

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Commerce and Consumer Services Committee

BILL: CS/SB 2638

SPONSOR: Commerce and Consumer Services Committee and Senator Alexander

SUBJECT: Florida Minimum Wage

DATE: April 19, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	Fav/CS
2.	_____	_____	JU	_____
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4.	_____	_____	TA	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This Committee Substitute implements the provisions of s. 24, Art. X of the State Constitution, relating to the Florida minimum wage. The committee substitute replicates the provisions of the constitution and adds additional provisions to:

- Adopt the U.S. Consumer Price Index for the south region, not seasonally adjusted, as the applicable index for determining the annual adjustments to the state minimum wage;
- Require the Agency for Workforce Innovation and the Department of Revenue to publish the annually adjusted minimum wage on their websites by October 1st of each year; and, subject to appropriation by the Legislature, requires AWI to notify employers listed in the unemployment compensation database in writing of the new wage by November 15th of each year;
- Require employees to first notify employers before initiating a civil action to enforce their right to receive the state minimum wage;
- Allow employers 15 calendar days to resolve any claims for the unpaid wages before a suit may be filed;
- Limit the damages awarded to employees;
- Restrict the court from awarding punitive damages; and
- Impose restrictions on class action suits.

This committee substitute amends section 95.11 of the Florida Statutes.

This committee substitute creates section 448.065 of the Florida Statutes.

II. Present Situation:

Constitutional Amendment

On November 2, 2004, Florida citizens passed Amendment 5 on the ballot during the general election. The amendment became s. 24, Art. X, of the State Constitution and contained seven distinct provisions. Subsection (a) outlines the purpose of the provision - to provide all working Floridians with a sufficient wage and protect employers from unfair low-wage competition. Subsection (b) provides that the terms “employer,” “employee,” and “wage,” will be defined as they are under the federal fair Labor Standards Act (FLSA) and its associated regulations.

Subsection (c) sets the minimum wage at \$6.15 beginning 6 months after the enactment of the amendment. This subsection also directs AWI to calculate the wage rate annually using the consumer price index¹ for urban wage earners and clerical workers, the CPI-W or a successor index as calculated by the U.S. Department of Labor. Moreover, the subsection requires raising the rate each year by the rate of inflation in the previous 12 months. This provision also requires that the new rate be published annually by January 1st and permits employers to credit towards the satisfaction of the minimum wage, any tips received by tipped employees.

Subsection (d) expressly prohibits employers from retaliating against employees who exercise their rights under the amendment. This provision outlines the rights protected by the amendment including, but not limited to, “the right to file a complaint or inform any person about any party’s alleged noncompliance with this amendment, and the right to inform any person of his or her potential rights under this amendment and to assist him or her in asserting such rights.”

Subsection (e) authorizes employees to bring a civil action to enforce the provisions of this amendment. An employee who prevails may recover unpaid wages, an equal amount in liquidated damages and attorney’s fees and costs. Employers or others who violate the provisions of the amendment are subject to a \$1,000 per violation fine. This provision also authorizes the Attorney General or other official designated by the Legislature to bring a civil action to enforce the amendment. Moreover, under this provision, the statute of limitation is 4 years and 5 years for willful violations. The amendment also permits class actions by employees.

Subsection (f) provides that implementing legislation is not required to enforce the amendment. However, this paragraph also permits the Legislature to create statutes to “establish additional remedies or fines for violation of this amendment, raise the applicable Minimum Wage rate, reduce the tip credit, or extend coverage of the Minimum Wage to employers or employees not covered by this amendment.” The provision then provides that AWI or the state legislature may adopt additional measures they deem appropriate to implement the amendment. According to this provision, the amendment does not prevent the Legislature or any other public body from adopting or enforcing measures that provide for the payment of higher or supplemental wages or benefits.

Subsection (g) of the amendment contains a severability clause.

¹ The Consumer Price Index (CPI) is a measure of the average change over time in the prices paid by urban consumers for goods and services.

