

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 609 Wage Protection for Employees

SPONSOR(S): Goodson

TIED BILLS: None **IDEN./SIM. BILLS:** SB 862

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 4 N	Caridad	Bond
2) Community & Military Affairs Subcommittee			
3) Judiciary Committee			

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 federal¹ 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.

Fair Labor Standards Act of 1938

The Fair Labor Standards Act (FLSA)² 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,³ overtime pay,⁴ recordkeeping,⁵ and child labor.⁶ The FLSA applies to most classes of workers.⁷

¹ A list of examples of federal laws that protect employees is located at: <http://www.dol.gov/compliance/laws/main.htm> (Last visited November 28, 2011). Examples include: *The Davis-Bacon and Related Acts* (requires all contractors and subcontractors performing work on federal or District of Columbia construction contracts or federally assisted contracts in excess of \$2,000 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* (The SCA requires contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of \$2,500 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* (provides employment-related protections to migrant and seasonal agricultural workers); *The Contract Work Hours and Safety Standards Act* (requires contractors and subcontractors 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* (prohibits federal contractors or subcontractors engaged in building construction or repair 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).

² 29 U.S.C Ch. 8.

³ 29 U.S.C. §206.

⁴ 29 U.S.C. §207.

⁵ 29 U.S.C. §211.

⁶ 29 U.S.C. §212.

⁷ The U.S. Department of Labor provides an extensive list of types of employees covered under the FLSA at <http://www.dol.gov/compliance/guide/minwage.htm> (Last visited February 24, 2011).

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.⁸

If an 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.⁹

The FLSA also establishes a federal minimum wage in the United States.¹⁰ 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.¹¹

The FLSA also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;¹²
- Criminal prosecutions by the United States Department of Justice;¹³ or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.¹⁴

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.¹⁵ An employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.¹⁶

State Protection of Workers

State law provides for protection of workers, including anti-discrimination, work safety and a state minimum wage. The state minimum wage was passed as a constitutional amendment¹⁷ and the implementation language is located in s. 448.110, F.S.

Article X, s. 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 amendment provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld. A court may also award the employee liquidated damages in the amount of the wages withheld and reasonable attorney's fees and costs.

The current state minimum wage is \$7.67 per hour, which is the federal rate.¹⁸ Federal law requires the payment of the higher of the federal or state minimum wage.¹⁹

⁸ 29 U.S.C. §207(a)(1).

⁹ 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 November 28, 2011).

¹⁰ 29 U.S.C. §206.

¹¹ 29 U.S.C. §218(a).

¹² 29 U.S.C. §216(c).

¹³ 29 U.S.C. §216(a).

¹⁴ 29 U.S.C. §216(b).

¹⁵ 29 U.S.C. §216(b).

¹⁶ 29 U.S.C. §216(b).

¹⁷ See Article X, s. 24 of the Florida Constitution (adopted in 2004).

¹⁸ See Agency for Workforce Innovation Website for information regarding the current minimum wage in the State of Florida. <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notice> (Last visited November 28, 2011).

In addition, any worker may sue in contract for unpaid wages. If the worker wins, he or she must be awarded costs and attorney fees.²⁰

Home Rule and Preemption

Article VIII ss. 1 and 2, of the state constitution, establishes two types of local governments: counties²¹ and municipalities. The local governments have wide authority to enact various ordinances to accomplish their local needs.²² 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.

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.²³ Florida law recognizes two types of preemption: express and implied.²⁴ Express preemption requires a specific legislative statement and cannot be implied or inferred.²⁵ Express preemption requires that a statute contain specific language of preemption directed to the particular subject at issue.

The absence of express preemption does not bar a court from a finding of preemption by implication. A court will look at two factors to determine if the subject matter has been preempted by the Legislature:

- Whether the Legislative scheme is so pervasive as to evidence an intent to preempt the particular area; and
- Whether there are strong public policy reasons for finding an area to be preempted by the Legislature.²⁶

In order to determine whether a legislative scheme is pervasive, a court will look at several factors including the nature of the subject matter, the need for state uniformity, and the scope and purpose of the state legislation.²⁷ For instance, the Florida Supreme Court has found implied preemption in the area of public records.²⁸

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

Effect of the Bill

The bill provides that the regulation of wage theft is expressly preempted to the state. It also defines "wage theft" as an illegal or improper underpayment or nonpayment of a worker's wages, salaries, commissions, or other similar form of compensation.

B. SECTION DIRECTORY:

Section 1 creates an unnumbered section of law, providing for preemption of wage theft to the state.

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

¹⁹ 29 U.S.C. §218(a).

²⁰ See s. 448.08, F.S.

²¹ There are two different types of counties in Florida; a charter county and a non-charter county.

²² Article VIII of the state constitution establishes the powers of chartered counties, non-charter counties and municipalities. Chapters 125 and 166, F.S., provides the additional powers and constraints of counties and municipalities.

²³ *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826, 851.

²⁷ *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

²⁸ *See Tribune Co. v. Cannella*, 458 So.2d 1075 (Fla. 1984) (holding that the legislative scheme of the Public Records Act preempted the law relating to production of records for inspection).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Miami-Dade County has enacted an ordinance regulating wage theft.²⁹ The ordinance is enforced by the county's Department of Small Business Development (SBD).³⁰ In March 2011, the Florida Retail Federation filed suit to challenge the constitutionality of the Miami ordinance.³¹ The Palm Beach County

²⁹ Miami-Dade County Code of Ordinances, Chapter 22.

³⁰ See CYNTHIA S. HERNANDEZ, RESEARCH INSTITUTE ON SOCIAL AND ECONOMIC POLICY, WAGE THEFT IN FLORIDA: A REAL PROBLEM WITH REAL SOLUTIONS 3 (2010).

³¹ *Fla. Retail Fed'n, Inc. v. Miami Dade County*, No. 2010-42326-CA-01 (Aug. 4, 2010).

Commission has considered enacting a similar ordinance, but has postponed a final vote pending the outcome of the Miami-Dade Case.³²

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

³² Jennifer Sorentrue, 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>; Andy Reid, Religious group: Palm Beach County's wage theft fight falls short, ORLANDO SENTINEL, Nov. 10, 2011, <http://www.orlandosentinel.com/news/local/fl-stealing-wages-palm-20111110,0,1072806.story>.