

Item # 15

EXHIBIT 5

ADDITIONAL MATERIAL

2:00 p.m.

Public Hearing

OCTOBER 23, 2012

**SUBMITTED BY THE OFFICE OF
THE COUNTY ATTORNEY**

Joni Armstrong Coffey
County Attorney



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MEMORANDUM

TO: Board of County Commissioners

FROM: Joni Armstrong Coffey, County Attorney
Andrew J. Meyers, Chief Appellate Counsel

DATE: October 18, 2012

RE: Proposed Wage Recovery Ordinance
October 23, 2012, Public Hearing Agenda Item #15
CAO Files: 12-026 & 12-420

On October 9, 2012, a public hearing was held on the proposed wage recovery ordinance (Item #5 on the October 9 public hearing agenda). During the hearing, the Board discussed a number of potential amendments to the proposed ordinance. Some of the amendments were drafted in advance of the hearing, while others were developed during the hearing. Several Board members also requested more information on currently-available remedies for wage recovery under both federal and state law, and asked questions about how recoverable wages are calculated for "tip workers" and other workers whose wages may be established or impacted by various federal statutes.

The public hearing was continued until October 23. This Office was directed to provide, for the Board's convenient reference, a red-lined version of the ordinance that includes all proposed amendments. That red-lined version is Attachment 1 to this memorandum.

Additionally, in response to the Board's inquiries on October 9, we have prepared the below description of both currently-available remedies for wage recovery and the impact various federal statutes have on establishing the amount of wages that may be recoverable under the proposed ordinance.

I. Currently-Available Remedies for Wage Recovery.

The three (3) primary remedies currently available for recovery of unpaid wages are:

- a. The Fair Labor Standards Act ("FLSA"), which is a federal statute;
- b. Florida's Minimum Wage Act ("FMWA"), a state statute; and

- c. Common law claims such as a claim for breach of contract. These common law claims are generally brought in conjunction with FLSA and FMWA claims because FLSA and FMWA, as explained below, do not address all unpaid wages. For that reason, breach of contract claims are discussed below in conjunction with FLSA and FMWA. Additionally, contractual wage issues may, pursuant to the terms of an applicable collective bargaining agreement, be referred for binding arbitration.

A. THE FAIR LABOR STANDARDS ACT.

1. **Who is Covered?** While a vast majority of employees are covered by FLSA, certain employees are not covered. Employers and employees fully or partially exempt from FLSA's minimum wage and overtime provisions are listed on Attachment 2.
2. **What Does it Cover?** Minimum wage and overtime (overtime is generally 1½ times an employee's regular rate of pay for all workweek hours above 40). FLSA does not cover any amount beyond minimum wage unless it is for overtime work.
3. **What Happens to Those Employees Not Covered by the FLSA?** Employees exempt from FLSA may sue for breach of contract to recover unpaid wages.
4. **What Happens to Any Amounts that are Not Minimum Wages or Overtime?** Because these amounts are not covered by FLSA, the employee may file a breach of contract action to recover these amounts.
5. **Remedies for Aggrieved Employees under FLSA.** A prevailing employee is entitled to unpaid minimum wages or overtime (as the case may be) plus liquidated damages in an amount equal to the unpaid minimum wages or overtime recovered. Thus, the employee receives "double damages" with regard to minimum wages or overtime. Prevailing employees can also recover attorney's fees and costs.
 - If the employer prevails, the employer will generally not be awarded attorney's fees and costs unless the court determines that the FLSA case is frivolous or has been litigated in bad faith.
6. **Remedies under Related Breach of Contract Action.** An employee may recover the amount owed and consequential damages. However, no liquidated damages are available (no "double damages" for the portion of unpaid wages that do not constitute minimum wages or overtime). Prevailing employees can recover attorney's fees and costs even when suing for breach of contract.
7. **Illustration:** An employee agrees to work for \$15 per hour. The employee works 20 hours but is not paid. The employee may file a complaint under FLSA for unpaid

minimum wages (\$7.67 per hour, as Florida's higher minimum wage applies). The employee may include a second claim for breach of contract for the difference between the promised wage and the minimum wage ($\$15 - \$7.67 = \$7.33/\text{hour}$). If the employee prevails, the employee will receive the amount owed for minimum wages ($\$7.67 \text{ times } 20 \text{ hours worked} = \153.40) plus an additional \$153.40 (liquidated damages) for a total of \$306.80. The employee will also receive \$146.60 under the breach of contract claim (the $\$7.33/\text{hour}$ differential times 20 hours). The total recovery would thus be \$453.40, plus attorney's fees and costs.

B. THE FLORIDA MINIMUM WAGE ACT.

1. **Who is Covered?** Apart from FLSA's interstate commerce threshold, which is inapplicable to FMWA claims, FMWA covers the same people covered by FLSA. Employees exempt under FLSA are exempt under FMWA.
2. **What Does it Cover?** FMWA expressly covers only minimum wages (\$7.67/hour).
3. **What Happens to Those Employees Not Covered by FMWA?** Just like in the case of FLSA, those employees not covered by FMWA may sue for breach of contract to recover promised wages.
4. **What Happens to Any Amounts that are Not Minimum Wages?** An employee may sue under FLSA to recover unpaid overtime, and may sue under contract law to recover any non-overtime wages that are above the minimum wage.
5. **Remedies for Aggrieved Employees under FMWA:** An aggrieved employee is entitled to unpaid minimum wages and liquidated damages equal to the amount of unpaid minimum wages (thus, the recovery is for "double" the unpaid minimum wage). A prevailing employee is also entitled to attorney's fees and costs.
 - Under FMWA, the prevailing party is entitled to attorney's fees and costs. This means that if the employer prevails, the employer may recover attorney's fees and costs.
6. **Remedies Under Related Breach of Contract Action:** Same as for breach of contract action brought in conjunction with FLSA claim. See section A(6) above.
7. **Illustration:** Works the same way as an FLSA claim. See section A(7) above.

***NOTE THAT BETWEEN FLSA, FMWA, AND A BREACH OF CONTRACT CLAIM, ALL EMPLOYEES HAVE THE ABILITY TO RAISE CLAIMS THAT COVER ALL OF THEIR UNPAID WAGES. THE CLAIMS AND AVAILABLE REMEDIES, HOWEVER, DIFFER DEPENDING ON THE TYPE OF WAGE AT ISSUE (MINIMUM WAGE, NON-OVERTIME WAGES ABOVE THE MINIMUM WAGE, OR OVERTIME).

C. PROPOSED WAGE RECOVERY ORDINANCE.

1. **Who is Covered?** Anyone, without exception, meeting the threshold amount (\$60) for work performed within Broward County.
2. **What Does it Cover?** All unpaid wages (minimum wages, overtime, and non-overtime amount above minimum wage). No separate claim need be filed for breach of contract.
3. **What Happens to Those Employees Not Covered by the Ordinance?** If the amount owed exceeds \$60 for work performed within Broward County, the employee is covered by the ordinance. Only claims less than \$60 are not covered.
4. **Remedies Available Under the Ordinance:** An employee would be entitled to the amount owed plus liquidated damages equal to or double the amount owed (depending on which version of the proposed ordinance, if either, is enacted). Thus, the employee may, in total, recover double damages or treble damages for all unpaid wages, depending on the ordinance version. The prevailing employee is also entitled to attorney's fees and costs.
5. **Illustration:** An employee is promised \$15 per hour for 20 hours of work. The employee is not paid, and files an administrative complaint under the ordinance for the amount owed (\$15/hour times 20 hours = \$300). If the employee prevails, the employee will recover the \$300 plus an additional \$300 or \$600 in liquidated damages (depending on version of the ordinance), plus attorney's fees and costs.

→ If the employer prevails, the employer may be entitled to attorney's fees if the employee's claim is determined to be frivolous.

***NOTE THAT AS THE ILLUSTRATION DEMONSTRATES, UNDER THE PROPOSED ORDINANCE, ALL UNPAID WAGES MAY BE RECOVERED WITHOUT HAVING TO POTENTIALLY DIVIDE CLAIMS BETWEEN A STATUTORY AND A BREACH OF CONTRACT ACTION. ADDITIONALLY, THE REMEDY IS THE SAME FOR ALL WAGES (MINIMUM WAGE, OVERTIME, AND NON-OVERTIME ABOVE THE MINIMUM WAGE).

II. OTHER WAGE-RELATED LAWS.

We were asked about other laws affecting recoverable wages. The primary laws are described below. Not all laws are described because, for example, Davis-Bacon-related provisions are included in dozens of separate federal statutes.

1. **Davis-Bacon Act.** Davis-Bacon and Related Acts ("DBRA") applies to contractors and subcontractors performing on many federally-funded or federally-assisted

contracts. DBRA contractors and subcontractors must pay their laborers no less than the locally prevailing wages and benefits for corresponding work on similar projects in the area. The Department of Labor determines the applicable wage rate.

2. **The McNamara-O'Hara Service Contract Act of 1965 ("SCA")**. SCA requires contractors and subcontractors performing on certain federal contracts to pay certain employees no less than the wage rates and benefits prevailing in the locality, or the rates contained in a predecessor contractor's collective bargaining agreement.
3. **The Migrant and Seasonal Agricultural Worker Protection Act**. In terms of wages, every non-exempt farm or agricultural employer must disclose the terms and conditions of employment to each migrant and seasonal worker; pay each worker the wages owed when due; provide each worker with an itemized statement of earnings and deductions; and keep payroll records for three years.
4. **The Contract Work Hours & Safety Standards Act ("CWHSSA")**. CWHSSA applies to certain federal and federally-assisted contracts and requires that covered employers 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.
5. **Provisions for Tipped Employees**. Employees whose wages include tips must be paid a minimum combined cash and tip wage of \$7.67/hour. Florida law provides that employers must pay tipped employees no less than \$4.65/hour, with the remainder of their wages being tips. Employers must meet certain conditions established by federal law to obtain this "tip credit" of \$3.02 (\$7.67 minus \$4.65). An employer has an obligation to keep records justifying the tip credit. An employee who brings an action for unpaid wages would receive any amounts unpaid after deduction of any documented tip credit.

III. SUMMARY COMPARISON CHART.

	CLAIMS	REMEDIES	ARE ATTORNEY'S FEES & COSTS RECOVERABLE?	RECOVERY PERIOD
FLORIDA MINIMUM WAGE ACT	Statutory claim for unpaid minimum wages and overtime (the claim for overtime is brought under FLSA). Any unpaid amounts which are not minimum wages or overtime may be recovered by suing for breach of contract.	Double the minimum wages/overtime owed. For any other amounts owed, damages for breach of contract would be the actual wages owed plus possible consequential damages (on case by case basis).	Yes, by prevailing employee or prevailing employer.	5 years
FAIR LABOR STANDARDS ACT	Same as under Florida Minimum Wage Act.	Same as under Florida Minimum Wage Act.	Same as under proposed Broward County ordinance.	2 years
PROPOSED WAGE RECOVERY ORDINANCE	Administrative claim covering all wages due an employee (minimum wage, overtime, and non-overtime above minimum wage).	Double or triple the wages owed, depending on which version of the ordinance is approved.	Yes, by prevailing employee. Prevailing employer may recover fees and costs only if claim is frivolous.	1 year

Andrew Meyer FOR JAC
 County Attorney

JAC/mm

- c: Bertha Henry, County Administrator
- Evan A. Lukic, County Auditor

ATTACHMENT 1

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ORDINANCE NO. 2012-

Field Code Changed

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA, CREATING CHAPTER 20½ OF THE BROWARD COUNTY CODE OF ORDINANCES ("CODE") TO PROHIBIT WAGE THEFTNON-PAYMENT OF EARNED WAGES; PROVIDING FOR AN ADMINISTRATIVE COMPLAINT, ADMINISTRATIVE HEARING AND ADMINISTRATIVE PROCEDURES FOR WAGE THEFTNON-PAYMENT OF EARNED WAGES CLAIMS; PROVIDING FOR ENFORCEMENT OF ADMINISTRATIVE ORDERS IN A COURT OF COMPETENT JURISDICTION; AND PROVIDING FOR SEVERABILITY, INCLUSION IN THE CODE, AND AN EFFECTIVE DATE.

Comment [BCF1]: Proposed by Vice Mayor Jacobs. This change in terminology occurs throughout the draft.

(Sponsored by Vice-Mayor Kristin Jacobs)

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WHEREAS, the Board of County Commissioners finds that the underpayment or nonpayment of wages earned by persons working in the County harms the public health, safety, and welfare,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA:

Section 1. Chapter 20½ of the Broward County Code of Ordinances is hereby created to read as follows:

[UNDERLINING OMITTED]

Chapter 20½. Wage TheftNon-Payment of Earned Wages.

Sec. 20½-1. Declaration of Policy.