Minimum Wage Law

The Fair Labor Standards Act (FLSA), 29 U.S.C. 201, et. seq., governs federal minimum wage as well as overtime, recordkeeping and child labor standards. Section 206 of the act sets the minimum wage at \$5.15 an hour effective September 1, 1997. Thirteen states plus the District of Columbia, excluding Florida, had minimum wage rates higher than the federal minimum wage as of January 1, 2005.² At that time, Florida was one of seven states that had not enacted a minimum wage law.³

FLSA governs or “covers” employees in one of two categories:

1. Enterprise coverage—Employees who work for enterprises, businesses or organizations doing at least \$500,000 of business per year, and hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies; or
2. Individual coverage—Employees whose work involves the production of goods for commerce or engagement in interstate commerce and domestic workers.

Employees in the aforementioned categories are to be paid the federal minimum wage. According to the Department of Labor, where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wages.

Like Florida’s constitutional amendment, current federal law also prescribes wages for tipped employees. Under FLSA, employers are required to pay \$2.13 per hour as direct wages to tipped employees as long as that amount plus tips received equals at least the federal minimum wage, the employee keeps all of his or her tips and the employee meets the definition of a tipped employee (customarily and regularly receives more than \$30 a month in tips).⁴ Although the Florida constitutional amendment does not explicitly state that the base wage for tipped employees will also be raised by one dollar, it does provide the following guidance: “For 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.”⁵ The Agency for Workforce Innovation (AWI) has interpreted this language to mean that tipped employees may not be paid less than \$3.13 per hour.⁶ Specifically, AWI indicates this new direct wage is derived by subtracting the 2003 tip credit, \$3.02, from Florida’s minimum wage.

FLSA also contains several exemptions to the minimum wage laws including, but not limited to, exemptions for workers with disabilities, full time students and student learners who are employed pursuant to sub-minimum wage certificates.⁷

² U.S. Department of Labor, *Minimum Wage Laws in the States-January 1, 2005*. 13 April 2005. <<http://www.dol.gov/esa/minwage/america.htm>>.

³ Id.

⁴ U.S. Department of Labor, *Questions and Answers about the Minimum Wage*. 12 April 2005. <<http://www.dol.gov/esa/minwage/q-a.htm>>.

⁵ Section 24, Art. X, State Constitution.

⁶ Workforce Innovation, *Florida’s Minimum Wage*, <http://www.floridajobs.org/resources/fl_min_wage.html>. 15 April 2005.

⁷ See, 29 U.S.C ss. 213 and 214.

The Wage and Hour Division of the U.S. Department of Labor enforces the minimum wage. The division has offices throughout the country that investigate wage and labor claims, bring enforcement actions against employers and hold education seminars related to employment laws.

III. Effect of Proposed Changes:

This committee substitute implements the provisions of s. 24, Art. X of the State Constitution, relating to the Florida minimum wage. The committee substitute replicates the provisions of the constitution and adds additional provisions to:

- Adopt the U.S. Consumer Price Index *for the south region* as the applicable index for determining the annual adjustments to the state minimum wage;
- Require the Agency for Workforce Innovation and the Department of Revenue to publish the annually adjusted minimum wage on their websites in order; and, subject to appropriation by the Legislature, requires AWI to notify employers listed in the unemployment compensation database in writing of the new wage;
- Require employees to first notify employers before initiating a civil action to enforce their right to receive the state minimum wage;
- Allow employers 15 calendar days to resolve any claims for the unpaid wages before a suit may be filed;
- Limit the damages awarded to employees;
- Restrict the court from awarding punitive damages; and
- Impose restrictions on class action suits.

Section 1 amends s. 95.11, F.S., outlining the statute of limitations for filing an action other than for the recovery of real property.

Subsection 95.11(2), F.S., provides a 5-year limitation period on the filing of a cause of action on a judgment or decree under certain conditions, a legal or equitable action based on a contract, obligation, or liability founded on a written document with certain exceptions, and an action to foreclose a mortgage. This section adds an action alleging a willful violation of the new state minimum wage law, s. 448.065, F.S., created in section 2 of this committee substitute.

