

MEMORANDUM

Agenda Item No. 7(A)

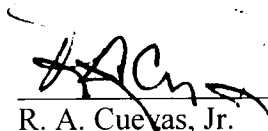
TO: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

DATE: (Second Reading 2-18-10)
December 15, 2009

FROM: R. A. Cuevas, Jr.
County Attorney

SUBJECT: Ordinance establishing
Chapter 22 of the Code;
prohibiting wage theft,
providing administrative
procedures and private cause
of action for wage theft

The accompanying ordinance was prepared and placed on the agenda at the request of Prime Sponsor Commissioner Natacha Seijas and Co-Sponsors Commissioner Audrey M. Edmonson and Vice-Chairman Jose "Pepe" Diaz.



R. A. Cuevas, Jr.
County Attorney

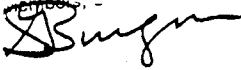
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Memorandum



Date: February 18, 2010

To: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

From: George M. Burgess 
County Manager

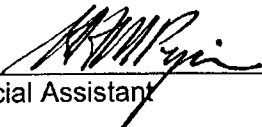
Subject: Ordinance establishing Chapter 22 of the Code - Prohibiting Wage Theft

The proposed legislation establishes Chapter 22 of the Code and applies to private sector employees and employers, prohibits wage theft, and provides administrative procedures and private cause of action. It is anticipated that the Department of Small Business Development will be responsible for implementation and administration of this legislation and will result in a fiscal impact to Miami-Dade County.

The exact fiscal impact is difficult to determine at this time and will vary based upon the number of claims per year. The Department of Labor (DOL) has indicated that employees from small-to medium sized businesses are the primary affected parties. Given the current economic conditions it is expected that this legislation will generate considerable interest. Currently DOL receives approximately 50 calls per day related to complaints where violations can be easily discerned and administrative action taken without the need for investigation. One in three of these complaints are not within DOL's jurisdiction and would be covered by the proposed legislation. Therefore, it is anticipated that the Department of Small Business Development will experience an initial volume of approximately 16 complaints per day.

To conduct the claim intake and analysis, administrative hearing coordination, and reporting functions for the anticipated volume, one additional position is necessary at a cost of \$75,000 per fiscal year. The cost for a hearing examiner is estimated at \$3,500 per hearing. In addition, a one-time database modification must be made at a cost of \$2,800 to ensure appropriate logging, tracking and reporting of cases.

The proposed legislation is designed to recover actual administrative processing and hearing costs from the employer if a violation is found, therefore it is anticipated that some cost recovery is possible.


Special Assistant

fis02810



MEMORANDUM

(Revised)

TO: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

DATE: February 18, 2010

FROM: R. A. Cuevas, Jr.
County Attorney

SUBJECT: Agenda Item No. 7(A)

Please note any items checked.

- _____ "3-Day Rule" for committees applicable if raised
- _____ 6 weeks required between first reading and public hearing
- _____ 4 weeks notification to municipal officials required prior to public hearing
- _____ Decreases revenues or increases expenditures without balancing budget
- _____ Budget required
- _____ Statement of fiscal impact required
- _____ Ordinance creating a new board requires detailed County Manager's report for public hearing
- _____ No committee review
- _____ Applicable legislation requires more than a majority vote (i.e., 2/3's _____, 3/5's _____, unanimous _____) to approve
- _____ Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required

Approved _____ Mayor

Agenda Item No. 7(A)

Veto _____

2-18-10

Override _____

ORDINANCE NO. _____

ORDINANCE ESTABLISHING CHAPTER 22 OF THE CODE OF MIAMI-DADE COUNTY, FLORIDA; PROHIBITING WAGE THEFT, PROVIDING ADMINISTRATIVE PROCEDURES AND PRIVATE CAUSE OF ACTION FOR WAGE THEFT PROVIDING SEVERABILITY, INCLUSION IN THE CODE, AND AN EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA:

Section 1. Chapter 22, Sections 1-10 of the Code of Miami-Dade County, Florida, is hereby established to read as follows:¹

CHAPTER 22 - WAGE THEFT

Sec. 22-1. Declaration of Policy.