It is hereby declared to be the policy of Broward County in the exercise of its police power for the public safety, health, and general welfare, to prevent wage theftthe non-payment of wages earned within Broward County. Eliminating the underpayment or nonpayment of wages earned by persons working in the County serves the public by promoting economic security and dignity for those working in the County; by promoting

Coding: Words in ~~struck-through~~ type are deletions from existing text. Words in underscored type are additions.

1 business and economic development through the elimination of unfair economic
2 competition that results from nonpayment or underpayment of earned wages by
3 ~~unscrupulous businesses that do not pay or that underpay their employees~~; and by
4 relieving the burden on the public to subsidize ~~unscrupulous~~ employers whose
5 employees are forced to rely on public assistance because of unpaid or underpaid
6 wages.

Comment [A2]: Proposed by County Attorney's Office to make consistent with change in terminology.

7 **Sec. 20½-2. Definitions.** For purposes of this chapter:

8 (a) *Employ.* The meaning of "employ," including as used in the terms
9 employing or employment, shall include to suffer or permit to work.

10 (b) *Employee* shall mean a natural person who meets the following three
11 criteria:

Comment [A3]: Proposed by County Attorney's Office because of proposed change to criteria immediately below.

12 _____ i. _____ performs work within the geographic boundaries of Broward
13 County while being employed by an employer;

14 _____ ii. _____ Is not covered by the remedies available under the Fair Labor
15 Standards Act, the Florida Minimum Wage Act, or a common law cause of action,
16 including for breach of contract to seek to recover unpaid wages; and _____

Comment [A4]: Proposed by Commissioner LaMarca

17 _____ iii. _____ Is not ~~but shall not include any~~ bona fide independent contractor.

18 (c) *Employer* means any natural person or entity employing an employee,
19 except such term does not include:

20
21 (1) _____ The United States or a corporation wholly owned by the government of the
22 _____ United States;

23 (2) _____ The State of Florida;

24 (3) _____ Broward County; or

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1 (4) Any Indian Tribe.

2

3 (1) The United States or a corporation wholly owned by the government of the

4 United States;

5 (2) The State of Florida;

6 (3) Broward County, or any municipality within Broward County; or

7 (4) Any Indian Tribe.

8

9 (1) The United States or a corporation wholly owned by the government of the

10 United States;

11 (2) The State of Florida; or

12 (3) Any Indian Tribe.

13

14 (d) *Independent contractor* shall have the same meaning as in the Internal

15 Revenue Code and implementing federal regulations.

16 (e) *Liquidated damages* shall mean twice the amount equal to the amount

17 of earned wages a respondent employer is found to have ~~unlawfully~~ failed to pay the

18 complainant employee. Where an employee is awarded ~~treble~~ damages for ~~wage theft~~

19 non-payment of earned wages violations, the ~~treble~~ damages are comprised of such

20 liquidated damages awarded in addition to back wages in order to compensate for the

21 economic losses suffered by reason of the employee not receiving his or her wage at

22 the time it was due.

23 (f) *Reasonable time* shall be presumed to be no later than fourteen (14)

24 calendar days from the date on which the work is performed unless the employer has

Comment [A5]: Three alternate versions. This is the original version from the proposed ordinance.

Comment [A6]: Alternate 1 – Proposed by Vice Mayor Jacobs to exempt municipalities

Comment [A7]: Alternate 2 – Proposed by several Board members to subject County (and municipalities) to ordinance.

Comment [BCF8]: Proposed by several Board members. Double damages would place the ordinance more in line with existing federal and state remedies. The original provision for treble damages was based on the Miami-Dade ordinance.

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1 established, by policy or practice, a pay schedule whereby employees earn and are
2 consistently paid wages according to regularly recurring pay periods, in which case
3 such pay schedule shall govern.

4 (g) *Threshold amount* shall mean sixty dollars (\$60.00).

5 (h) *Wage rate* shall mean any form of monetary compensation which the
6 employee, in connection with work performed within the geographic boundaries of
7 Broward County, agreed to accept in exchange for performing work for the employer,
8 whether daily, hourly, or by the piece, but in all cases shall be equal to no less than the
9 highest applicable minimum wage rate established by operation of any federal, state, or
10 local law.

Comment [A9]: Proposed by County Attorney's Office. Traveled with original version of proposed ordinance.

Comment [BCF10]: Proposed by County Attorney's Office. This was previously implied but is now expressly stated for added clarity.

11 **Sec. 20½-3. ~~Wage Theft~~Non-Payment of Earned Wages Violations. ~~A wage~~**
12 ~~theft violation~~The non-payment of earned wages occurs when an employer fails to pay
13 any portion of wages due to an employee, according to the wage rate applicable to that
14 employee, within a reasonable time from the date on which that employee performed
15 the work for which those wages were compensation. Subject to the terms and
16 conditions stated in this chapter, sSuch violation shall entitle an employee, upon a
17 finding by a Hearing Officer appointed by Broward County that an employer has
18 ~~unlawfully~~ failed to pay earned wages, to receive back wages in addition to liquidated
19 damages from that employer. However, notwithstanding anything to the contrary that
20 may appear in this chapter, if the employer proves by a preponderance of the evidence
21 that the act or omission giving rise to a non-payment of earned wages action was in
22 good faith and that the employer had reasonable grounds for believing that the non-
23 payment was not a violation of this chapter, the Hearing Officer may, in his or her sound
24

Comment [A11]: Proposed by County Attorney's Office.

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1 discretion, award no liquidated damages or award liquidated damages in a lower
2 amount than would be awardable absent such demonstration by the employer.

3 **Sec. 20 $\frac{1}{2}$ -4. Procedures for ~~Wage Theft~~Non-Payment of Earned Wages**

4 **Claims.**

- 5 (a) *Filing ~~wage theft~~non-payment of earned wages complaints.*
- 6 (1) Complaints alleging ~~wage theft~~non-payment of earned wages may be
7 considered under this chapter only if the following conditions are met:
- 8 a. The employee alleges a ~~non-payment of earned wages~~wage theft
9 violation equal to or exceeding the ~~the~~ threshold amount;
- 10 b. The employee ~~notifies the employer in writing, within sixty (60) days~~
11 after wages were due to be paid but were not paid, that the employer has
12 not paid all wages earned by the employee. ~~The notice must identify all~~
13 wages to which the employee claims entitlement, the actual or estimated
14 work dates and hours for which payment is sought, and the total amount
15 of alleged unpaid wages through the date of the notice;
- 16 c. The employee files, concurrently with the complaint, a true copy of
17 the ~~notice required by paragraph (b) immediately; and~~
- 18 ~~d.~~ The employee alleges in the complaint that the employer did not
19 pay all earned but unpaid wages ~~specified in the written notice, or~~
20 otherwise resolve the claim to the satisfaction of the employee, within
21 fifteen (15) days after the employer received the written notice or prior to
22 the filing of the complaint, whichever is later.

Comment [BCF12]: Proposed by Commissioner Lieberman. This language tracks the Florida wage statute.

Comment [A13]: Proposed by Commissioner Lieberman. The language tracks the Florida wage statute.

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- (2) Either of the following may file a written, signed complaint with the County pursuant to the procedures established by the County Administrator pursuant to Administrative Rule:
- a. An employee aggrieved by a ~~wage theft~~non-payment of earned wages action prohibited by this ~~chapter~~; or
 - b. Any entity a member of which is an employee aggrieved by a non-payment of earned wages violation of this ~~article~~chapter.
- (3) A signed complaint for ~~wage theft~~non-payment of earned wages must be filed with the County in the manner prescribed by Administrative Rule 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 ~~chapter~~article has occurred ("filing deadline"). If the alleged ~~wage theft~~non-payment of earned wages violation is ongoing at the time of the filing of the complaint, the complaint may also seek recovery of amounts that accrue after the filing of the complaint. With regard to amounts that were due at the time the complaint was filed, an aggrieved employee may recover only those amounts that were specified in the notice required by section 21½-4 above that became due and payable within the one (1) year period prior to the date the complaint was filed.
- (4) The complaint shall set forth the facts upon which it is based with sufficient specificity to identify the respondent employer(s) and for the County to determine both that an allegation of ~~wage theft~~non-payment of earned

Comment [A14]: Issue raised by Commissioner Lieberman.

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wages has been made and that the other criteria stated in this chapter
have threshold amount has been met.

Comment [A15]: Proposed by County Attorney's Office.

(b) *Respondent.*

(1) Upon the filing of any complaint, the County shall promptly determine whether the complaint meets the criteria established by this chapter.
alleges wage theft, non-payment of earned wages, names at least one (1)
respondent employer, satisfies the notice requirements of Section 20-12-
4(b), and meets the threshold amount. The duty of the County in

Comment [A16]: Proposed by County Attorney's Office.

determining whether a complaint meets those criteria is limited to receiving the complaint and comparing the information provided therein 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.

(2) Upon making such determination, the County shall serve the complaint and a written notice on each respondent charged with the commission of wage theft non-payment of earned wages, 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 Officer and that the respondent may be responsible for the costs of the Hearing Officer and other enforcement costs. Such service shall be by certified mail, made in the same manner as a civil complaint under the Florida Rules of Civil Procedure.

Comment [BCF17]: Proposed by County Attorney's Office.

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- (3) Each respondent shall file an answer to the complaint with the County not later than twenty (20) days after receipt of the complaint and the written notice referenced above.
- (c) *Hearing before Hearing Officer.*
- (1) Within thirty (30) days after the service of the Complaint on the respondent, or within ten (10) days after the County determines that any conciliation efforts (as referenced below) will not result in resolution of the dispute, whichever is later, the County shall appoint a Hearing Officer that it deems to be qualified to hear wage-theft/non-payment of earned wages matters. The Hearing Office shall be a member of the Florida Bar, in good standing, for at least the five (5) years preceding service as a Hearing Officer. In conducting any hearing to determine whether a violation of this chapter has occurred, the Hearing Officer shall have the authority to administer oaths, issue subpoenas, compel the production of evidence, and receive evidence. The Hearing Officer shall have the authority to consolidate two (2) 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 Officer in wage theft matters is subject to appeal in a court of competent jurisdiction.
- (2) 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

Comment [A18]: Proposed by County Attorney's Office based on comments during prior public hearing.

Comment [A19]: Proposed by County Attorney's Office (the provision is moved to the next page).

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be under oath and a transcript shall be made available at cost to any interested party.

- (3) Discovery shall be permitted upon motion of any party and shall proceed in the manner provided by the Florida Rules of Civil Procedure.
- (4) The Hearing Officer may direct that the parties submit a pre-hearing statement addressing the issues of law and fact that will be involved in such hearing, identifying the witnesses that will testify, and providing a list of all documents or other types of exhibits that will be submitted.
- (5) 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. The Hearing Officer's ruling shall be considered a final administrative ruling, enforceable in a court of competent jurisdiction, and reviewable as provided by applicable law.
- (6) Subject to paragraph (7) immediately below, in any proceeding under this chapter, the burden of proof by a preponderance of the evidence rests upon the complainant.
- (7) When the following three (3) conditions are met:
 - a. 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;
 - b. Such records are imprecise, inadequate, or do not exist; and
 - c. A complainant employee presents sufficient evidence to show, as a matter of just and reasonable inference, the amount of work done

Comment [BCF20]: Proposed by County Attorney's Office.

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1 or the extent of work done or what compensation is due for the
2 work done;

3 then the burden of imprecision falls on the respondent whose obligation it
4 was to keep accurate records, and the respondent must come forward
5 with evidence of the precise amount of work performed or with evidence to
6 negate the reasonableness of the inference to be drawn from the
7 complainant's evidence. If the respondent fails to meet this burden, the
8 Hearing Officer may award approximate damages based on the
9 complainant's evidence.

10 (d) *Subpoenas.*

11 (1) Any party may request that a subpoena be issued by the Hearing Officer.
12 Witnesses summoned by subpoena shall be entitled to the same witness
13 and mileage fees as are witnesses in proceedings in the County Court of
14 Broward County, Florida. Fees payable to a witness summoned by
15 subpoena issued at the request of a party shall be paid by that party.

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

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- (3) In the case of refusal to obey a subpoena, the Hearing Officer or any party may seek enforcement of a subpoena issued under the authority of this chapter by filing a petition for enforcement in a court of competent jurisdiction. In such enforcement proceeding, the court may award to the ~~prevailing party~~ prevailing in the enforcement proceeding all or part of the costs and attorney's fees incurred in obtaining the enforcement order, as authorized by the Florida Rules of Civil Procedure.
- (4) 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 a court of competent jurisdiction, not more than five hundred dollars (\$500.00) or imprisoned not more than sixty (60) days or both.
- (5) 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 Officer pursuant to its subpoena or other order, or who willfully mutilates, alters, or by any other means falsifies any documentary evidence, may be fined by in a court of competent jurisdiction, not more than five hundred dollars (\$500.00) or imprisoned not more than sixty (60) days or both.
- (e) *Applicability of Florida Rules of Civil Procedure.*
- (1) 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.

Comment [A21]: Proposed by County Attorney's Office.