Currently, subsection 95.11(3), F.S., provides a 4-year limitations period for several actions including, for example, actions founded on negligence and actions to rescind a contract. This section of the committee substitute adds an action generally alleging a violation of the new state minimum wage law, s. 448.065, F.S., created in section 2 of this committee substitute.

Section 2 creates the “Florida Minimum Wage Act” in s. 448.065, F.S.

Subsection (2) expressly states that the purpose of this section is to implement s. 24, Art. X, of the State Constitution pursuant to the authority granted to the Legislature under that constitutional provision.

Subsection (3) designates May 2, 2005, as the effective date of the new minimum wage of \$6.15 per hour. This subsection also limits eligibility for the minimum wage to workers who are

currently entitled to receive the federal minimum wage under FLSA and its associated implementing regulations. In addition, this section provides that the exemptions outlined in ss. 213 and 214 of FLSA are incorporated into this act by reference.

Paragraph (4)(a) directs AWI to calculate the adjusted minimum wage rate, indexing it to the rate of inflation for the preceding 12 months. This section requires AWI to use the Consumer Price Index for Urban Wage Earners and Clerical Workers, CPI-W, for the south region, not seasonally adjusted, or a successor index as calculated by the U.S. Department of Labor. AWI is also required to execute this calculation on September 30, 2005, and each September 30th thereafter. This section also provides that the adjusted state minimum wage will take effect each January 1st beginning on January 1, 2006.

Paragraph (4)(b) directs AWI and the Department of Revenue (DOR) to notify employers annually of the new minimum wage by posting the adjusted wage on its website by October 15, 2005. Subject to appropriation by the Legislature, AWI is to mail notice of the new wage to employers listed in the unemployment compensation database by November 15th of each year. This section provides that employers are responsible for updating their address information in the database and that AWI is not responsible for failure to notify based on incorrect or incomplete address information.

Subsection (5) prohibits retaliatory action or discrimination by employers against employees who file a complaint, inform another person of his or her rights, or assist another individual in asserting his or her rights under s. 24, Art. X, of the State Constitution.

Paragraph (6)(a) provides that a person who has not been paid in accordance with the provision of this act may bring a civil action against his or her employer. This section requires potential plaintiffs to notify their employers in writing of their intent to file suit, and include the following information in the notice:

- The minimum wage to which the employee is entitled;
- The actual or estimated work dates and hours for which payment is sought; and
- The total amount of alleged unpaid wages through the date of the notice.

Paragraph (6)(b) allows the employer 15 calendar days after the receipt of the notice to pay the back wages or otherwise resolve the claim to the satisfaction of the employee. If the employer fails to pay the back wages or otherwise satisfy the claim, the employee may file a civil action.

Paragraph (6)(c) outlines the type of damages recoverable by a complainant who files civil action under this act. Subparagraph (6)(c)1. provides that a complainant who prevails in such an action shall be awarded unpaid back wages plus the same amount in liquidated damages as well as reasonable attorney's fees and costs which is consistent with subsection (e) of the constitutional provision. This section also permits the employers to avoid a judgment of liquidated damages or any award not to exceed the unpaid minimum wage if the employer shows by a preponderance of the evidence that the act or omission that gave rise to the action was in good faith and that the employer had reasonable grounds to believe the act or omission was not a violation of s. 24, Art. X, of the State Constitution. Whether to award damages under such circumstances is within the court's sound discretion.

Subparagraph (6)(c)2. allows such legal or equitable relief that may be appropriate including, reinstatement in employment and injunctive relief. However, this subparagraph excludes the awarding of punitive damages from any relief granted the complainant.

Paragraph (6)(d) provides that actions brought under this act are also subject to s. 768.79, F.S., which provides guidelines for offers of judgment.

Subsection (7) authorizes the Attorney General to bring a civil action to enforce the provisions of this act including seeking injunctive relief. This section also permits the imposition of a \$1,000 per violation fine, payable to the state, on any employer or other person for willfully violating this section.

Subsection (8) provides a statute of limitation of 4 years from the date of the violation. That time period is extended to 5 years where there has been a willful violation of this act.

