

## 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	11 Y, 4 N	Gibson	Hoagland
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 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. Therefore, local governments may not regulate over and above the existing state and federal laws. The bill also defines "wage theft" as an illegal or improper underpayment or nonpayment of an individual worker's wages, salaries, commissions, or other similar form of compensation.

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

The bill has an effective date of July 1, 2012.

# 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 required to work off the clock;
- employee has their time card altered;
- 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 protect employees from wage theft including, but not limited to, the Fair Labor Standards Act (FLSA) and Florida's minimum wage laws. An aggrieved employee may also file a common law breach of contract claim in circuit court.

#### Employee Protection: Federal and State

Both federal<sup>1</sup> and state laws provide protection to employees who are employed by private and governmental entities. These protections include workplace safety, anti-discrimination, anti-child labor, workers' compensation, and wage protection laws.

#### *Federal Protection of Employees*

Examples of federal laws, which the U.S. Department of Labor administers and enforces, include:

- **The Davis-Bacon and Related Acts**<sup>2</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>3</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>4</sup> - Covers migrant and seasonal agricultural workers who are not independent contractors; requires, among other things, disclosure of employment terms and payment of wages owed when due.
- **The Contract Work Hours and Safety Standards Act**<sup>5</sup> - Applies to federal service contracts and federal and federally assisted construction contracts over \$100,000; requires contractors

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<sup>1</sup> A list of examples of federal laws that protect employees is located at: <http://www.dol.gov/compliance/laws/main.htm> (last visited January 4, 2012).

<sup>2</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>3</sup> Pub. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 351-58).

<sup>4</sup> Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended at 29 U.S.C. §§ 1801-72).

<sup>5</sup> Pub. L. No. 87-581, 76 Stat. 357 (codified as amended at 40 U.S.C. §§ 3701-08).

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>6</sup> - Applies to federally funded or assisted contracts for construction or repair of public buildings; prohibits contractors or subcontractors performing 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 FLSA<sup>7</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>8</sup> overtime pay,<sup>9</sup> recordkeeping,<sup>10</sup> and child labor.<sup>11</sup> The FLSA applies to most classes of workers.<sup>12</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>13</sup>

Thus, if a nonexempt 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 a nonexempt employee is a violation of the FLSA.<sup>14</sup>

The FLSA also establishes a federal minimum wage in the United States.<sup>15</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>16</sup>

The FLSA provides for enforcement in three separate ways:

- civil actions or lawsuits by the federal government;<sup>17</sup>
- criminal prosecutions by the United States Department of Justice;<sup>18</sup> or
- private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.<sup>19</sup>

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

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<sup>6</sup> 40 U.S.C. §276c 18 U.S.C. §874.

<sup>7</sup> 29 U.S.C. ch. 8.

<sup>8</sup> 29 U.S.C. §206.

<sup>9</sup> 29 U.S.C. §207.

<sup>10</sup> 29 U.S.C. §211.

<sup>11</sup> 29 U.S.C. §212.

<sup>12</sup> 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 January 4, 2012).

<sup>13</sup> 29 U.S.C. §207(a)(1).

<sup>14</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 January 4, 2012).

<sup>15</sup> 29 U.S.C. §206.

<sup>16</sup> 29 U.S.C. §218(a).

<sup>17</sup> 29 U.S.C. §216(c).

<sup>18</sup> 29 U.S.C. §216(a).

<sup>19</sup> 29 U.S.C. §216(b).

equal to the amount of the unpaid wages.<sup>20</sup> An employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.<sup>21</sup>

### *State Protection of Employees*

State law provides for protection of employees, including anti-discrimination,<sup>22</sup> work safety,<sup>23</sup> and a state minimum wage. Since 2004, the state minimum wage has been established by the Florida Constitution.<sup>24</sup> 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 constitution provides that an employee may bring a civil action in a court of competent jurisdiction for the amount of the wages withheld.<sup>25</sup> 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.<sup>26</sup> Further, any employer that willfully violates the minimum wage law is fined \$1,000 for each violation.<sup>27</sup> The Attorney General is also empowered to bring a civil action to enforce the state's minimum wage laws.<sup>28</sup>