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1 (2) ~~All papers or pleadings required by this chapter to be served may be~~
2 ~~served by certified mail or in accordance with Rule 1.080, Florida Rules of~~
3 ~~Civil Procedure.~~ must be filed and served in the manner provided for by
4 the Florida Rules of Civil Procedure. All other papers required by this
5 chapter to be served must be served by certified mail.

Comment [BCF22]: Proposed
by County Attorney's Office.

6 (f) *Conciliation.*

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

12 (2) Any conciliation agreement shall be between the respondent and the
13 complainant.

14 (3) Whenever a party believes that the other party has breached a conciliation
15 agreement, the aggrieved party may file a civil action in a court of
16 competent jurisdiction for enforcement of such agreement. In such
17 enforcement proceeding, the court may award to the prevailing party all or
18 part of the costs and attorney's fees incurred in obtaining the enforcement
19 order, as authorized by the Florida Rules of Civil Procedure.

Comment [A23]: Proposed
by County Attorney's Office.

20 (4) Nothing said or done in the course of attempting conciliation under this
21 chapter may be used as evidence in any subsequent proceeding under
22 this chapter or otherwise without the written consent of the parties to the
23 underlying complaint.
24

Coding: Words in ~~struck-through~~ type are deletions from existing text. Words in
underscored type are additions.

1 (g) *Representation by Non-lawyer Advocate.* Any person may be represented
2 by counsel in any proceeding under this chapter. Any party, including corporate
3 entities, as an alternative to counsel, may be represented by a non-lawyer advocate
4 authorized by that party, except where such representation is prohibited by law or
5 disallowed by the Hearing Officer for good cause.

6 (h) *Enforcement by private persons or by the State of Florida.*

7 (1) *Enforcement by private persons.* If during the pendency of a wage
8 ~~theft~~non-payment of earned wages violation complaint but prior to the
9 issuance of a final decision by a Hearing Officer, a complainant employee
10 brings a private action in his or her own right, whether under state law,
11 federal law, or both, in any state or federal court to seek unpaid wages
12 based upon the same facts and allegations as the complainant employee's
13 complaint to the County, or affirmatively or by consent opts to participate
14 in any such litigation, that complainant employee's administrative
15 complaint of wage ~~theft~~non-payment of earned wages shall be deemed
16 withdrawn with respect to any respondent employer named as a
17 defendant in such court action. This section shall be interpreted narrowly
18 so as to leave unaffected any cumulative rights which were not the subject
19 of a ~~complaint~~ complainant employee's complaint.

20 (2) *Enforcement by the State of Florida.* If at any time during the pendency of
21 a complaint of wage ~~theft~~non-payment of earned wages, the Hearing
22 Officer becomes aware of an enforcement action by the Florida Attorney
23 General or other body of the State of Florida based on wage violations
24 involving the same facts as the complainant employee's complaint to the

Comment [BCF24]: Typographical error.

Coding: Words in ~~struck-through~~ type are deletions from existing text. Words in underscored type are additions.

1 County, the Hearing Officer shall dismiss, without prejudice, the
2 complainant employee's administrative complaint with respect to the
3 respondent or respondents named in such State enforcement action.

Comment [A25]: Proposed
by County Attorney's Office.

4 **Sec. 20½-5. Enforcement of ~~Wage Theft~~Non-Payment of Earned Wages**

5 **Violations.**

6 (a) *Order Issued.* At the conclusion of a hearing, the Hearing Officer shall
7 issue a final written order stating whether the wage theft non-payment of earned wages
8 violation has been established by a preponderance of the evidence. If such violation
9 has been so established, the final written order shall:

- 10 (1) Require the employer to pay wage restitution to the affected employee in
11 an amount equal to ~~three (3) times~~ twice the amount of back wages that
12 the respondent employer is found to have unlawfully failed to pay the
13 complainant employee; this ~~treble-damage~~ amount shall include the back
14 wages in addition to liquidated damages as compensation for the
15 economic losses suffered by reason of the employee not receiving his or
16 her wage at the time it was due;
- 17 (2) Require the employer to reimburse the employee for any reasonable costs
18 and attorney's fees incurred by the employee in connection with the
19 administrative hearing; and
- 20 (3) Require the employer to pay to the Board of County Commissioners an
21 assessment of costs in an amount not to exceed actual administrative
22 processing costs and the cost of the hearing.

Comment [BCF26]:
Proposed by several Board
members.

23 (b) *Failure to Comply with Order.* If any respondent employer fails to comply
24 with the Hearing Officer's final written order within thirty (30) days after issuance of the

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underscored type are additions.

1 order, interest shall accrue on all amounts due and owing the employee and the County
2 with interest commencing as of the date of the order. Such interest shall accrue at the
3 applicable rate for court judgments in Florida. Additionally, the employee, or the County
4 with regard to any amount owed to the County, -may file an appropriate action in a court
5 of competent jurisdiction to enforce compliance with the order. If the employee or the
6 County files and prevails in such action, the employee (or the County, as applicable)
7 shall be entitled to recover its reasonable court costs and attorney's fees from the
8 employer.

9 (c) *Cumulative Rights Preserved.* Nothing in this chapter shall be construed
10 to limit, preclude, or in any way abrogate the cumulative rights or remedies available to
11 employees at common law or by statute including, but not limited to, rights related to the
12 violation of overtime, minimum wage, living wage, prevailing wage, or equal pay laws.

13 **Sec. 20½-6. Penalty for Filing a Frivolous Complaint.** If a Hearing Officer
14 determines that any wage-theft/non-payment of earned wages complaint submitted to
15 the County was without any basis in law or fact, the Hearing Officer shall issue an order
16 requiring the complainant, or the entity filing the complaint on behalf of its member,
17 where applicable, to reimburse, within thirty (30) days of the order: (1) the County for all
18 administrative costs incurred by the County in connection with such complaint; and (2)
19 each respondent employer named in the complaint for all reasonable costs and
20 attorney's fees incurred by the employer in connection with the complaint. If such
21 reimbursement is not timely made, the County or the employer may file an appropriate
22 action in a court of competent jurisdiction to obtain such reimbursement.

23 **Sec. 20½-7. Reporting.** A fiscal report regarding the administrative costs
24 associated with the implementation of this Ordinance shall be created by the head of

Comment [A27]: Proposed by County Attorney's Office.

Coding: Words in ~~struck-through~~ type are deletions from existing text. Words in underscored type are additions.

1 the office or division that oversees or administers the process created by this
2 Ordinance, and shall be submitted to the County Administrator within six (6) months
3 after this Ordinance's effective date and one (1) year after its effective date. Thereafter,
4 such fiscal report shall be submitted annually. The fiscal report should provide quarterly
5 statistical data about the number of inquiries, number of petitions for hearings, number
6 of hearings scheduled, the costs of the hearings, and the results of the hearings.

Comment [A28]: Proposed by Commissioner LaMarca.

7 Sec. 20½-8. Sunset Review.
8 This Chapter shall, subject to a sunset review by the Board of County
9 Commissioners, stand repealed five (5) years after its effective date.

Comment [BCF29]: Proposed by Commissioner LaMarca.

10 Section 2. SEVERABILITY.
11 If any portion of this Ordinance is determined by any Court to be invalid, the
12 invalid portion shall be stricken, and such striking shall not affect the validity of the
13 remainder of this Ordinance. If any Court determines that this Ordinance, or any portion
14 hereof, cannot be legally applied to any individual(s), group(s), entity(ies), property(ies),
15 or circumstance(s), such determination shall not affect the applicability hereof to any
16 other individual, group, entity, property, or circumstance.

17 Section 3. INCLUSION IN CODE.
18 It is the intention of the Board of County Commissioners that the provisions of
19 this Ordinance shall become and be made a part of the Broward County Code; and that
20 the sections of this Ordinance may be renumbered or relettered and the word
21 "ordinance" may be changed to "section," "article," or such other appropriate word or
22 phrase in order to accomplish such intentions.

23 Section 4. EFFECTIVE DATE.
24 This Ordinance shall become effective as provided by law on January 2, 2013.

Comment [A30]: Proposed by Vice Mayor Jacobs.

Coding: Words in ~~struck-through~~ type are deletions from existing text. Words in underscored type are additions.

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ENACTED
FILED WITH THE DEPARTMENT OF STATE
EFFECTIVE

AJM/mm
Wage Recovery Ordinance.doc
10/18/12
12-420

Coding: Words in ~~struck through~~ type are deletions from existing text. Words in underscored type are additions.

ATTACHMENT 2

Source - Federal Department of Labor. <http://www.dol.gov/compliance/guide/minwage.htm>

FLSA applies to enterprises with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce. For most firms, a test of not less than five hundred thousand dollars (\$500,000) in annual dollar volume of business applies.

However, FLSA covers the following regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state, and local government agencies.

Employees of firms that do not meet the five hundred thousand dollar (\$500,000) annual dollar volume test may be covered in any workweek when they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.

In addition, FLSA covers domestic service workers, such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters, if they receive at least one thousand seven hundred dollars (\$1,700) (in 2009 dollars) in cash wages from one (1) employer in a calendar year, or if they work a total of more than eight (8) hours a week for one (1) or more employers.

FLSA exempts some employees from its overtime pay and minimum wage provisions, and it also exempts certain employees from the overtime pay provisions only.

Employees exempt from minimum wage and overtime provisions:

- **Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in the Department of Labor's regulations).**
- **Employees of certain seasonal amusement or recreational establishments.**
- **Employees of certain small newspapers and switchboard operators of small telephone companies.**
- **Seamen employed on foreign vessels.**
- **Employees engaged in fishing operations.**

- Employees engaged in newspaper delivery.
- Farm workers employed on small farms (i.e., those that used less than five hundred (500) "man-days" of farm labor in any calendar quarter of the preceding calendar year).
- Casual babysitters and persons employed as companions to the elderly or the infirm.

Employees exempt from overtime provisions:

- Certain commissioned employees of retail or service establishments.
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.
- Auto, truck, or farm implement parts-clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans.
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations.
- Domestic service workers who reside in their employers' residences.
- Employees of motion picture theaters.
- Farmworkers.

Employees that may be partially exempt from the overtime provisions:

- Employees engaged in certain operations on agricultural commodities and employees of certain bulk petroleum distributors.
- Employees of hospitals and residential care establishments that have agreements with the employees that they will work 14-day periods in lieu of 7-day workweeks (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over eight (8) in a day or eighty (80) in the 14-day work period, whichever is the greater number of overtime hours).

- **Employees who lack a high school diploma, or who have not completed the eighth grade, who spend part of their workweeks in remedial reading or training in other basic skills that are not job specific. Employers may require such employees to engage in these activities up to ten (10) hours in a workweek.**

Item # 15⁽⁴⁾

ADDITIONAL MATERIAL

2:00 p.m.

Public Hearing

OCTOBER 23, 2012

SUBMITTED AT THE REQUEST OF

COMMISSIONER CHIP LaMARCA



Florida Retail Federation

THE VOICE OF FLORIDA RETAILING

227 S. ADAMS STREET ■ TALLAHASSEE, FL
32301-1720
850.222.4082 ■ FAX 850.561.6625
Toll-Free 888.FL.RETAIL (888.357.3824) ■ www.fr.org

Commissioner Chip LaMarca
Broward County Governmental Center
115 S. Andrews Ave.
Fort Lauderdale, FL 33301

October 19, 2012

Dear Commissioner:

On behalf of the members of the Florida Retail Federation, I would like to share with the Commission pertinent information regarding the proposed ordinance on wage protection.

We have been following the issue of wage protection as it has progressed in Miami-Dade, Palm Beach and Broward Counties. As you are likely aware, we filed suit in Miami-Dade County to challenge its wage protection ordinance. This case was discussed during the Broward County Commission meeting held on October 9, and there is perhaps a misunderstanding of how the case progressed. The circuit court found in favor of Miami-Dade County. The decision was never appealed, and Florida's Third District Court of Appeal has never opined on the ordinance. While we feel there were sufficient grounds on which to appeal, the decision was made to conserve resources and not to pursue the appeal. The decision of the Miami-Dade circuit court does not create precedent. It has no binding effect whatsoever on a Broward County circuit court or the Fourth District Court of Appeal in the event either court is called upon to review a similar ordinance.

We continue to oppose local wage protection ordinances such as the one proposed by Broward County. It is unquestionably wrong for employers to deny employees the wages they have rightfully earned. The members of the Florida Retail Federation believe in paying fair wages and creating positive working environments. When existing laws are not operating as we would like them to, it is our feeling that adding additional laws is not necessarily the answer. Our challenge to the Miami-Dade law was not a challenge to the right to be paid. It was a challenge to setting up an additional, very burdensome layer of regulation which we feel violates Article V, Section 1 of the Constitution of the State of Florida, which prohibits the establishment of courts outside of those delineated in Article V. This is why we also oppose the proposed ordinance in Broward. In a time where we as a state are trying to open our borders to more businesses and more jobs, the possibility of 67 different county tribunals addressing wage protection does not a welcome mat make.