It is hereby declared to be the policy of Miami-Dade County in the exercise of its police power for the public safety, health and general welfare, to eliminate and prevent wage theft. Eliminating the underpayment or nonpayment of wages earned by persons working in the County serves the public purpose by promoting economic security and dignity for those working in the County; by promoting business and economic development through the elimination of unfair economic competition by unscrupulous businesses that do not pay or that underpay their employees; and by relieving the burden on the public that subsidize unscrupulous employers whose employees are forced to rely on public assistance because of unpaid or underpaid wages.

Sec. 22-2. Definitions.

¹ Words stricken through and/or [[double bracketed]] shall be deleted. Words underscored and/or >>double arrowed<< constitute the amendment proposed. Remaining provisions are now in effect and remain unchanged.

(a) *Employee* shall mean a natural person who performs work within the geographic boundaries of Miami-Dade County while being employed by an employer, but shall not include any bona fide independent contractor.

(b) *Employer* shall include any person who, acting either individually or as an officer, agent, or employee of another person, acts directly or indirectly in the interest of a person or entity employing an employee;
but such term does not include:

- (1) The United States or a corporation wholly owned by the government of the United States;
- (2) The State of Florida;
- (3) Miami-Dade County;
- (4) The Public Health Trust of Miami-Dade County, or
- (5) An Indian Tribe.

(c) The meaning of *employ*, including as used in the term *employment*, shall include to suffer or permit to work.

(d) *Independent contractor* shall have the same meaning as in the Internal Revenue Code and implementing federal regulations.

(e) *Wage rate* shall mean any form of monetary compensation which the employee agreed to accept in exchange for performing work for the employer, whether daily, hourly, or by piece but in all cases shall be equal to no less than the highest applicable rate established by operation of any federal, state or local law.

(f) *Reasonable time* shall be presumed to be no later than fourteen calendar days from the date on which the work is performed but may be modified for a period not to exceed thirty days by an express agreement between the employer and the employee which has been reduced to writing and signed by the employee.

(g) *Threshold amount* shall mean sixty dollars (\$60).

(h) *Liquidated damages* shall mean twice the amount a respondent employer is found to have unlawfully failed to pay the complainant employee. Where an employee is awarded treble damages for wage theft violations, liquidated damages are awarded in addition to back wages in order to compensate

for the economic losses suffered by reason of the employee not receiving their wage at the time it was due.

Sec. 22-3. Wage theft violations.

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.

Sec. 22-4. Procedures for wage theft complaints.

(1) *Filing wage theft complaint.*

(a) *Threshold amount.* In order for a complaint to be submitted to the County by, or on behalf of, an aggrieved employee, that employee must allege a wage theft violation in which the unpaid wages are equal to no less than the threshold amount.

(b) Either of the following may file a written, signed complaint with the County using the procedures set forth in an Implementing Order:,

(i) an employee aggrieved by a wage theft action prohibited by this article; or

(ii) any entity a member of which is aggrieved by a violation of this article.

(c) A signed complaint for wage theft must be filed with the County in the manner prescribed by Implementing Order no later than one (1) year after the last date upon which the complainant employee performed the work for a respondent employer with regard to which the employee alleges a violation of this article has occurred ("filing deadline"); however, with respect to alleged ongoing violations, once a complaint has been made in compliance with the filing deadline, the County's

enforcement capacity is limited only by the applicable statute(s) of limitations.

(d) The complaint shall set forth the facts upon which it is based with sufficient specificity to identify the respondent or respondents and for the County to determine both that an allegation of wage theft has been made and that the threshold amount has been met.

(2) Respondent.

(a) Upon the filing of any complaint, the County shall promptly determine that the wage theft complaint alleges wage theft, names at least one respondent and meets the threshold amount criterion. The duty of the County in determining whether a complaint meets this criterion is limited to receiving the complaint and comparing the information provided in the complaint to the criteria required herein. This determination is a ministerial act and may not be based on further investigation or the exercise of independent judgment.

