

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 Judiciary Committee

BILL: SB 862

INTRODUCER: Senator Simmons

SUBJECT: Wage Protection for Employees

DATE: February 17, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Anderson	Yeatman	CA	Favorable
2.	White	Cibula	JU	Pre-meeting
3.	_____	_____	GO	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill expressly preempts the regulation of wage theft to the state. Therefore, local governments are prohibited from regulating wage theft. Under the bill, “wage theft” is defined as an illegal or improper underpayment or nonpayment of an individual worker’s wages, salaries, commissions, or other similar form of compensation.

This bill creates an undesignated section of law.

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 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.
- A variety of federal and state laws 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 to enforce his or her right to wages.

Employee Protection: Federal and State

Both federal¹ 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 Acts²** - 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 Act³** - 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 Act⁴** - 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 Act⁵** - Applies to federal service contracts and federal and federally assisted construction contracts greater than \$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" Act⁶** - 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.

¹ A list of federal laws that protect employees is located at: <http://www.dol.gov/compliance/laws/main.htm> (last visited January 27, 2012).

² 40 U.S.C. ss. 3141-48 (the Davis-Bacon Act has also been extended to approximately 60 other acts).

³ 41 U.S.C. ss. 351-58.

⁴ 29 U.S.C. ss. 1801-72.

⁵ 40 U.S.C. ss. 3701-08.

⁶ 40 U.S.C. s. 276c; 18 U.S.C. s. 874.

Fair Labor Standards Act

The FLSA⁷ establishes a federal minimum wage and requires employers to pay time and half to its employees for overtime hours worked. The FLSA establishes standards for minimum wages,⁸ overtime pay,⁹ recordkeeping,¹⁰ and child labor.¹¹ The FLSA applies to most classes of workers.¹²

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.¹³

Thus, if a nonexempt employee works more than 40 hours in a week, then the employer must pay at least time and half for those hours over 40. A failure to pay a nonexempt employee is a violation of the FLSA.¹⁴ The FLSA also establishes a federal minimum wage in the United States.¹⁵ 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.¹⁶

The FLSA provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;¹⁷
- Criminal prosecutions by the United States Department of Justice;¹⁸ or
- Private lawsuits by employees or workers, which includes individual lawsuits and collective actions.¹⁹

The FLSA provides that an employer who violates section 206 (minimum wage) or section 207 (maximum hours) is liable to the employee for the amount of the unpaid wages and liquidated

⁷ 29 U.S.C. ch. 8.

⁸ 29 U.S.C. s. 206.

⁹ 29 U.S.C. s. 207.

¹⁰ 29 U.S.C. s. 211.

¹¹ 29 U.S.C. s. 212.

¹² 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 Feb. 16, 2012).

¹³ 29 U.S.C. s. 207(a)(1).

¹⁴ 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 Feb. 16, 2012).

¹⁵ 29 U.S.C. s. 206.

¹⁶ 29 U.S.C. s. 218(a).

¹⁷ 29 U.S.C. s. 216(c).

¹⁸ 29 U.S.C. s. 216(a).

¹⁹ 29 U.S.C. s. 216(b).

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

State Protection of Employees

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

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

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 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.³¹

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: counties³² and municipalities. Local governments have wide authority to enact various

²⁰ 29 U.S.C. §216(b).

²¹ *Id.*

²² Section 760.10, F.S.

²³ Sections 448.20-26 and 487.2011-2071, F.S.

²⁴ Art. X, s. 24, Fla. Const.

²⁵ Art. X, s. 24(e), Fla. Const.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 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 Feb. 16, 2012).

³⁰ 29 U.S.C. §218(a).

³¹ Section 448.105, F.S.

³² Florida has both charter and non-charter counties.

ordinances to accomplish their local needs.³³ 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.³⁴ Florida law recognizes two types of preemption: express and implied.³⁵ Express preemption requires a specific legislative statement and cannot be implied or inferred.³⁶ 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.³⁷ 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.³⁸ 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.³⁹ Second, a court will consider whether strong public policy reasons exist for finding an area to be preempted by the Legislature.⁴⁰ An example of an area where the courts have found implied preemption is the regulation of public records.⁴¹

There is no apparent express preemption 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.

Miami-Dade County Wage Theft Ordinance

In February of 2010, Miami-Dade County enacted an ordinance regulating wage theft.⁴² The ordinance is enforced by the county's Department of Small Business Development (SBD)⁴³ 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

³³ 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.

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

³⁵ *Id.*

³⁶ *Id.*

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

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

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

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

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

⁴² Miami Dade County, Fla., Code ch. 22.