We continue to support a statewide solution that will consistently address these concerns in all Florida counties, and we are working towards that goal. Thank you for your time.

Sincerely,

Samantha Padgett

General Counsel

Florida Retail Federation

Item # 15⁽³⁾

ADDITIONAL MATERIAL

2:00 p.m.

Public Hearing

OCTOBER 23, 2012

SUBMITTED AT THE REQUEST OF

COMMISSIONER CHIP LaMARCA

Wage Theft Project Update



Legal Aid Society of Palm Beach County, Inc.

August 31, 2012

Project Background

This report presents and explains the data collected by the Legal Aid Society of Palm Beach County's ("LAS") Wage Theft Project between February 2, 2011, and August 31, 2012. Wage theft refers to the nonpayment or underpayment of wages.

Acceptance Criteria

Any individual who has/had an employer-employee relationship who has a claim of wage theft that occurred in Palm Beach County, regardless of amount owed, is eligible for acceptance into the Wage Theft Project.

Definitions

Potential Clients. Individuals who have contacted Legal Aid through the Wage Theft Project; referrals from other individuals, advocacy groups and public agencies. It is important to note that these individuals may or not make specific claims that they are victims of wage theft or that their employer owes them money. Potential clients are then subject to an intake (see definition below) to determine eligibility (*i.e.*, that they have/had an employer-employee relationship and that their claim is for unpaid wages).

Intake. The process of completing internal intake forms, establishing the employer-employee relationship, conducting a preliminary investigation of employer and/or liable legal entities, determining wages owed, and possibly drafting an initial demand letter.

Retained Clients. Retained clients are those individuals who have completed an intake form, been interviewed by Legal Aid staff and determined to have a claim for wages under state or federal law.

Employee. As defined by the Fair Labor Standards Act, and consistent with the Miami-Dade Wage Theft Ordinance, and an employee is "any individual who is employed by an employer" who is "to suffer[ed] or permit[ted] to work"; the term employee does not include any bona fide independent contractor or independent contractor relationship.

Independent Contractor. An individual, who in their own name or through a legal entity, contracts with an employer to provide services on a project or on an as-needed basis, but who is not legally classified or defined as an employee. The definition of independent contractor shall have the same meaning as in the Internal Revenue Code (the 20-Factor Test) and implementing federal regulations.

Partner (Pro Bono) Attorneys. Local attorneys specializing in wage theft (labor and employment law), who have volunteered on a completely pro bono basis, to take on referred Wage Theft Project clients for whom demand letters failed to garner satisfactory settlements. Clients referred through the Wage Theft Project are never charged a fee for representation.

The Data

A total of 384 individuals contacted LAS during the time period studied, between February 2, 2011 and August 31, 2012.

Methodology

In an attempt to insure complete transparency for the Wage Theft Project, all contact with the Project is tracked. These initial contacts are referred to as "potential clients". There are various reasons that potential clients do not become retained clients (see Exhibit C-2), which include not showing up for appointments (including referrals with outdated contact information), and determinations that the complaint is unrelated to wage theft, such as no employee-employer relationship (i.e., independent contractors).

In addition, some clients who are retained and who complete an intake and interview have their cases dismissed by the Wage Theft Project (see Exhibit C-1) for a variety of reasons, but in all cases related either to the client's failure to pursue his/her claim, lack of merit to the claim (determined following intake and investigation) or lack of ability to collect (the investigation determined that the employer is no longer in business or claims are otherwise legally uncollectable).

Finally, in determining the percentage of clients who receive compensation for unpaid wages, we utilize the following methodology: the total number of demand letters sent out to employers divided by the payments received thereafter (it is important to note that our initial Wage Theft Project Updates utilized a different basis for the calculation: the total number of potential cases (see definition above) divided by the payments received). The former calculation was inaccurate because it took into account cases that were not in any way pursued by the Wage Theft Project and in almost all cases were not wage theft claims or involved individuals who did not intend to pursue a case of wage theft. We believe the revised method of calculating results presented here is a more accurate reflection of the efficacy of the Wage Theft Project.

Wage Theft Report Highlights

Through August 31, 2012

Total amount of wages recovered: \$114,511.14

Total number of clients receiving wages: 55

Average recovery per client: \$2,082.02

Average time for between intake and payment: 109 days

Total number of clients retained: 151

Update from June Report

33 new potential clients contacted LAS since we last updated this report on June 20, 2012. 23 of the 33 came in for intakes, and of that group, 21 were retained by Legal Aid and/or partner pro bono attorneys. 2 of the 33 new potential clients that came in for intakes were not retained as they were directly referred to a partner pro bono attorney due to lawsuits potentially needing to be expediently filed. 4 never came in for intake because their issue was completely unrelated to wage theft, and 6 never followed up again after initial call.

As of August 31, 2012, disposition of the 23 cases is as follows:

- **21 cases** are pending.
- **2 cases** were referred to partner attorneys and are pending.

FIGURE 1 represents all cases by source of referral.

FIGURE 2 represents all cases by disposition.

FIGURE 3 represents all cases by the industry in which the client was employed.

FIGURE 4 represents all cases by amount of alleged wage theft, as well as what, if any, compensation was attained.

FIGURE 5 represents all retained cases by nature of alleged wage violation.

FIGURE 6 represents compensated cases by amount of time taken to attain compensation.

FIGURE 7 is a final summary of data.

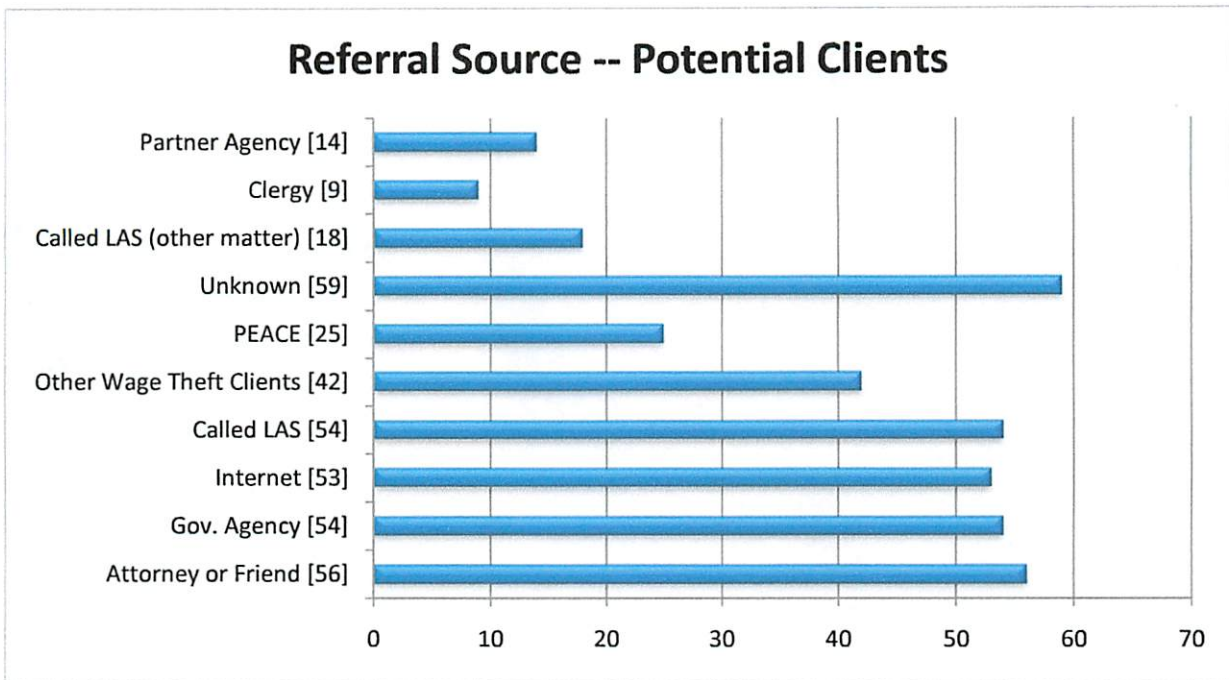
FIGURE 8 represents all case intakes by month from the start of the Project through August 31, 2012.

FIGURE 9 represents partner attorney referred cases – status update.

FIGURE 10 represents totally compensated claims – graph.

All figures are based on data collected and compiled through August 31, 2012.

FIGURE 1.1
Where did **potential clients** come from?



Other than the “Unknown” group, the next largest grouping of potential clients (15%) contacted LAS directly after learning about the Wage Theft Project through LAS efforts (attorney/friend recommendations). The next three largest categories, each representing 14% of potential clients was Government agency referrals; the Internet, and calls to LAS due to general knowledge of its existence and services provided in the community. Government agency referrals came from a variety of local, state, and federal sources, predominantly Palm Beach County Courthouse, Palm Beach County OEO, and the U.S. Department of Labor.

9% of potential clients were referred through a combination of Clergy (2%) and PEACE (7%) outreach efforts.

The fifty-nine (59) potential clients (15%) with “unknown” referral sources were classified as such because those clients did not return LAS’s phone calls and never provided referral information or their issue was not wage theft related and was therefore not applicable; these potential clients were obviously not retained.

FIGURE 1.2
Where did retained clients come from?

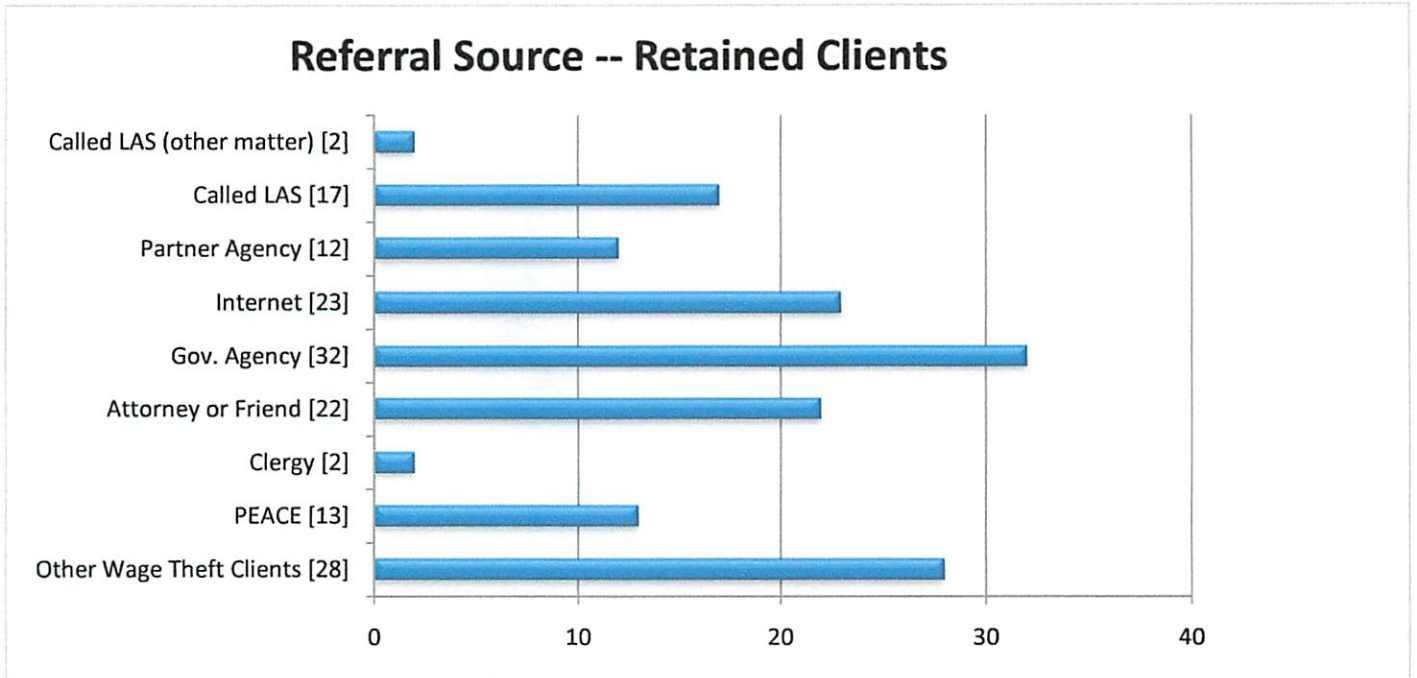
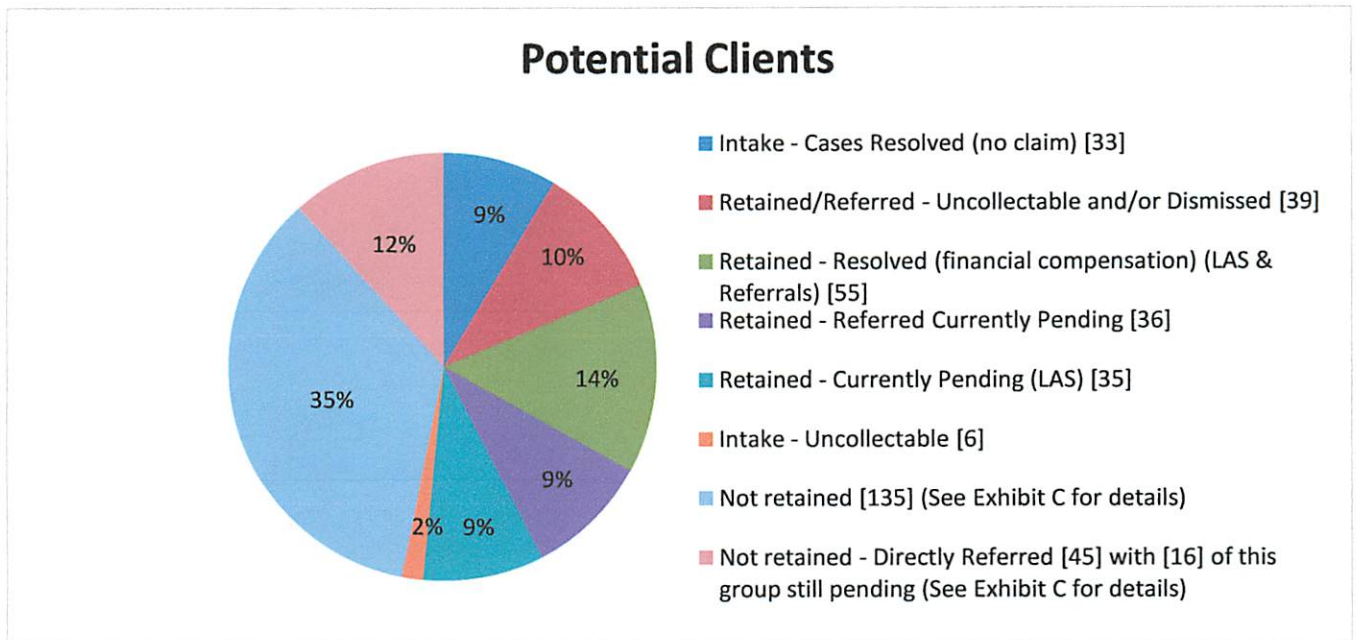