(b) Upon making such determination, the County shall serve the complaint and a written notice on the respondent or person charged with the commission of a wage theft practice, setting forth the allegations, rights and obligations of the parties including, but not limited to the right to a due process hearing on the matter before a Hearing Examiner and that the respondent may be responsible for the costs of the Hearing Examiner and other enforcement costs. Such service shall be by certified mail.

(c) Each respondent shall file an answer to the complaint with the County not later than twenty (20) days after receipt of the complaint and notice from the Director.

(3) Subpoenas.

(a) If a Hearing Examiner is appointed, any party may request that a subpoena be issued by the Hearing Examiner. Witnesses summoned by subpoena of the Hearing Examiner shall be entitled to the same witness and mileage fees as are witnesses in proceedings in the County Court of Miami-Dade County, Florida. Fees payable to a witness summoned by

subpoena issued at the request of a party shall be paid by the party.

(b) Within ten (10) days after service of a subpoena upon any person, such person may petition the Hearing Examiner to revoke or modify the subpoena. The Hearing Examiner shall grant the petition if it finds that the subpoena requires appearance or attendance at an unreasonable time or place, that it requires production of evidence which does not relate to the matter, that it does not describe with sufficient particularity the evidence to be produced, that compliance would be unduly onerous, or for other good reason.

(c) In the case of the contumacy or refusal to obey a subpoena, the Hearing Examiner or any party may seek enforcement of a subpoena issued under the authority of this chapter by filing a petition for enforcement in the County Court of Miami-Dade County, Florida;

(d) In any enforcement proceedings authorized by this chapter, the court may award to the prevailing party all or part of the costs and Attorney's fees incurred in obtaining the court order as authorized by the Florida Rules of Civil Procedures;

(e) Any person who willfully fails or neglects to attend and testify or to answer any lawful inquiry or to produce records, documents or other evidence, if in his or her power to do so, may be fined by the County Court of Miami-Dade County, Florida, not more than five hundred dollars (\$500.00) or imprisoned not more than sixty (60) days or both.

(f) Any person who, makes or causes to be made any false entry or false statement of fact in any report, account, record or other document submitted to the Hearing Examiner pursuant to its subpoena or other order, or shall willfully mutilate, alter or by any other means falsify any documentary evidence, may be fined by the County Court of Miami-Dade County, Florida, not more than five hundred dollars (\$500.00) or imprisoned not more than sixty (60) days or both.

(4) Applicability of Florida Rules of Civil Procedure.

(a) The provisions of Rule 1.090, Florida Rules of Civil Procedure, shall govern the computation of any period of time

prescribed or allowed by this chapter or by rules, regulations, or orders adopted pursuant to this chapter.

(b) All papers or pleadings required by this chapter to be served may be served by certified mail or in accordance with Rule 1.080, Florida Rules of Civil Procedure.

(5) Standards for Resolving Factual Disputes.

(a) Adequate Records. When the following three conditions are met:

(i) where by operation of some other statute or regulation, a respondent employer has an obligation to keep records of an employee's hours worked and or records of compensation provided to an employee; and

(ii) where such records are imprecise, inadequate or do not exist; and

(iii) where a complainant employee presents sufficient evidence to show, as a matter of just and reasonable inference, the amount of work done or the extent of work done or what compensation is due for the work done;

(b) Then the burden of imprecision falls on the respondent whose obligation it was to keep accurate records and the respondent must come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the complainant's evidence; if the respondent fails to meet this burden, the Hearing Examiner or any court, whichever is applicable, may award approximate damages based on the complainant's evidence.

(6) Conciliation.

(a) It is the policy of the County to encourage conciliation of charges. The County will work with the parties in an attempt to conciliate the agreement. If possible, a written conciliation agreement resolving the dispute between the complainant and the respondent shall be executed prior to the referral of the matter to a Hearing Examiner.

(b) A conciliation agreement arising out of such conciliation shall be an agreement between the respondent and the complainant.

(c) Whenever a party believes that the other party has breached a conciliation agreement, the aggrieved party may file a civil action in a court of competent jurisdiction for enforcement of such agreement.

(d) Nothing said or done in the course of attempting conciliation under this chapter may be used as evidence in any subsequent proceeding under this chapter or otherwise without the written consent of the parties to the underlying charge of violation.