⁴³ Cynthia S. Hernandez, Research Institute on Social and Economic Policy, *Wage Theft in Florida: A Real Problem with Real Solutions* 3 (2010).

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.⁴⁴ 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.⁴⁵ 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.⁴⁶ The hearing examiner has the authority to administer oaths, issue subpoenas, compel the production of and receive evidence.⁴⁷ At the hearing, parties may proceed with discovery, submit evidence, cross-examine witnesses, and obtain the issuance of subpoenas.⁴⁸ The hearing examiner's final order is subject to appeal in a court of competent jurisdiction.⁴⁹ From the inception of the ordinance through January 6, 2012, the Department of Small Business Development reports that there have been a total of 1596 wage complaints, claims, or inquiries logged, resulting in a total of \$813,369.71 awarded to claimants.⁵⁰

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

- Allows employees to have the case decided by a hearing officer, avoiding potentially lengthy and expensive court processes, unless appealed.⁵¹
- 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;⁵²
- Covers all employees in Miami-Dade County, including the many employees not covered by the Fair Labor Standards Act.⁵³

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

⁴⁵ 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.

⁴⁶ 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, 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 <http://www.miamidade.gov/aopdfdoc/aopdf/pdffiles/IO3-24.pdf> (last accessed January 27, 2012). The hearing examiner qualifications are found on p. 14.

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

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Department of Small Business Development, *Wage Theft Status Report* (Jan. 2012) (on file with the Senate Committee on Judiciary).

⁵¹ Michael Peltier, *Wage Theft Bill Advances Despite No Agreement*, WCTV, Jan. 23, 2012.

⁵² 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 (last visited January 27, 2012).

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

- Creates a burdensome business environment by establishing the foundation for a statewide patchwork of various additional regulations that businesses are forced to learn and comply with.⁵⁴
- Is largely unnecessary given the adequacy of existing remedies for employees, and does not discourage frivolous or unfounded claims.⁵⁵
- Is unconstitutional, in that it is void of many of the due process protections present in state and federal laws, and provides no finality.⁵⁶

Legal Challenge

In August of 2010, the Florida Retail Federation filed suit to challenge the constitutionality of the Miami-Dade County ordinance.⁵⁷ 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.⁵⁸ The litigation is still ongoing with a ruling on a motion to dismiss and motion for summary judgment expected soon.

Palm Beach County

Palm Beach County has also addressed the issue of wage theft locally through a pilot program involving the Palm Beach County Legal Aid Society (Legal Aid).⁵⁹ The process established by 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.⁶⁰ The process relies on volunteers and does not require county resources. Between February 2, 2011,

⁵³ Cynthia S. Hernandez, Research Institute on Social and Economic Policy, *Wage Theft in Florida: A Real Problem with Real Solutions* 3 (2010) (“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.”).

⁵⁴ Florida Retail Federation, *Wage Theft Preemption*, available at <http://www.frf.org/index.php/government-affairs/legislative-issues/frf-general/wage-theft-preemption> (last visited Feb. 16, 2012).

⁵⁵ *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.

⁵⁶ *Id.* Whether or not an employee prevails under the ordinance, it appears that he or she may still pursue the same claim in state or federal court.

⁵⁷ *Fla. Retail Federation, Inc. v. Miami-Dade County, Fla.*, Case No. 10-42326CA30 (11th Jud. Cir.).

⁵⁸ 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).

⁵⁹ See Legal Aid Society of Palm Beach County, Inc., *Wage Theft Brochure*, available at <http://www.legalaidpbc.org/assets/WageTheftBrochure.pdf> (last visited Jan. 27, 2012).

⁶⁰ Legal Aid Society of Palm Beach County, Inc., *Wage Theft Project Update* (June 20, 2011) (on file with the Senate Committee on Judiciary).

and June 20, 2011, Legal Aid retained 34 clients with wage theft complaints, and six of these clients went on to receive compensation from their employers.⁶¹

The Palm Beach County Commission has considered enacting a similar ordinance to Miami-Dade, but has reportedly postponed a final vote until March of 2012.⁶²

III. Effect of Proposed Changes:

Section 1 preempts to the state any wage theft ordinances or regulations. A county, municipality, or political subdivision of the state may not adopt or maintain in effect any law, ordinance, or rule that creates requirements, regulations, or processes for the purpose of addressing wage theft. This section 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.

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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. The bill may make enforcement of wage theft claims by employees more costly.

C. Government Sector Impact:

None.

⁶¹ *Id.*

⁶² Jennifer Sorentue, *Palm Beach County commissioners table wage-theft law*, THE PALM BEACH POST, June 22, 2011.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