FIGURE 2

What happened to each Individual (potential client) who contacted Legal Aid?



Approximately 58% of potential clients came in for an intake and of that number, 221 total clients, 68% (151) were retained and demand letters were sent out. Typically, clients for whom demand letters failed to garner satisfactory settlements were referred to partner attorneys who specialize in wage theft.

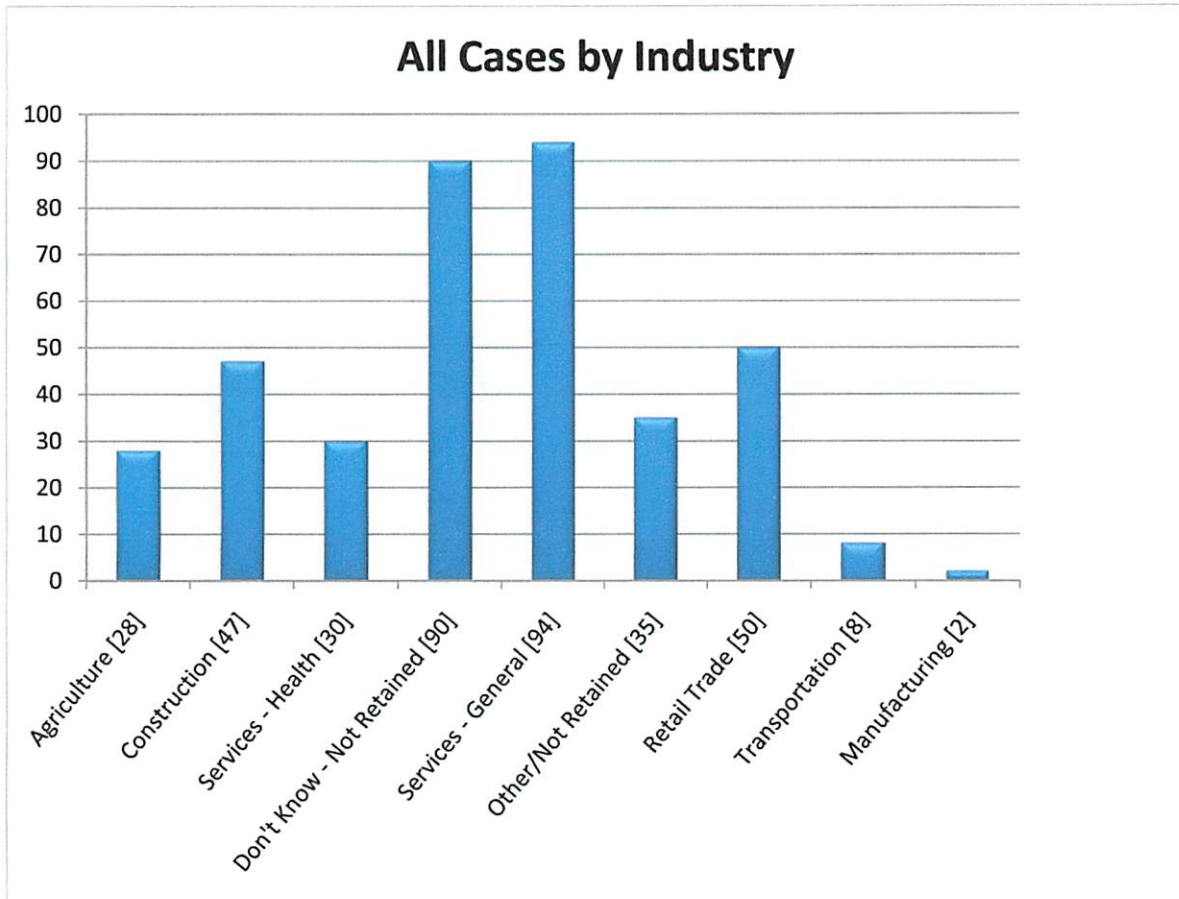
Currently 58% (87) of retained and directly referred clients' cases are pending.

To date 27 (LAS) and 28 (Pro Bono Referrals) of the clients retained (36%) have been compensated thus far, typically with settlements for full wages legally owed.

For some of the Retained/Referred-Uncollectable and/or Dismissed group, 7 cases were found to be without merit/no legal basis, 5 cases the company had gone out of business (bankrupt), 2 cases the employer did not meet enterprise coverage under the FLSA, 1 case the client disappeared during the litigation phase, 1 LAS case was closed due to irreconcilable differences with the client, 1 the company was never reached after multiple attempts, and 2 cases were previously referred to Miami-Dade Wage Theft Project and are now officially closed from the LAS Wage Theft Project data.

Those in the non-retained group included clients that called the Project but after a telephone or in-person screening process, did not meet the qualifications for a wage theft claim, e.g. independent contractors or those with non-wage related claims. Also included in this group are clients that were directly referred to pro bono attorneys due to either a conflict of interest or due to the fact that they worked for the same employer as other current wage theft project clients who had already been referred after non-response from the employer following an initial wage theft project demand letter. (See Exhibit C for details)

FIGURE 3.1
Where did individuals (potential clients) who contacted Legal Aid work?



The most represented single industry was services, divided into two categories, general and health, representing a total of 32%, which included services such as: housecleaning/housekeeping, laundry, beauty salons, recreational facilities, animal shelter/humane society, as well as home healthcare companies and medical offices. Next was retail trade (9%), and construction (12%) which also included HVAC services. Retail trade included the following: restaurants/bars, general and specialty food supermarkets.

The thirty-five (35) cases classified as “Other/Not Retained” encompassed a wide array of professions. This classification included, but was not limited to, general administration, telemarketing, housekeeping and recreational services, transportation, and real estate.

There did not appear to be any statistically significant correlation between industry and case disposition.

FIGURE 3.2
Where did retained clients work?

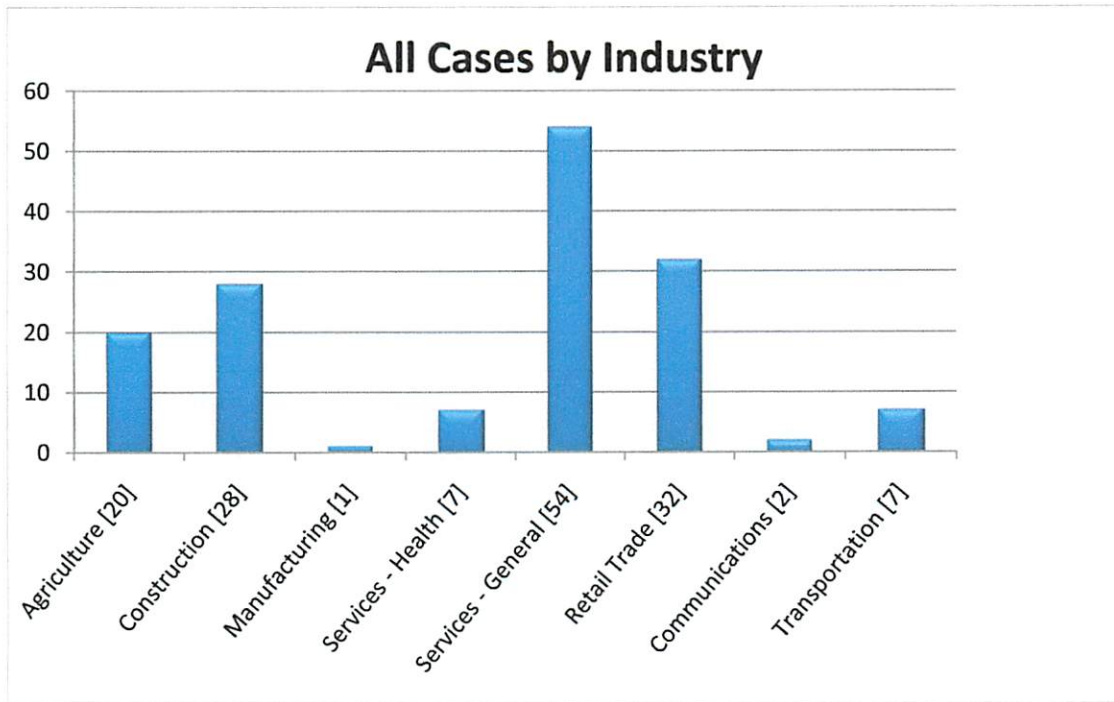


FIGURE 3.3
Where did clients work where claims were paid or resolved?

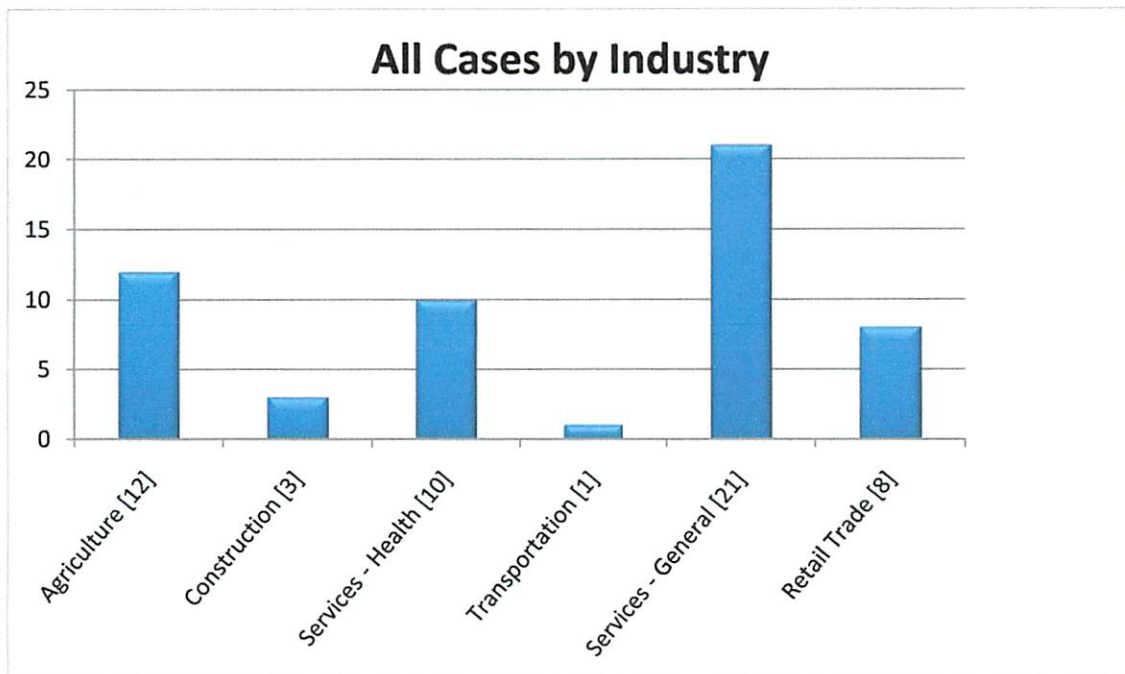


EXHIBIT A-1
 Industry Details (potential clients)
 (Grouped by Current SIC Codes)