(7) Hearing before Hearing Examiner.

(a) Within fifteen (15) days after the service of the Complaint on the respondent, and after determination that the complaint meets the threshold and other requirements, any party may submit a written request for a hearing before a Hearing Examiner. The County shall appoint a Hearing Examiner that it deems to be qualified to hear wage theft matters. In conducting any hearing to determine whether a violation of this chapter has occurred, the Hearing Examiner shall have the authority to administer oaths, issue subpoenas, compel the production of and receive evidence. The Hearing Examiner shall have the authority to consolidate two or more complaints into a single hearing where such complaints name the same respondent(s) and involve sufficiently similar allegations of fact to justify consolidation. The final determination of the Hearing Examiner in wage theft matters is subject to appeal in a court of competent jurisdiction.

(b) In any hearing before the Hearing Examiner pursuant to this section, the respondent may file a written answer to the complaint. All parties shall appear at the hearing in person, with or without counsel, and may submit evidence, cross-examine witnesses, obtain issuance of subpoenas and otherwise be heard. Testimony taken at the hearing shall be under oath and a transcript shall be made available at cost to any interested party.

(c) Discovery shall be permitted upon motion of any party and shall proceed in the manner provided by the Florida Rules of Civil Procedure.

(d) The Hearing Examiner may direct that the parties submit a pre-hearing statement addressing the issues of law and fact that will be involved in such hearing, identify the witnesses that will testify, and provide a list of all documents or other types of exhibits that will be submitted.

(e) Upon the conclusion of the hearing, an adjudicative final order shall be issued and served upon the parties setting forth written findings of fact and conclusions of law.

(f) In any proceeding under this article, the burden of proof by a preponderance of the evidence rests upon the complainant.

(8) Representation by Non-lawyer Advocate.

Any person may be represented by counsel in any proceeding herein. Any party, including corporate entities, as an alternative to counsel, may be represented by a non-lawyer advocate authorized by that party in any proceeding herein unless specifically disallowed by the Hearing Examiner for good cause.

(9) Enforcement by private persons or by the State of Florida.

(a) Enforcement by private persons.

(i) If during the pendency of a wage theft violation complaint but prior to the issuance of a final decision by a Hearing Examiner, a complainant employee brings a private action in their own right, whether under state law, federal law, or both, in any state or federal court to seek unpaid wages based upon the same facts and allegations as the complainant employee's complaint to the County, or affirmatively or by consent opts to participate in any such litigation, that complainant employee's complaint of wage theft shall be deemed withdrawn with respect to any respondent employer named as a defendant in such court action. This section shall be interpreted narrowly so as to leave unaffected

any cumulative rights which were not the subject of a complaint employee's complaint.

(ii) The County, upon becoming aware of any private action described herein shall advise the complainant and any respondent subject to the private action in writing within fifteen (15) days of this provision and its effect on the complaint. Within thirty (30) days of the issuance of such notice, the County will dismiss, with prejudice, the complainant's complaint only with respect to the respondent or respondents who are named as a defendants to the private action.

(b) *Enforcement by the State of Florida.* If at any time during the pendency of a complaint of wage theft, the County becomes aware of an enforcement action by the Florida Attorney General or other body of the State of Florida based on wage violations involving the same facts as the complainant employee's complaint to the County, the County will dismiss, either with or without prejudice, the complainant employee's complaint with respect to the respondent or respondents named in such State enforcement action. The County shall advise the complainant and any respondent of such dismissal.

Sec. 22-5. Enforcement of Wage Theft Violations

(1) *Order Issued.*

At the conclusion of a hearing and upon a finding of a wage violation, the Hearing Examiner shall issue a written order as follows:

(a) if the preponderance of the evidence demonstrates a wage theft violation, the Hearing Examiner shall order the employer to pay wage restitution to the affected employee in an amount equal to three times the amount of back wages that the respondent employer is found to have unlawfully failed to pay the complainant employee; this treble amount shall include the back wages in addition to liquidated damages as compensation for the economic losses suffered by reason of the employee not receiving their wage at the time it was due; and

(b) the County shall order the employer to pay to the Board of County Commissioners an assessment of costs in an amount

