

**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 Criminal Justice

BILL: CS/SB 1216

INTRODUCER: Criminal Justice Committee and Senator Bradley

SUBJECT: Wage Theft

DATE: April 1, 2013

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	_____	_____	JU	_____
3.	_____	_____	CM	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

CS/SB 1216 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 wages, salaries, commissions, or other similar form of compensation.

This bill substantially amends section 34.01 of the Florida Statutes. The bill creates sections 448.115 and 448.116 of the Florida Statutes.

**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.<sup>1</sup> The Fair Labor Standards Act (FLSA)<sup>2</sup> 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.<sup>3</sup> A state may set the rate higher than the federal minimum but not lower.<sup>4</sup>

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.<sup>5</sup> 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 that have less than \$500,000 in annual business.<sup>6</sup>

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

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<sup>1</sup> Links to most federal laws and regulations that affect wage and hour issues are located at [www.dol.gov/whd/reg-library.htm](http://www.dol.gov/whd/reg-library.htm) (last visited March 6, 2013).

<sup>2</sup> 29 U.S.C. ch. 8.

<sup>3</sup>The 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 March 6, 2013).

<sup>4</sup> 29 U.S.C. s. 218(a).

<sup>5</sup> 29 U.S.C. s. 207(a)(1).

<sup>6</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#who> (last visited March 6, 2013).

### ***State Protection of Employees***

State law provides for protection of employees, including anti-discrimination,<sup>7</sup> work safety,<sup>8</sup> 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 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 fined \$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 \$7.79 per hour, which is higher than the federal minimum wage.<sup>9</sup> Federal law requires the payment of the higher of the federal or state minimum wage.<sup>10</sup>

Chapter 448, F.S., includes the State 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.<sup>11</sup>

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 establishes two types of local governments: counties<sup>12</sup> and municipalities. Local governments have wide authority to enact various ordinances to accomplish their local needs.<sup>13</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>14</sup> Florida law recognizes two types of preemption: express and implied.<sup>15</sup> Express preemption requires a

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<sup>7</sup> Section 760.10, F.S.

<sup>8</sup> Sections 448.20-26 and 487.2011-2071, F.S.

<sup>9</sup> See Department of Employment Opportunity website for information regarding the Florida minimum wage, <http://www.floridajobs.org/minimumwage/FloridaMinimumWageHistory2000-2013.pdf> (last visited March 6, 2013).

<sup>10</sup> 29 U.S.C. §218(a).

<sup>11</sup> Section 448.105, F.S.

<sup>12</sup> Florida has both charter and non-charter counties.

<sup>13</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>14</sup> *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006).

<sup>15</sup> *Id.*

specific legislative statement and cannot be implied or inferred.<sup>16</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>17</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>18</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>19</sup> Second, a court will consider whether strong public policy reasons exist for finding an area to be preempted by the Legislature.<sup>20</sup> An example of an area where the courts have found implied preemption is the regulation of public records.<sup>21</sup>

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.

### **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. 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. Alachua County commissioners are also considering whether to enact a wage theft ordinance.<sup>22</sup>

Miami-Dade's ordinance,<sup>23</sup> 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.

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<sup>16</sup> *Id.*

<sup>17</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

<sup>18</sup> *See Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

<sup>19</sup> *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

<sup>20</sup> *Tallahassee Memorial Regional Medical Center, Inc. v. Tallahassee Medical Center Inc.*, 681 So. 2d 826, 831 (Fla. 1st DCA 1996).

<sup>21</sup> *See Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).

<sup>22</sup> Gainesville Sun, *Residents state their case for wage-theft ordinance*, published January 8, 2013, [www.gainesville.com/article/20130108/ARTICLES/130109676](http://www.gainesville.com/article/20130108/ARTICLES/130109676) (last visited March 7, 2013).

<sup>23</sup> Miami Dade County, Fla., Code ch. 22.

From the inception of the ordinance through December 31, 2012, Miami-Dade County reports that a total of 1,223 claims have been made, with a total of \$1,567,755 recovered in 882 of the claims through either conciliation between the parties or an award after hearing.<sup>24</sup>

Broward County's ordinance took effect on January 2, 2013.<sup>25</sup> It provides a process that is similar to Miami-Dade County's ordinance, but that has 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 of 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.
- 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.