Subsection (9) allows complainants to bring class actions under this act pursuant to Rule 1.220, Florida Rules of Civil Procedure. However, in any class action brought pursuant to this act, plaintiffs must prove, by the preponderance of evidence, the individual identity of each class member and the individual damages for each class member.

Subsection (10) states that the act provides the exclusive remedy under state law for the violation of s. 24, Art. X, of the State Constitution.

Subsection (11) provides that AWI's authority, aside from calculating the adjusted state minimum wage and publishing the initial state minimum wage, is limited to that authority expressly granted by the Legislature.

Section 3 provides that sections 448.01-448.110, F.S., are to be designated as Part I of chapter 448, F.S., and entitled "Terms and Conditions of Employment."

Section 4 provides a severability clause for the act.

Section 5 provides an effective date of July 1, 2005 for this act.

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:

While subsection 24 (f), Art. X of the State Constitution states that implementing legislation is not required to enforce this provision, it authorizes the state Legislature to “adopt any measures appropriate” for its implementation. Furthermore, it states that this provision does not limit the authority of the Legislature to adopt any other law, regulation, requirement, policy or standard that provides for payment of *higher or supplemental* wages or benefits.

However, the subsection 24(f) concludes with this statement:

It is intended that case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of this amendment and any implementing statutes or regulations.

Access to Courts

Subsection 24(e), Art. X of the State Constitution allows persons “aggrieved by a violation of this amendment” to “bring a civil action in a court of competent jurisdiction against an Employer or person violating this amendment...” Proposed subsection 448.065(6), F.S., requires the employee to provide notification of their intent to initiate civil action, and restricts such action until 15 days after such notification, thereby providing the employer the opportunity to resolve the dispute. In addition, it specifies the notice requirements.

To the extent that this implementing legislation unreasonably limits access to the courts, it could be found to be unconstitutional.

Class Action Lawsuits

Subsection 24(e), Art. X of the State Constitution allows for class actions to enforce this provision “may be brought as a class action pursuant to Rule 1.220 of the Florida Rules of Civil Procedure.” Proposed subsection 448.065(9), F.S., requires that “[i]n any class action brought under this section, the plaintiffs shall prove, by a preponderance of the evidence, the individual identity of each class member and the individual damages of each class member.”

To the extent that this provision conflicts with the expressed language in the constitution, it could be found to be unconstitutional.

Damages

Subsection 24(e), Art. X, of the State Constitution provides that upon prevailing in an action against an employer, the employee is entitled to

recover the full amount of any back wages unlawfully withheld plus the same amount as liquidated damages, and shall be awarded reasonable attorney's fees and costs. In addition, they shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, without limitation, reinstatement in employment and/or injunctive relief.

Proposed subparagraph 448.065(6)(c)1., F.S., limits such damages if the court finds that the employer proves by a preponderance of the evidence that he or she acted in good faith and “had reasonable grounds for believing that his or her act or omission was not a violation” of the constitutional minimum wage provision. This limitation parallels the language of 29 U.S.C. s. 260, also know as s. 11 of the Portal-to-Portal Act of 1947, which was enacted to minimize the uncertainty regarding the liabilities of employers under FLSA.⁸

In addition, proposed subparagraph 448.065(6)(c)2., F.S., states that the legal or equitable relief provided for violations of the state minimum wage “shall not include punitive damages.”

To the extent that this implementing legislation limits or reduces the damages provided for in the constitutional minimum wage provision, or is inconsistent with “case law, administrative interpretations, and other guiding standards developed under the federal FLSA,” it could be found to be unconstitutional.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This committee substitute limits the damages available to employees who have not received the wages due them, as determined by the courts.

C. Government Sector Impact:

AWI estimates an initial cost of posting the minimum wage to the internet of \$90.00 and less than that figure for updates. The agency also estimates costs of \$150,159 for FY 2005-2006, and \$168,129 for FY 2006-2007, for the required mailing to employers.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

⁸ 29 CFR Ch. V, Part 790 (view at <http://www.osha.gov/pls/epub/wageindex.download?p_file=F8840/wh1056.pdf>). 15 April 2005.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