The current state minimum wage is \$7.67 per hour, which is the federal rate.<sup>29</sup> Federal law requires the payment of the higher of the federal or state minimum wage.<sup>30</sup>

Chapter 448, F.S., includes the State Minimum Wage Act, which implements the constitutional provision in Article X, s. 24. It also prohibits an employer from retaliation against the employee for enforcing their rights, and it preserves the rights that an employee has under any collective bargaining agreement or employee contract.<sup>31</sup>

An employee may bring a common law breach of contract claim for unpaid wages too, and s. 448.08, F.S., allows the court to award attorney's fees and costs if the employee prevails.

### 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. 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 that 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.<sup>34</sup> Florida law recognizes two types of preemption: express and implied.<sup>35</sup> Express preemption requires a specific

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<sup>20</sup> 29 U.S.C. §216(b).

<sup>21</sup> *Id.*

<sup>22</sup> S. 760.10, F.S.

<sup>23</sup> Ss. 448.20-26 and 487.2011-2071, F.S.

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

<sup>25</sup> Art. X, s. 24(e), Fla. Const.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 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 January 4, 2012).

<sup>30</sup> 29 U.S.C. §218(a).

<sup>31</sup> S. 448.105, F.S.

<sup>32</sup> Florida has both charter and non-charter counties.

<sup>33</sup> Article VIII of the state constitution establishes the powers of charter 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.*

legislative statement and cannot be implied or inferred.<sup>36</sup> 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, though courts are careful when imputing intent on behalf of the legislature to preclude a local government from using its home rule powers.<sup>37</sup> Before finding that implied preemption exists, a court will first consider whether the legislative scheme is so pervasive as to evidence intent to preempt the particular area.<sup>38</sup> Factors that point to a pervasive legislative scheme include the nature of the subject matter, the need for state uniformity, and the scope and purpose of the state legislation.<sup>39</sup> Second, a court will consider whether there are strong public policy reasons for finding an area to be preempted by the Legislature.<sup>40</sup> An example of an area where the courts have found implied preemption is the regulation of public records.<sup>41</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.

### Miami-Dade County Wage Theft Ordinance

In February of 2010, Miami-Dade County enacted an ordinance regulating wage theft.<sup>42</sup> The ordinance is enforced by the county's Department of Small Business Development (SBD)<sup>43</sup> and provides a local process for employees to file claims for unpaid wages outside of the processes available under state and federal law.

Section 22-3 of the Miami Dade County Code states:

For any employer to fail to pay any portion of wages due to an employee, according to the wage rate applicable to that employee, within a reasonable time from the date on which that employee performed the work for which those wages were compensation, shall be wage theft; and such a violation shall entitle an employee, upon a finding by a hearing examiner appointed by Miami-Dade County or by a court of competent jurisdiction that an employer is found to have unlawfully failed to pay wages, to receive back wages in addition to liquidated damages from that employer.

Upon the filing of a complaint, the County determines if the complaint 1) alleges wage theft, 2) names at least one respondent, and 3) meets the threshold requirement of at least \$60 in unpaid wages.<sup>44</sup> If the complaint meets the initial criteria, the County serves the complaint and a written notice on the accused employer in an attempt to recover the funds.<sup>45</sup> The County tries to work with the parties to resolve the case either through the payment of the wages or a conciliation agreement, however, if the dispute cannot be settled, the case is referred to a Hearing Examiner.<sup>46</sup> The Hearing Examiner has the

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

<sup>37</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

<sup>38</sup> *See Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

<sup>39</sup> *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

<sup>40</sup> *Tallahassee Mem'l Reg'l Med. Ctr, Inc. v. Tallahassee Med. Ctr, Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

<sup>41</sup> *See Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

<sup>42</sup> Miami Dade County, Fla., Code ch. 22.

<sup>43</sup> CYNTHIA S. HERNANDEZ, RESEARCH INSTITUTE ON SOCIAL AND ECONOMIC POLICY, WAGE THEFT IN FLORIDA: A REAL PROBLEM WITH REAL SOLUTIONS 3 (2010).