INDUSTRY CATEGORIES	PLACES OF EMPLOYMENT
Agriculture Division A Major Group 071-078	2 Farms (Fruits and Vegetables) 1 Fruit Market 4 Nurseries with Landscaping Services 21 Specialized Landscaping Services
Construction Division C Major Group 15-17	3 Handyman/General Repairs 4 Stone/Mason Company for Large Construction 5 Air Conditioning Companies 1 Private Residence 30 General Construction Company (including painting) 1 Granite Company 1 Tile and Flooring Company 1 Roofing 1 Electrical
Services – Health Division I Major Group 80	1 Medical Management Company (Group 80) 1 Medical Testing Company 22 Home Healthcare Companies (Group 80) 7 Medical/Dental Practitioner’s Office (Group 80)
Other/Not Retained	1 General Administration 2 Real Estate 4 Construction (general) 8 Housekeeping (services) & general services 2 Recreational Facility (services) 4 Restaurant (retail) 1 Specialty Food Store (retail) 3 Home Healthcare (services) 1 Inside Sales 1 Outside Sales 1 Aviation Management Company 7 General Services 2 Health Services 2 Transportation (trucking) 92 Don’t Know (no follow-through)
Services Division I Major Group 70-88	1 Entertainment/Games- Slots (Group 79) 3 General Administration/Nonprofit (Group 83) 4 Security Company (Group 73) 1 Equestrian Sports (Group 79) 11 Marketing/Mgt/PR and Staffing (Group 87) 2 Teacher (Educational – Group 82) 4 Beauty (Nail and Beauty Salons and Spa) (Group 72) 1 Health/Fitness (Gym) (Group 79) 2 Hotel (Group 70) 2 Laundromats (Group 72) 3 Dry Cleaner and Alterations (Group 72) 9 Housecleaning Services (Group 73) 7 Janitorial Services (Group 73) 1 Country Club (Group 79)

EXHIBIT A-1
Industry Details (potential clients)
(Grouped by Current SIC Codes)

INDUSTRY CATEGORIES	PLACES OF EMPLOYMENT
<p align="center">Services Division I Major Group 70-88</p>	<p>1 Recreational Campground (Group 70) 9 Mechanics and Auto Tinting (Group 75) 1 Parking Services 1 Attorney's Office 1 HOA Company (maintenance services) 7 Human Society/Animal Shelter (Group 86) 4 General Administration (Groups 73 and 87) 1 Road Cleaning Services (Group 73) 1 Pool Services 1 Polling Services 1 Debt Consolidation Services 1 Party Planning Services</p>
<p align="center">Retail Trade Division G Major Group 52-59</p>	<p>30 Restaurants (Group 58) 1 Specialty (Imported) Food Store(Group 54) 1 Department Store (Group 57) 2 Clothing Boutiques 1 Gold Auction Store 6 Specialty (Latin) Supermarket (Group 54) 1 General Supermarket (Group 54) 1 Retail Store (Pets) (Group 59) 2 Flower Shops 1 Mattress Company</p>
<p align="center">Transportation Division E Major Group 40-49</p>	<p>1 moving company (local) (Group 42) 6 trucking company (OTR) (Group 47) 1 Aviation Company</p>
<p align="center">Manufacturing Division D Major Group 20-39</p>	<p>1 Sign Company (Group 39) 1 Ice Cream Manufacturing Facility</p>

EXHIBIT A-2
 Industry Details (intake clients)
 (Grouped by Current SIC Codes)

INDUSTRY CATEGORIES	PLACES OF EMPLOYMENT
Agriculture Division A Major Group 071-078	1 Farm (Fruits and Vegetables) 1 Fruit Market 21 Specialized Landscaping Services
Construction Division C Major Group 15-17	3 Handyman/General Repairs 4 Stone/Mason Company for Large Construction 5 Air Conditioning Companies 1 Private Residence 22 General Construction Company (including painting) 1 Electrical 1 Granite Company 1 Tile and Flooring Company
Services – Health Division I Major Group 80	1 Medical Management Company (Group 80) 8 Home Healthcare Companies (Group 80) 7 Medical/Dental Practitioner’s Office (Group 80)
Other/Intake-Not Retained	1 General Administration (services) 2 Real Estate (Division H: Real Estate) 2 Housekeeping (services) 2 Recreational Facility (services) 1 Restaurant (retail) 1 Specialty Food Store (retail) 1 Home Healthcare (services) 1 Inside Sales (services) 1 Outside Sales (services)
Services Division I Major Group 70-88	1 Entertainment/Games- Slots (Group 79) 8 Marketing/Mgt/PR and Staffing (Group 87) 2 Communications/Sales 2 Teacher (Educational – Group 82) 1 Administrative (School – Educational – Group 82) 1 Attorney’s Office 2 General Administration/Nonprofit (Group 83) 3 Security Company (Group 73) 4 Beauty (Nail and Beauty Salons and Spa) (Group 72) 1 Health/Fitness (Gym) (Group 79) 1 Hotel (Group 70) 2 Laundromats (Group 72) 3 Dry Cleaner & Alterations (Group 72) 9 Housecleaning Services (Group 73) 7 Janitorial Services (Group 73) 1 Country Club (Group 79) 1 Road Cleaning Services (Group 73) 1 Pressure Cleaning Company 1 Party Planning + 1 Polling Services 1 Recreational Campground (Group 70) 9 Mechanic & Auto Tinting (Group 75) 1 Parking Services 1 Debt Consolidation 1 HOA (Maintenance) 7 Humane Society/Animal Shelter (Group 86)

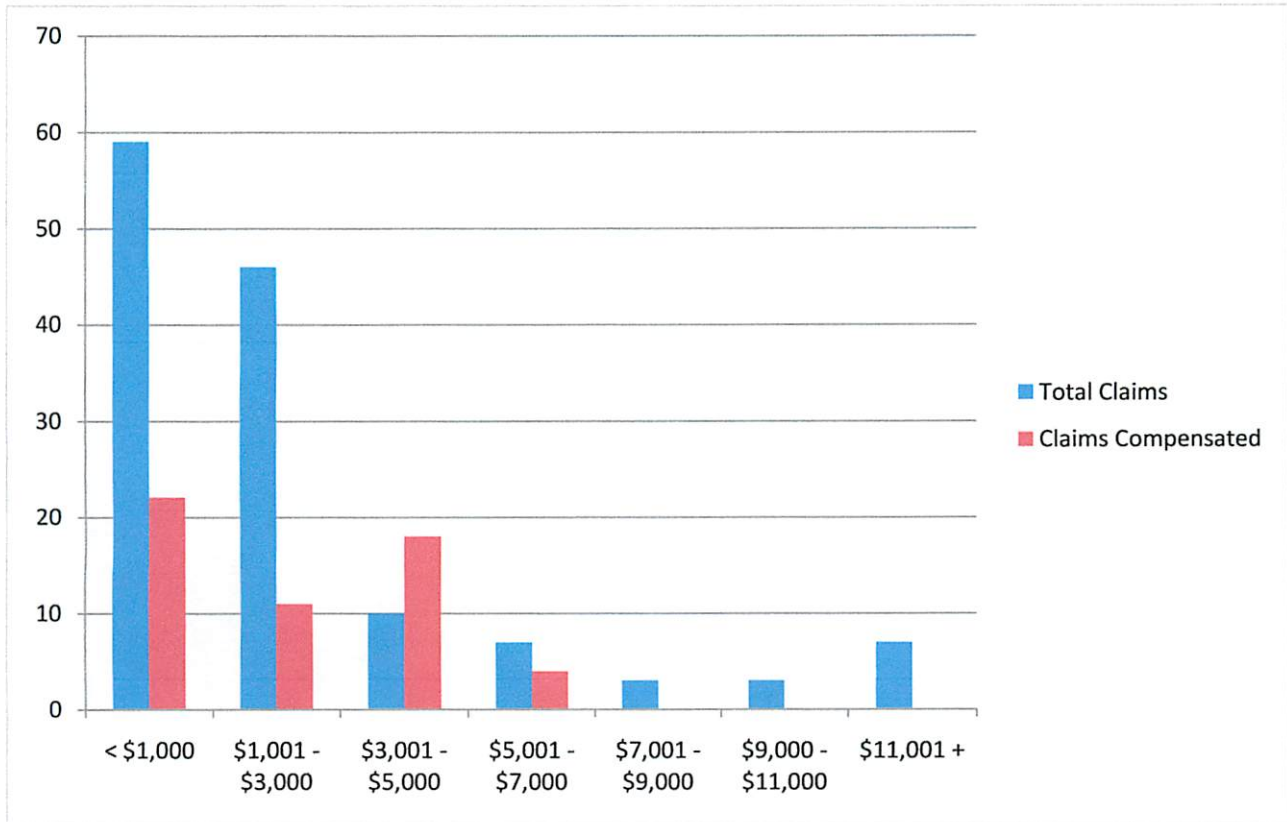
EXHIBIT A-2
 Industry Details (intake clients)
 (Grouped by Current SIC Codes)

INDUSTRY CATEGORIES	PLACES OF EMPLOYMENT
Retail Trade Division G Major Group 52-59	29 Restaurants (Group 58) 2 Specialty (Imported) Food Store(Group 54) 6 Specialty (Latin) Supermarket (Group 54) 1 Plants and Produce (Group 543) 2 Flower Shops 1 Mattress Company 1 Food Catering Company
Transportation Division E Major Group 40-49	2 moving company (local) (Group 42) 6 trucking company (OTR) (Group 47) 1 Aviation Company
Manufacturing Division D Major Group 20-39	1 Sign Company (Group 39) 1 Ice Cream Manufacturing Facility

EXHIBIT A-3
 Industry Details (resolved cases)
 (Grouped by Current SIC Codes)

INDUSTRY CATEGORIES	PLACES OF EMPLOYMENT
Agriculture Division A Major Group 071-078	12 Specialized Landscaping Services
Construction Division C Major Group 15-17	2 Air Conditioning Company 1 General Construction Company (including painting)
Services – Health Division I Major Group 80	1 Medical Office (Hearing Aid Center) (Group 80) 3 Medical Office (Mental Health) 1 Dental Office 5 Home Healthcare
Services Division I Major Group 70-88	1 Entertainment/Games- Slots (Group 79) 3 Marketing/Mgt/PR (Group 87) 1 General Administration/Nonprofit (Group 83) 2 Security Company (Group 73) 2 Laundromats (Group 72) 2 Janitorial/Cleaning Services (Group 73) 1 Road Cleaning Services (Group 73) 7 Animal Shelter 1 Beauty Salon 1 Mechanic Shop
Retail Trade Division G Major Group 52-59	3 Restaurants (Group 58) 1 Restaurant/Night Club 1 Specialty (Imported) Food Store(Group 54) 1 Retail Store (Pets) (Group 59) 1 Retail (general merchandise) Store 1 Retail (produce and plants/food) Store
Transportation (Div E)	1 Moving Company

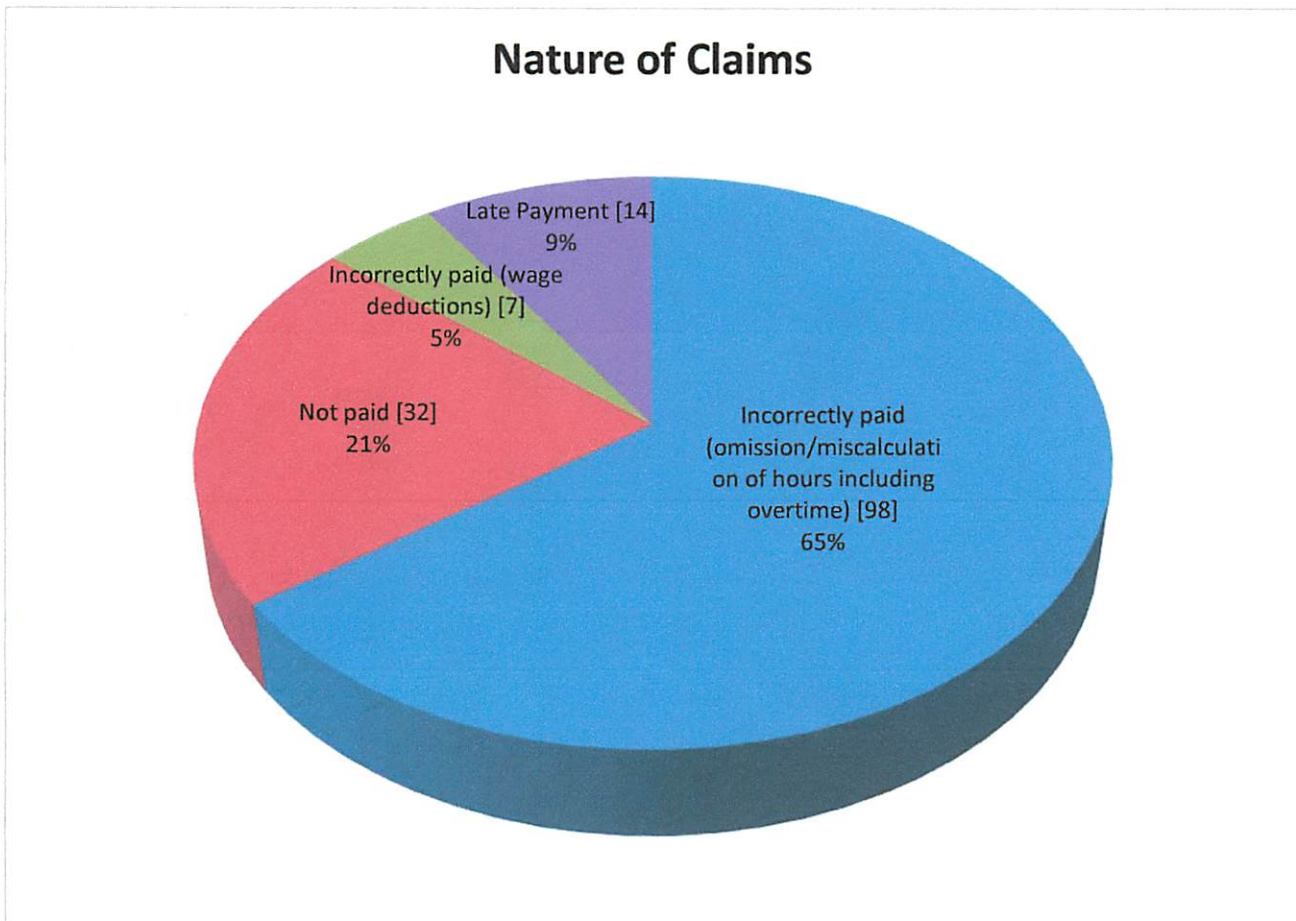
FIGURE 4
What amounts were owed to retained clients?



