

The bill explicitly states that it does not preclude a person who commits wage theft from being prosecuted for theft under s. 812.014, F.S.

Section 3 provides that the bill shall take effect upon becoming 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 present situation, 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 may facilitate the resolution of more wage theft claims through nonjudicial processes, which might result in economic benefits to employees. It may also result in reduced legal costs for both employees and employers, as the parties will have a means to resolve wage theft claims in addition to formal legal action.

C. Government Sector Impact:

Because the bill creates a new civil action for redress of wage theft claims in county court, there may be an increase in 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:

The bill states that any local wage theft regulation or ordinance that departs from the provisions provided by the bill is expressly prohibited and preempted. However, the bill also provides that

local wage theft regulations or ordinances enacted before January 1, 2014, may be amended, revised, or repealed. The bill does not expressly state that such ordinances are not preempted. Therefore, it is unclear whether local ordinances are preempted to the extent that they deviate from the bill.

VIII. Statutes Affected:

This bill substantially amends section 34.01 of the Florida Statutes.

This bill creates section 448.115 of the Florida Statutes.

IX. Additional Information:

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

CS/CS by Rules on April 2, 2014:

- Expands the original jurisdiction of county courts to cover wage theft claims.
- Authorizes an employee to initiate a civil action for wage theft.
- Specifies requirements that must be met prior to initiation of a claim.
- Authorizes a local jurisdiction to establish an administrative process to assist in the conciliation of wage theft disputes.
- Preempts regulation of wage theft claims to the state after a specified date.

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.

- B. **Amendments:**

None.