<sup>44</sup> Miami-Dade County, Fla., Code s. 22-4(2)(a).

<sup>45</sup> Miami-Dade County, Fla., Code s. 22-4(2)(b). The county might also first make a phone call to the employer in an attempt to resolve the issue before serving a complaint.

<sup>46</sup> Miami-Dade County, Fla., Code s. 22-4(6)(a). The wage theft ordinance and implementing order (IO) do not expressly provide qualifications for hearing examiners, however, House staff learned that Miami-Dade's SBD has relied on the hearing examiner qualifications from another implementing order (IO 3-24, relating to responsible wages and benefits for county construction contracts) in selecting hearing examiners for the wage theft ordinance. IO 3-24 can be found at

authority to administer oaths, issue subpoenas, compel the production of and receive evidence.<sup>47</sup> At the hearing, parties may proceed with discovery, submit evidence, cross-examine witnesses, and obtain the issuance of subpoenas.<sup>48</sup> The Hearing Examiners final order is appealable to a court of competent jurisdiction.<sup>49</sup> In January of 2012, Miami-Dade County reported to House staff that there have been a total of 901 cases and \$393,213.98 awarded to claimants.

Proponents of the Miami-Dade County wage theft ordinance argue that the ordinance:

- allows employees to avoid circuit court, a process which is often lengthy and expensive for employees;<sup>50</sup>
- provides a simpler process for employees who are often unaware of the federal and state remedies available, including undocumented workers, who often fear deportation, and thus are reluctant to file a complaint with the U.S. Department of Labor;<sup>51</sup>
- covers all employees in Miami-Dade County, including the many employees not covered by the Fair Labor Standards Act.<sup>52</sup>

Opponents of the Miami-Dade County wage theft ordinance argue that the ordinance:

- is unnecessary given the extensive amount of remedies for employees already in state and federal law, and simply creates a patchwork of various additional regulations that businesses are forced to learn and comply with;<sup>53</sup>
- is unconstitutional, void of many of the due process protections present in state and federal laws, and provides no finality by doing nothing to prevent an employee who prevails or does not prevail under the ordinance from filing the same claim in state or federal court.<sup>54</sup>
- does not discourage frivolous or unfounded claims.<sup>55</sup>

### Legal Challenge

In August of 2010, the Florida Retail Federation filed suit to challenge the constitutionality of the Miami-Dade County ordinance.<sup>56</sup> The Florida Retail Federation alleged in its complaint that the ordinance violates due process, separation of powers, right to jury trial, prohibition on local governments creating courts, and that the ordinance is preempted by federal and state law.<sup>57</sup> The litigation is still ongoing with a ruling on a motion to dismiss and motion for summary judgment expected soon.

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<http://www.miamidade.gov/aopdfdoc/aopdf/pdffiles/IO3-24.pdf> (last accessed January 5, 2012). The hearing examiner qualifications are found on p. 14.

<sup>47</sup> Miami-Dade County Code of Ordinances, s. 22-4(7).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See JON BOOHER, M.S., AND JOHN DMELLO, PH.D., A COMPARATIVE STUDY OF THE WAGE THEFT PROJECT OF THE LEGAL AID SOCIETY OF PALM BEACH COUNTY WITH THE WAGE THEFT PROGRAM OF THE DEP'T OF SMALL BUSINESS DEV. OF MIAMI-DADE COUNTY AS ESTABLISHED BY THE WAGE THEFT ORDINANCE (2011).

<sup>51</sup> See Dave Jamieson, "Wage Theft: Business Interests Try To Scuttle New Worker Laws," The Huffington Post, Sep. 5, 2011, [http://www.huffingtonpost.com/2011/07/06/wage-theft-business-workers-laws\\_n\\_891578.html](http://www.huffingtonpost.com/2011/07/06/wage-theft-business-workers-laws_n_891578.html) (last visited January 4, 2012).