The above chart includes the claims of most (currently some are not included as they have yet to be determined) of the retained clients. Legal Aid has not independently verified the claimed amounts for these cases; amounts are solely based upon each individual's claims for wages. In most cases the individual's claim was based solely on verbal claims of wages owed, without any documentation corroborating either the agreement as to the amount they were to be paid or the hours/dates actually worked. Based on this information from the client, the figures representing wages owed were calculated by LAS staff in accordance with appropriate legal principals. Several clients were referred to partner attorneys before claims could be calculated by LAS and are therefore not included in the chart.

All clients who had received compensation as of August 31, 2012 had claims ranging between \$94.00 and \$5,000.00.

FIGURE 5
What issues did retained clients present?



The majority of retained clients (98) (65%) alleged that they were incorrectly paid. This category can be subdivided into (a) instances of improper wage deductions, and (b) instances of omission or miscalculation of overtime or straight-time hours. Nonpayment of wages accounted for 21% of claims (32).

All claims between June 2012 and August 2012 involved non-payment of last few paychecks including some incorrect payment of wages, including overtime, and/or late payment of wages.

See Exhibit B below for additional details regarding the nature of claims (for all intake clients).

EXHIBIT B-1

Nature of Claims Based on Intake – Additional Details for “Incorrect Payment” Claims

CATEGORY	INCORRECTLY PAID	NUMBER
	<ul style="list-style-type: none">• Correctly Paid by Contractor, but Subcontractor took cut of wages	4
	<ul style="list-style-type: none">• Not Paid Minimum Wage	5
	<ul style="list-style-type: none">• Omission or Miscalculation of Hours (<i>includes: adjustment of timesheets, off-the-clock work, disagreement about hours worked, and wage deductions</i>)	80
	<ul style="list-style-type: none">• Miscalculation of Hours – Employee Mistaken/Confused	4
	<ul style="list-style-type: none">• Not Paid Overtime	29
	<ul style="list-style-type: none">• Employer Behind in Payment of Wages	1
	<ul style="list-style-type: none">• Partially Incorrect Pay	1
	<ul style="list-style-type: none">• Commissions Unpaid	1
	<ul style="list-style-type: none">• Employer Out of Business – Last Paycheck Not Paid	26
	<ul style="list-style-type: none">• Employer did not pay out accrued vacation pay	1

EXHIBIT B-2

Nature of Claims Based on Intake - Additional Details for “Not Paid” Claims

CATEGORY	NOT PAID	NUMBER
	<ul style="list-style-type: none">• Employer Out of Business	3
	<ul style="list-style-type: none">• Employer Having Financial Difficulties	24
	<ul style="list-style-type: none">• Employee Termed/Resigned-Employer Refuses to Pay	18
	<ul style="list-style-type: none">• Employer Withholding Wages in Exchange for Return of Company Property or Completion of Paperwork	2
	<ul style="list-style-type: none">• Employer refusing to pay due to broken equipment	1
	<ul style="list-style-type: none">• Employer Refused to Pay (no reason given)	12
	<ul style="list-style-type: none">• Employer does not have records of employee working during that time-frame (part-time employee)	1
	<ul style="list-style-type: none">• Employee on FMLA – allegedly owed PTO/Sick/Vacation Time	1

FIGURE 6
How long did it take to resolve cases?

<i>Client Number (LAS)</i>	<i>Business Days Between LAS Demand Letter and Payment</i>
1	9
2	5
3	0 (paid before demand letter)
4	11
5	22
6	0 (paid before demand letter)
7	27
8	33
9	28
10	0 (paid before demand letter)
11	12
12	10
13	9
14	95
15	150
16	45
17	15
18	21
19	30
20	2
21	30
22	15
23	7
24	30 (paid before demand letter)
25	60
26	120

<i>Client Number (LAS)</i>	<i>Business Days Between LAS Demand Letter and Payment</i>
27	150
28	120
29	120
30	120
31	120
32	120
33	120
34	120
35	120
36	120
37	390
38	390
39	390
40	390
41	120
42	120
43	120
44	120
45	120
46	120
47	120
48	60
49	41
50	49
51	13
52	180
53	365
54	365
55	365

FIGURE 7
Final Summary

Number of potential clients	384
Number of clients that came in for intake	221
Number of retained clients (demand letter sent out)	151
Total of wage theft claims (not including cases referred before claims established)	\$445,947.32
Number of cases settled (LAS Clients (27) and Pro Bono Referral Clients (28))	55
Total amount recovered	\$114,511.14
Number of cases currently pending	87
Cases dismissed, determined uncollectable or closed at pro bono attorney's discretion (See Exhibit C)	54
Number of retained cases where employees were paid in cash	20
Estimate of Mailing Costs including Certified Letters	\$1,201.90

The Legal Aid Society of Palm Beach County performed intakes with 221 clients that came in with wage theft complaints between February 2, 2011 and August 31, 2012. 151 (68%) of those clients were actually retained.

55 (27 LAS cases and 28 Pro Bono Referral cases) (36%) of the 151 retained cases have resulted in clients receiving compensation from their employers. The length of time between demand letter and payment generally ranged from 2 to 390 days.

See Exhibit C-1, C-2 and C-3 for details regarding all cases that were dismissed/determined to be uncollectable/cases closed at pro bono or LAS attorney's discretion and cases where no intake was performed.

20 of the retained clients were paid in cash by their employers, representing 13%.

Of the current 87 cases pending, 35 are LAS clients and 52 have been referred to partner pro bono attorneys, and are either awaiting more client information or a response from the employer following the initial demand letter/complaint.

EXHIBIT C - 1

Cases Dismissed/Determined to be Uncollectable (Retained Clients)

CATEGORIES	NUMBER
<u>CASES DISMISSED/DETERMINED TO BE UNCOLLECTABLE</u>	
• Employer Out of Business	3
• Client Fell Under Agricultural Exemption under FLSA	1
• Employer Paid Independent Contractor Who Stole from Employees*	4
• Employer Did Not Meet Enterprise Coverage Under FLSA	2
• Client Changed Mind after Lawsuit Prepared/disappeared	4
• Client Did Not Follow Up with Pro Bono Attorneys	7
• Pro Bono Attorney closed case – chose not to proceed with litigation	2
• LAS Attorney closed case – chose not to proceed (irreconcilable differences)	1
• LAS Attorney closed case – employer not reached after multiple attempts	1
• Client changed mind	4
• No Merit (no legal basis)	7
• Company went bankrupt – Pro Bono Attorney closed case	2
• Not in Palm Beach County - referred	2

*Referred to Palm Beach County State Attorney

EXHIBIT C - 2

Cases Not Taken (Potential Clients) (no intake performed)

CATEGORIES	NUMBER
<u>CASES NOT TAKEN(No Intake)</u>	
• No Show or Follow-Up	56
• Issue Completely Unrelated to Wage Theft	51
• Independent Contractors (referred to small claims or reduced fee panel)	29
• Matter Resolved without Legal Assistance Required (after client called)	9
• Company bankrupt – referred to small claims or private attorney	3
• Not in Palm Beach County – referred	2
• Directly referred to pro bono attorneys	45

EXHIBIT C - 3

Cases Dismissed/Determined to be Uncollectable (Intake Clients)

CATEGORIES	NUMBER
<u>CASES DISMISSED/DETERMINED TO BE UNCOLLECTABLE</u>	
• Client Confused (not wage theft and/or vacation pay issue)	5
• Independent Contractors (referred to small claims)	6
• No Show to Intake/No Follow-Up	20
• Client Changed Mind/Wants to Wait	2
• Client never followed up with pro bono attorney after referral	3
• Client not Reachable (phone number not in service)	1
• Case too old to pursue – all applicable statutes of limitation for collection have expired	2
• Client lied on intake form about having retained attorney	1
• Client changed mind and hired private attorney	1

FIGURE 8.1
Case Intake Numbers by Month
February 2, 2011 through August 31, 2012

<i>Month</i>	<i>Number of Case Intakes</i>
February	7
March	11
April	4
May	8
June	9
July	10
August	21
September	21
October	24
November	6
December	5
January 2012	9
February 2012	10
March 2012	16
April 2012	7
May 2012	18
June 2012	12
July 2012	16
August 2012	7

FIGURE 8.2
Case Intake Numbers by Month
February 2, 2011 through August 31, 2012

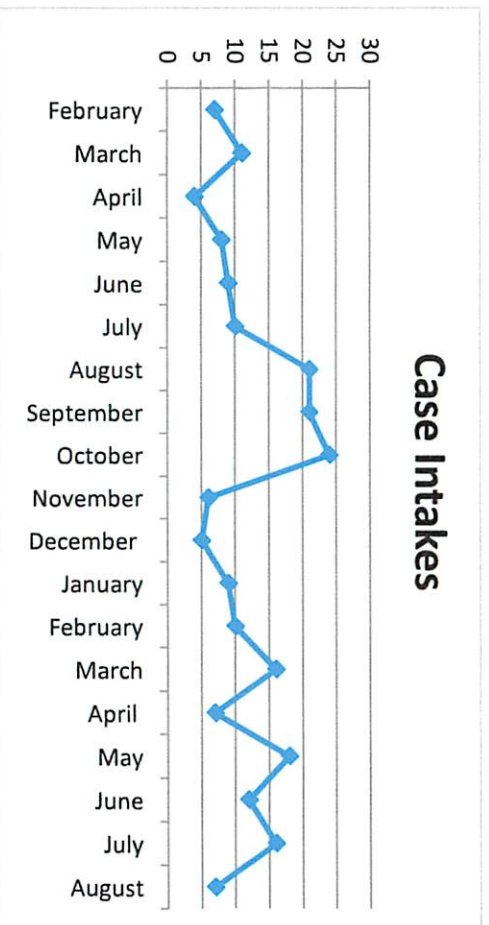
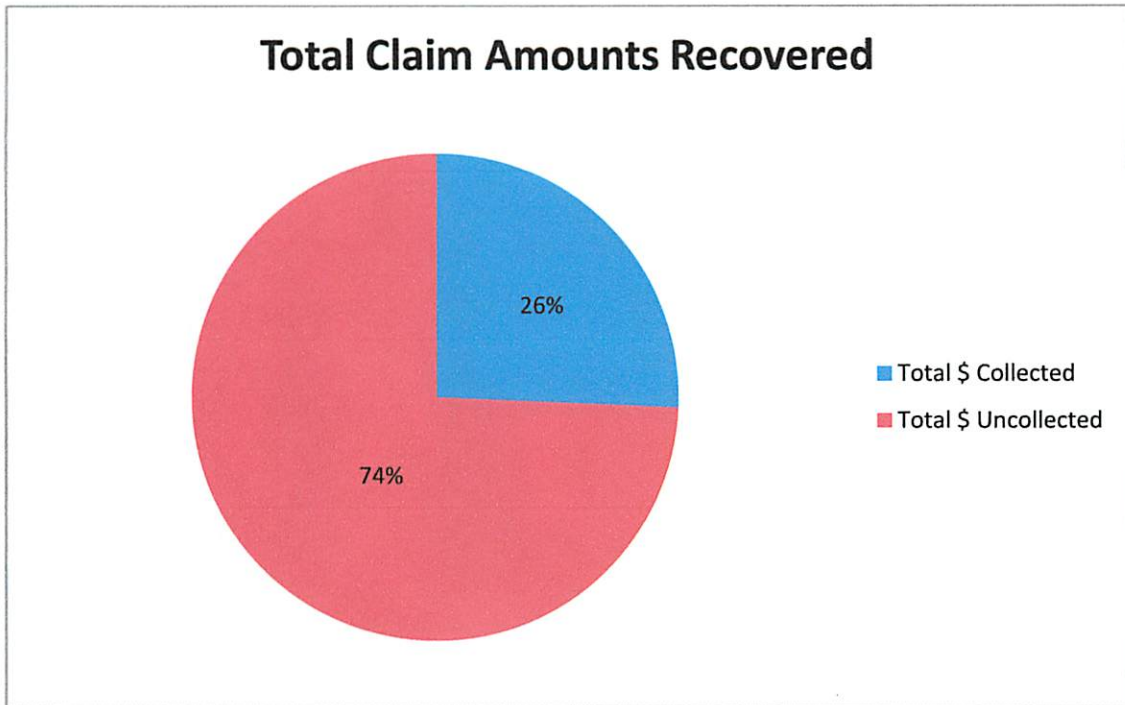


