

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 957 Local Regulation Of Wage Theft

SPONSOR(S): Civil Justice Subcommittee; Combee

TIED BILLS: None **IDEN./SIM. BILLS:** SB 926

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	7 Y, 4 N, As CS	Cary	Bond
2) Local & Federal Affairs Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Wage theft is a term sometimes used to describe the failure of an employer to pay any portion of wages due to an employee. Federal and state laws provide protection from wage theft through various laws, including the Federal Fair Labor Standards Act and Florida's minimum wage laws. These laws may be enforced, according to which one is violated, by a civil action brought by the employee, or by government sanctions and fines. A few local governments have enacted local ordinances regarding wage theft.

This bill preempts any wage theft ordinance that was not enacted before January 1, 2014, and provides guidelines that a county must follow in order to establish a wage theft ordinance. Specifically:

- The county must partner with a local legal services organization to establish a process through which the legal services organization must address wage theft claims;
- An individual victim of wage theft may contact the legal services organization, which must determine whether the individual has a bona fide claim for unpaid wages;
- The legal services organization must notify the employer and offer the employer an opportunity to resolve the matter informally but expeditiously;
- The informal resolution may include attorney fees and costs from the employer;
- If an informal resolution cannot be reached, the legal services organization must file a court action as appropriate or refer unresolved claims to local pro bono or other counsel for resolution; and
- The county must set up a means for the legal services organization to provide regular (monthly, quarterly, or annual, or any combination thereof) reports regarding the legal services organization's work on wage theft cases.

The bill provides that the county may dedicate county funds to assist the legal services organization in addressing claims of wage theft.

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

The bill is effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

"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 protect employees from wage theft including, but not limited to, the Fair Labor Standards Act¹ and Florida minimum wage laws.

Worker Protection: Federal and State Laws

Both federal² 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)³ is the main federal law regarding wages. The FLSA 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,⁴ overtime pay,⁵ recordkeeping,⁶ and child labor.⁷ The FLSA applies to most classes of workers.⁸ The FLSA provides that:

¹ 29 U.S.C. ch. 8.

² A list of examples of federal laws that protect employees is located at: <http://www.dol.gov/compliance/laws/main.htm> (last visited March 5, 2014). 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 the 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).

³ 29 U.S.C. ch. 8.

⁴ 29 U.S.C. s. 206.

⁵ 29 U.S.C. s. 207.

⁶ 29 U.S.C. s. 211.

⁷ 29 U.S.C. s. 212.

⁸ 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 March 5, 2014).

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.⁹

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.¹⁰

The FLSA also establishes a federal minimum wage in the United States.¹¹ 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.¹² The FLSA also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;¹³
- Criminal prosecutions by the United States Department of Justice;¹⁴ or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.¹⁵

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.¹⁶ An employer who fails to pay according to law is also responsible for the employee's attorney fees and costs.¹⁷

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 amendment¹⁸ 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 fees and costs.

The current state minimum wage is \$7.93 per hour,¹⁹ which exceeds the current federal minimum wage of \$7.25 per hour.²⁰ Federal law requires the payment of the higher of the federal or state minimum wage.²¹ 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.²²

⁹ 29 U.S.C. s. 207(a)(1).

¹⁰ 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 March 5, 2014).

¹¹ 29 U.S.C. s. 206.

¹² 29 U.S.C. s. 218(a).

¹³ 29 U.S.C. s. 216(c).

¹⁴ 29 U.S.C. s. 216(a).

¹⁵ 29 U.S.C. s. 216(b).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Art. X, s. 24, FLA. CONST. (adopted in 2004).

¹⁹ See Florida Department of Economic Opportunity website for information regarding the current minimum wage in the State of Florida, at <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notice> (last visited March 5, 2014).

²⁰ See <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (last visited March 5, 2014).

²¹ 29 U.S.C. s. 218(a).

²² See s. 448.08, F.S.

Home Rule and Preemption

Article VIII, ss. 1 and 2, of the state constitution, establish two types of local governments: counties²³ and municipalities. The local governments have wide authority to enact various ordinances to accomplish their local needs.²⁴ 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.²⁵ Florida law recognizes two types of preemption: express and implied.²⁶ Express preemption requires a specific legislative statement and cannot be implied or inferred.²⁷ 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.²⁸

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.²⁹ For instance, the Florida Supreme Court has found implied preemption in the area of public records.³⁰

Wage Theft as a Cause of Action

Currently an unpaid or underpaid employee has a cause of action in contract or quasi-contract in all appropriate courts, depending upon the amount in controversy. There is also a cause of action for unpaid minimum wages in s. 448.110, F.S.