<sup>52</sup> CYNTHIA S. HERNANDEZ, RESEARCH INSTITUTE ON SOCIAL AND ECONOMIC POLICY, WAGE THEFT IN FLORIDA: A REAL PROBLEM WITH REAL SOLUTIONS 3 (2010) provides ". . . a large percentage of the region's [South Florida] workers are not covered under the Fair Labor Standards Act because they work for an employer who employs less than five employees or whose business does not generate more than \$500,000 annually, leaving the U.S. Department of Labor Wage and Hour Division with no jurisdiction to protect these workers."

<sup>53</sup> SNIFFEN & SPELLMAN P.A., WAGE THEFT ORDINANCES: AN UNNECESSARY AND REDUNDANT REMEDY FOR FLORIDA EMPLOYEES (2011).

<sup>54</sup> Florida Retail Federation, *Q&A on Wage Theft Ordinances*.

<sup>55</sup> *Id.* Under the ordinance, if an employer is found liable, it is forced to pay attorney's fees and the cost of administering the complaint. However, if an employer is not found liable, the same standard does not apply to the employee who is not held responsible for attorney's fees or costs.

<sup>56</sup> *Fla. Retail Federation, Inc. v. Miami-Dade County, Fla.*, Case No. 10-42326CA30 (11th Jud. Cir.).

<sup>57</sup> See Complaint for Declaratory and Injunctive Relief, *Fla. Retail Federation, Inc. v. Miami-Dade County, Fla.*, Case No. 10-42326CA30 (11th Jud. Cir. Aug. 4, 2010).

## Palm Beach County

Palm Beach County has also addressed the issue of wage theft locally through a pilot program of sorts involving the Palm Beach County Legal Aid Society.<sup>58</sup> The process established by Palm Beach County Legal Aid is similar to the process established by the Miami-Dade County ordinance, but instead of a hearing examiner reviewing the claims, Legal Aid refers cases to attorneys who represent employees pro bono in filing a claim in civil court or with the U.S. Department of Labor.<sup>59</sup> A study comparing Palm Beach's Legal Aid process with Miami-Dade's Ordinance process found that the ordinance proved much more effective in resolving wage theft.<sup>60</sup> However, it should be noted that Palm Beach County's process relies on volunteers and does not require county resources.<sup>61</sup>

The Palm Beach County Commission has considered enacting a similar ordinance to Miami-Dade, but has reportedly postponed a final vote until March of 2012.<sup>62</sup>

### Effect of the Bill

The bill provides that the regulation of wage theft is expressly preempted to the state. Therefore, local governments may not regulate over and above the existing state and federal laws. The bill 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.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

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

1. Revenues:

None.

2. Expenditures:

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<sup>58</sup> See JON BOOHER, M.S., AND JOHN DMELLO, PH.D., A COMPARATIVE STUDY OF THE WAGE THEFT PROJECT OF THE LEGAL AID SOCIETY OF PALM BEACH COUNTY WITH THE WAGE THEFT PROGRAM OF THE DEP'T OF SMALL BUSINESS DEV. OF MIAMI-DADE COUNTY AS ESTABLISHED BY THE WAGE THEFT ORDINANCE (2011).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* One possible reason for the increased effectiveness the study stated is that Miami-Dade County has the weight of an ordinance behind it, whereas Palm Beach County Legal Aid can only threaten a civil court action.

<sup>61</sup> SNIFFEN & SPELLMAN P.A., WAGE THEFT ORDINANCES: AN UNNECESSARY AND REDUNDANT REMEDY FOR FLORIDA EMPLOYEES (2011).

<sup>62</sup> *Supra* FN 58.

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may prevent additional burdens on businesses by eliminating the possibility of a patchwork of wage theft regulations throughout Florida's 67 counties and over 400 municipalities.

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:

The Miami-Dade County Commission passed two resolutions in November of 2011:

- 1) a resolution opposing state legislation that would preempt Miami-Dade County's wage theft ordinance; and
- 2) a resolution urging the Florida Legislature to pass a statewide wage theft law modeled after the Miami-Dade County wage theft ordinance.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.