Palm Beach County 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. As of November 16, 2012, the Wage Recovery Program had retained 168 clients and has been able to recover \$115,915 in unpaid wages for 59 of those clients.<sup>26</sup> On December 4, 2012, the commission passed a resolution condemning wage theft and providing \$100,000 to the Legal Aid Society to expand the Wage Recovery Program.<sup>27</sup>

### **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

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<sup>24</sup> E-mail from Miami-Dade County to Senate Criminal Justice Committee dated March 7, 2013 (on file with the Senate Committee on Criminal Justice).

<sup>25</sup> Broward County Code of Ordinances, s. 20½, Non-Payment of Earned Wages.

<sup>26</sup> See Legal Aid Society of Palm Beach County, Inc., *Wage Recovery Project November 16, 2012 Update*, included in Palm Beach County Board of County Commissioner Agenda Item Summary Packet for Agenda Item 4A-2 at December 4, 2012 meeting. The packet is available online at <http://www.ordinancewatch.com/files/72011/LocalGovernment79272.pdf>, (last visited March 7, 2013).

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

- \$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 six dollars. 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.

### 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** of the bill 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** of the bill 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 new statute, wage theft is illegal or improper underpayment or nonpayment of an individual employee's wages, salaries, commissions, or similar compensation within a reasonable time from when 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 bill provides for a filing fee of \$50 for wage theft claims brought pursuant to the new statute. 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 claim cannot be filed unless the employer fails to pay the amount of unpaid compensation or otherwise resolves the claim to the employee's satisfaction within 7 days of the notice.

The claim is generally governed by Florida Small Claims Rules. However, the amount claimed can exceed the small claims threshold of \$5000. If the employee proves the claim by a preponderance of the evidence, he or she is entitled to an award of damages equal to twice the amount of compensation that is owed. The court cannot award any other damages. Costs, but not attorney fees, may be awarded to the prevailing party pursuant to s. 448.08, F.S.

*Local Government Administrative Process:* The bill allows local governments to establish an administrative program 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, ordinance, or provision for recovery of unpaid compensation, except for those that establish an administrative process as

described above or a local ordinance governing wage theft that was enacted before January 1, 2011. The Miami-Dade County wage theft ordinance is the only local wage theft ordinance that is excluded from preemption.

#### **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 effects of the bill, the Florida 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 will have an impact on both employees seeking payment of allegedly unpaid compensation and employers who are sued for payment of unpaid wages. It would remove the option for employee/claimants in Broward County to seek payment under the local wage theft ordinance. Since that ordinance appears to require little cost for the claimant, employees would presumably incur the \$50 filing fee and costs of service of process (subject to reimbursement if their claim is successful).<sup>28</sup> However, the bill permits local governments to provide for payment of the filing fee on behalf of the claimant.

With the exception of Miami-Dade county, the bill provides a new means for employees in Florida to redress wage theft claims. It seems reasonable to expect that this will result in an increase in filed claims, or the resolution of claims prior to filing, due to the possibility that the employer could have to pay double the amount of compensation owed.

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<sup>28</sup> Process may be served on a Florida defendant by certified mail. If that is unsuccessful, process must be served by the sheriff or an authorized process server.

**C. Government Sector Impact:**

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

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

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

**CS by Criminal Justice on April 1, 2013:**

- Deletes the prohibition against jury trials.
- Limits the court filing fee to \$50.
- Allows notice to the employer to be made either orally or in writing, and reduces the time for the employer to resolve the claim from 15 days to 7 days.
- Requires a prevailing plaintiff to be awarded twice the compensation owed.
- Allows the prevailing party to recover costs, but not attorney's fees.
- Deletes the specific authority for the Attorney General to bring a civil action injunctive relief and civil penalties.
- Deletes the preemption of local rules and ordinances governing any condition of employment, but retains the preemption as it relates to employee compensation.
- Removes the limitation that prohibited application of the Miami-Dade County wage theft ordinance to claims against employers with more than \$500,000 annual business volume.

**B. Amendments:**

None.