Legal Services Organizations

The Florida Access to Civil Legal Assistance Act³¹ (Act) establishes an administrative framework whereby public funds may be used in an effective and efficient manner to enhance the availability of civil legal assistance to the poor. The Act allows the Department of Legal Affairs (DLA) to contract with a statewide not-for-profit organization that allocates funds to not-for-profit legal aid organizations.³²

The Florida Bar also provides rules and regulations for legal service plans in Florida.³³ The Bar's rules appear to encompass a much wider variety of groups than those organizations contemplated by the statutes. For instance, the Bar defines a "group" that could qualify under the bill as "an organization of two or more persons whose individual members are identifiable in terms of some common interest or

²³ There are two different types of counties in Florida; a charter county and a non-charter county.

²⁴ Article VIII of the state constitution establishes the powers of chartered counties, non-charter counties and municipalities. Chapters 125 and 166, F.S., provide the additional powers and constraints of counties and municipalities.

²⁵ *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So.2d 826, 851 (Fla. 1st DCA 1996).

²⁹ *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

³⁰ *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).

³¹ Chapter 2002-288, L.O.F.

³² Section 68.095, F.S.

³³ Rules Regulating the Florida Bar, ch. 9.

affinity,” and includes churches, educational institutions, credit unions, employing units, and associations.³⁴ The Bar also requires the group to carry an insurance policy of at least \$100,000 and to file a plan for approval by the Bar, among other requirements.³⁵

The DLA contracts with The Florida Bar Foundation, which, among other things, allocates money to legal service providers across the state, many of which fall under the umbrella of Florida Legal Services, Inc. Florida Legal Services affiliates have offices in Miami-Dade, Pasco, Hillsborough, Pinellas, Brevard, Broward, Orange, Osceola, Volusia, Putnam, Seminole, Marion, Citrus, Lee, Leon, Palm Beach, St. Lucie, Polk, Charlotte, Manatee, Sarasota, Highlands, Duval, Clay, St. Johns, Collier, Okaloosa, Bay, Escambia, Gadsden, Alachua, and Columbia Counties.³⁶ There may be additional offices that qualify for state funding which do not fall under the Florida Legal Services umbrella.

Most law schools also offer practice clinics whereby law students may, under the supervision of faculty, assist poor or underrepresented clients with certain legal matters.³⁷

Effect of the Bill

The bill creates s. 448.111, F.S., to preempt certain local ordinances that regulate wage theft and to provide standards for local governments to follow when drafting a wage theft ordinance. The bill provides that a county may adopt a wage theft ordinance upon a determination that it is necessary to do so. The bill does not provide guidance on how such a determination should be made.

If a county enacts a wage theft ordinance, the ordinance must meet certain requirements:

- The county must partner with a local legal services organization to establish a process through which the legal services organization must address wage theft claims;
- An individual victim of wage theft may contact the legal services organization, which must determine whether the individual has a bona fide claim for unpaid wages;
- The legal services organization must notify the employer and offer the employer an opportunity to resolve the matter informally but expeditiously;
- The informal resolution may include attorney fees and costs from the employer;
- If an informal resolution cannot be reached, the legal services organization must file a court action as appropriate or refer unresolved claims to local pro bono or other counsel for resolution; and
- The county must set up a means for the legal services organization to provide regular (monthly, quarterly, or annual, or any combination thereof) reports regarding the legal services organization’s work on wage theft cases.

The bill provides that the county may dedicate county funds to assist the legal services organization in addressing claims of wage theft.

The bill provides that any regulation of wage theft enacted on or after January 1, 2014, by a local government that exceeds the provisions of this section is preempted to the state.³⁸

B. SECTION DIRECTORY:

Section 1 creates s. 448.111, F.S., regarding local regulation of wage theft.

³⁴ Rules Regulating the Florida Bar, rule 9-1.3.

³⁵ Rules Regulating the Florida Bar, rule 9-2.2.

³⁶ Information is from the Florida Legal Services, Inc., Legal Aid and Legal Service Program Directory – State of Florida, June 2013. <http://www.floridalegal.org/Directory/2013Directory.pdf> (last visited March 6, 2014).

³⁷ For example, see http://www.law.fsu.edu/academic_programs/jd_program/cac/profile.html for a description of the Florida State University College of Law’s Public Interest Law Center (last visited March 6, 2014).

³⁸ Miami-Dade, Broward, and Alachua Counties had enacted wage theft ordinances prior to January 1, 2014, which are thus grandfathered and not preempted. For more information, see the “other comments” subsection of Section III of this analysis.

Section 2 provides an effective date upon becoming a law.

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 direct economic impact on the private sector.

D. FISCAL COMMENTS:

The bill preempts local governments from adopting wage theft ordinances that do not comply with the requirements of the bill. Current wage theft ordinances appear to create a stream of revenues and expenditures. However, the bill appears to grandfather all existing wage theft ordinances since there do not appear to have been any wage theft ordinances passed this calendar year. Therefore, the bill does not appear to have a direct impact on local governments.

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:

Drafting Issues

Lines 16-20 of the bill describe a legal services organization as “an organization that provides free or low-cost legal services to qualified persons and meets the minimum standards established by The Florida Bar for providing such services, including a legal practice clinic operated by an accredited Florida law school.” This definition appears to reference ch. 9 of the Rules Regulating the Florida Bar, but it is unclear if there are other minimum standards that may be implicated. If the reference is to ch. 9,

it would allow a county to partner with any number of organizations outside of the Florida Legal Services umbrella. Any two persons, one of whom is a managing attorney, could purchase an insurance policy, find a sponsor, and file a plan with the Bar. If the plan is approved by the Bar, they would be eligible under the bill to contract with the county.

Lines 31-34 of the bill require “a determination by a county that a local solution to wage theft is necessary” in order for the county to adopt a wage theft ordinance. The bill does not provide any guidance as to how such a determination is to be made or even if such a determination needs to be memorialized through a vote or resolution.

Other Comments

Currently, only Miami-Dade,³⁹ Broward,⁴⁰ and Alachua⁴¹ Counties are known to have specific wage theft ordinances. These ordinances are similar. The ordinances provide that a complaint may be filed with the county for wage theft, and the case is heard before a hearing officer. The hearing officer may enter an enforceable conciliation agreement. The ordinances also state that a separate civil action may be filed.

In March 2011, the Florida Retail Federation (FRF) filed suit to challenge the constitutionality of the Miami-Dade County ordinance.⁴² The FRF alleged that the Miami-Dade ordinance: created a court outside of the unified court system created by Florida Constitution;⁴³ violated the separation of powers⁴⁴ by allowing the executive branch⁴⁵ to perform a judicial function; and violated the right to a jury trial⁴⁶ because an issue involving back pay is a legal issue that entitles the defendant to a jury trial,⁴⁷ which the ordinance does not allow. The trial court dismissed the case without specifically addressing any of these issues.⁴⁸

³⁹ Chapter 22, Miami-Dade County Code of Ordinances, adopted February 18, 2010. Chapter 22. sec. 3, of the Miami Dade County Code provides: “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.”

⁴⁰ Chapter 20 1/2, Broward County Code of Ordinances, adopted October 23, 2012.

⁴¹ Chapter 66, Alachua County Code of Ordinances, adopted April 16, 2013. The ordinance has an implementation date of January 1, 2014, however it was enacted in 2013, so it appears that this ordinance would be grandfathered.

⁴² *Fla. Retail Fed'n, Inc. v. Miami Dade County*, No. 2010-42326-CA-01 (Aug. 4, 2010).

⁴³ Article V, sec. 1, FLA. CONST., creates a supreme court, district courts of appeal, circuit courts, and county courts, and then proclaims, “No other courts may be established by the state, any political subdivisions or any municipality.” The Florida Bar Journal published a commentary entitled *Judicial Reform – Now or Never* by one of the drafters of art. V, sec. 1, in which former state Rep. Talbot “Sandy” D’Alemberte wrote, “The abolition of municipal courts has received considerable comment. The legislature thought that municipal courts, for the most part, are not independent of the city councils which appointed them; thus they are unable to dispense impartial, objective justice.” Florida Bar Journal, vol. 46, no. 2, Feb. 1972.

⁴⁴ Article II, sec. 3, FLA. CONST., prohibits a person belonging to one branch from exercising any powers appertaining to either of the other branches.

⁴⁵ For the purpose of Separation of Powers analysis, a local government is considered a part of the executive branch. See *City of Miami v. Wellman*, 976 So.2d 22, 26 (Fla. 3rd DCA 2008).

⁴⁶ Art. I, sec. 22, FLA. CONST., provides the right to a jury trial for all cases that traditionally afforded a jury trial at the time the original Florida constitution was adopted in 1845.

⁴⁷ Generally, cases involving legal, as opposed to equitable, relief are afforded a jury trial, according to *Metropolitan Dade County Fair Housing and Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc.*, 511 So.2d 962 (Fla. 1967). Back pay is considered to be a legal issue which should be afforded a jury trial according to *O’Neal v. Florida A & M Univ. ex rel. Bd. of Trustees for Florida A & M Univ.*, 989 So.2d 11 (Fla. 1st DCA 2008).

⁴⁸ *Florida Retail Federation v. Miami-Dade County*, Case No. 10-42326CA30, decided on March 23, 2012 (on file with Civil Justice Subcommittee staff).

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.⁴⁹ The Palm Beach County Commission recently allocated \$104,000 to the Legal Aid Society of Palm Beach County to continue the program.⁵⁰ This bill appears to be drafted to allow counties to follow the Palm Beach County model.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2014, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments remove language that may have been interpreted to limit a local government's ability to contract with a legal services organization and allow a legal services organization to either resolve a wage theft case or partner with pro bono or volunteer attorneys. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

⁴⁹ 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 6, 2014).

⁵⁰ *Palm Beach County Renews Compromise Wage Theft Effort*, Andy Reid, Florida Sun-Sentinel, January 15, 2014. http://articles.sun-sentinel.com/2014-01-15/news/sfl-palm-beach-county-renews-compromise-wage-theft-effort-20140115_1_wage-county-commission-low-income-workers (last visited March 6, 2014).