FIGURE 9
Partner (Pro Bono) Attorney Referred Cases – Status Report
February 2, 2011 through August 31, 2012

NUMBER OF CASES	STATUS
9	Closed/Uncollectable
2	Closed/Attorney decided to not litigate
3	Closed/Employer didn't meet Enterprize Coverage
9	Closed/Clients Unresponsive/Missed Intakes
6	Closed/Client Changed Mind
1	Lawsuit Filed – Pending
28	Closed/Settled
51	Currently Pending

Figure 10
Total Compensated Claims (February 2, 2011 to August 31, 2012)



A total of fifty-five (55) wage theft clients have received compensation to date, averaging approximately \$2,082.02 per client.

Item # 15⁽²⁾

ADDITIONAL MATERIAL

2:00 p.m.

Public Hearing

OCTOBER 23, 2012

SUBMITTED AT THE REQUEST OF

COMMISSIONER CHIP LaMARCA

WAGE THEFT ORDINANCES: AN UNNECESSARY AND REDUNDANT REMEDY FOR FLORIDA EMPLOYEES

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EXECUTIVE SUMMARY

Several states have recently enacted “wage theft” statutes, which specifically create a cause of action in court for employees who are not paid wages to which they are entitled. These states include: Illinois (2010); Maryland (2011); Massachusetts (2010); New Mexico (2009); New York (2010, effective 2011); and Washington (2006).¹ Local governments around the Country are now weighing in on this subject, with campaigns being conducted in cities such as New Orleans² and Los Angeles,³ and, in Florida, Palm Beach County. Last year, Miami-Dade was the first county in the United States to pass a wage theft ordinance.⁴ These local governments and many others have also passed ordinances that require payment of a minimum wage that is higher than that prescribed by federal law, or state minimum wage laws as many states require minimum wages above the federal requirement.⁵

Fairly summarized, wage theft ordinances typically provide an avenue of relief through a quasi-judicial forum to individuals claiming they have been unpaid or underpaid for work performed on their employer’s behalf. Undoubtedly, “the theft of wages and the denial of fair compensation for work completed [is] against the laws and policies of the state.”⁶ However, the enactment of wage theft ordinances by local governments is unnecessary and redundant given the extensive remedies which already exist under state and federal law. In particular, Section 448.08, Florida Statutes, though not expressly denominated as a “wage theft” law, provides the same type of relief as the laws passed by the aforementioned states and the local government ordinances that create a quasi-judicial cause of action for the inappropriate withholding of wages.

If local governments continue to pass wage theft ordinances, Florida businesses could theoretically have to comply with varying standards in up to 67 counties and over 400 cities. More realistically, if even a handful of local governments were to enact wage theft ordinances, companies doing business in those jurisdictions would face a “patchwork of regulation that will create challenges for businesses operating throughout the state,” particularly because it is “unlikely the ordinances would be identical to one another.”⁷

What is needed is uniformity of regulation, not the Balkanization of an issue as important as the remuneration one receives and the ability of a business to operate without undue regulation. Remedies already exist for underpayment or non-payment of wages in the myriad of state and federal laws and regulations which provide judicial and administrative fora through which aggrieved individuals may pursue a claim. The statutes already in existence not only provide for damages for unpaid or underpaid wages, but also authorize an award of attorney's fees and costs, thereby undercutting any argument that unpaid workers are effectively denied access to remedies designed to rectify the underpayment or non-payment of wages.

Legislation proposed this year in the Florida House of Representatives and Florida Senate - House Bill 241 and Senate Bill 982 - provides for the uniformity Florida businesses need, particularly those operating in numerous cities and/or counties. Navigating current state and federal laws is daunting enough for many Florida employers; an additional layer of regulatory burden will cause confusion, create an unnecessary burden to businesses throughout the state and, as the experience in Miami-Dade County has shown, lead to increased litigation against employers.

A Primer On Wage Theft Ordinances

Fairly summarized, wage theft is the underpayment or nonpayment of wages earned by an employee. Wage theft can occur when employees are paid below the minimum wage, not paid for overtime, forced to work off the clock, have their time cards altered, or are simply not paid for work performed for their employer.⁸ Although remedies for wage theft exist in various federal and state statutes, as well as through common law causes of action, Miami-Dade County passed a county-wide wage theft ordinance in 2010.⁹ Pursuant to the Miami-Dade Ordinance, a wage theft violation occurs when an employer fails to pay within a reasonable time any portion of wages due to an employee, based on the wage rate applicable to that employee.¹⁰ The Miami-Dade Ordinance applies to the private sector without regard to the total number of employees who work for the employer, but only provides relief to those who have been unfairly denied wages over \$60.00.¹¹ Curiously, the ordinance does not include the County as a covered “employer”; therefore, the County is not subject to the remedies set forth in the ordinance.¹²

The ordinance is enforced by Miami-Dade County’s Department of Small Businesses, which also administers and enforces the County’s “living wage” ordinance. The ordinance creates a quasi-judicial process for wage recovery administered by that Department. However, the ordinance does not provide due process protections or mechanisms designed to ensure the balance between the interests and rights of both the employee and the employer.¹³

Once a complaint is filed, the ordinance requires that the Department of Small Businesses promptly determine whether the complaint properly alleges the elements of

“wage theft,” whether at least one respondent is named therein, and whether the allegations meet the threshold dollar amount criterion. After these determinations are made, the County must serve the complaint and a written notice on the employer.¹⁴ Within fifteen days after service of the complaint on the employer, either party may request a hearing before a hearing examiner. Miami-Dade County has the sole discretion to appoint a hearing examiner it deems qualified to hear wage theft matters, but objective criteria relative to the qualifications of the hearing examiner are not established. The ordinance also does not require a hearing examiner be a lawyer, judge, or an individual with experience in employment or labor law matters.¹⁵ Additionally, if an employer is found guilty of wage theft, it must pay for the cost of administering the complaint. However, unlike cases brought in a judicial forum, costs are not imposed on employees who file groundless claims under the ordinance.¹⁶ Merely in the nine months following its enactment, from February to November 2010, Miami-Dade County’s Ordinance had generated over 420 complaints.¹⁷

Palm Beach County¹⁸ also considered passing a wage theft ordinance in February 2011, but ultimately decided to postpone consideration of the issue because of litigation filed in circuit court challenging the constitutionality of the Miami-Dade County Ordinance, as well as the introduction of H.B. 241 and S.B. 982 during the current Florida legislative session, which, as explained in more detail infra, prohibit the enactment of such ordinances.¹⁹ The ordinance proposed in Palm Beach County provides for a definition of wage theft and sets forth certain procedures and criteria for a wage theft complaint to be filed and processed with the County.²⁰ Once a claim is received by the County from an aggrieved employee, and the County determines that

the complaint is adequate pursuant to the criteria set forth in the ordinance, the employer is notified of the complaint and of its burden to file an answer to the complaint, as well as its right to request a hearing.²¹ The proposed ordinance would also require the County to facilitate conciliation between the parties before the matter is referred to a hearing. Additionally, similar to the Miami-Dade County Ordinance, the draft Palm Beach ordinance would permit the County to select a “special master” to preside over the hearing, hear testimony from any witnesses, as well as receive documents into evidence. At the conclusion of the hearing, the special master is required to issue a written order that contains findings of fact and conclusions of law.²²

As an alternative to passing the proposed wage theft ordinance, the Business Forum of Palm Beach County and the Legal Aid Society of Palm Beach County, in an effort to avoid a confrontational, litigation-based solution as the first option, have proposed that a concerted effort be made to educate employers and employees of their obligations and rights under current federal and state laws, and to inform employees how they can utilize the services provided by Legal Aid to resolve allegations of wage theft. Further, once it is clear that litigation is necessary, as part of the proposal Legal Aid has agreed to assign a staff or pro bono attorney from its roster of volunteer lawyers to represent the employee and file a complaint on his or her behalf in federal or state court, or with the Department of Labor's Wage and Hour Division, depending on the nature of the allegations.²³

In response to the Miami-Dade Ordinance and the proposed ordinance in Palm Beach County, as well as the very real potential that other localities will be persuaded to enact their own individual wage theft ordinances, H.B. 241 and S.B. 982 have been

proposed in the Florida Legislature. These bills, as currently constituted, would prohibit counties, municipalities, or political subdivisions from adopting or maintaining any law, ordinance, or rule that creates requirements, regulations, or processes for wage theft.²⁴ While the bills recognize that wage theft contravenes the laws and policies of Florida, they also recognize, quite correctly, that numerous federal and state laws already exist to protect employees from unfair wage practices.

The Current Legal and Regulatory Framework

As the introductory language to H.B. 241 and S.B. 982 make clear, there are a host of state and federal laws already in existence that provide an avenue of relief for individuals claiming they have not been fully remunerated. These statutes not only provide a judicial forum through which litigation can be commenced, but also provide for administrative mechanisms that can be invoked by individuals who, for whatever reason, do not wish to actually sue their current or former employer.²⁵ Several of these laws also provide protection against retaliation by employers who are upset by an employee's pursuit of the wages he or she feels are owed. These statutes include:

Federal Laws

1. The Fair Labor Standards Act of 1938 (establishes a national minimum wage requirement and payment of overtime);²⁶
2. The Davis-Bacon Act (requires federal contractors pay wages prevailing in the locality where they do business);²⁷
3. The MacNamara-O'Hara Service Contract Act of 1965 (requires payment of locally prevailing wages and benefits for federal construction projects; contractors and subcontractors may be subject to contract termination and debarment from future contracts for up to three years);²⁸
4. The Migrant and Seasonal Agricultural Worker Protection Act (protects farm and agricultural labors by requiring written disclosure of terms and conditions of employment, payment of all wages when due and prohibiting employers from requiring employees making purchases from specific vendors);²⁹
5. The Contract Work Hours and Safety Standards Act (requires payment of

overtime to laborers and mechanics working in excess of forty hours per week);³⁰

6. The Copeland “Anti-kickback” Act (prohibits employers from inducing employees to give up any portion of their compensation to which they are otherwise entitled).³¹

State Laws

1. Chapter 448, Florida Statutes (provides a state remedy for both minimum wage and overtime pay violations; prohibits wage rate discrimination based on sex; prohibits employers from requiring employees to purchase product from a specific vendor; and prohibits employers from retaliating against employees who seek to enforce their rights);

2. Section 448.08, Florida Statutes (requires payment of court costs and attorney’s fees to a prevailing party in any action for any unpaid wages);

3. Section 24, Article X of the State Constitution (protects against minimum wage violations for a period of four to five years, awards double damages and attorney’s fees and costs to a prevailing plaintiff; fines employers \$1,000 for each willful violation and empowers Florida’s Attorney General to bring civil suit to enforce amendment).

Remedies also exist at common law, primarily through an action for conversion. Moreover, other statutory authority not explicitly mentioned in the text of proposed H.B. 241 and S.B. 982 exists that would provide a cause of action to individuals who claim wage theft.³² Further, employees in a unionized workplace are, in most instances, able to file a grievance through contract language contained in negotiated collective bargaining agreements.

Myths Regarding The Need For Wage Theft Ordinances

Proponents of wage theft ordinances advance several arguments in favor of their enactment. Arguably, the most frequently cited argument is that, in the absence of a wage theft ordinance, many employees simply have no recourse to recover unpaid wages due to exemptions in federal and state laws, or other coverage gaps within the existing legal framework. As demonstrated above, this assertion is erroneous and fails to take into account the breadth and scope of the avenues of relief provided by federal and state statutes, as well as under common law principles, which allow aggrieved employees to pursue a claim for unpaid wages.³³

Indeed, workers throughout the United States are protected by the FLSA, which covers employers: 1) that employ employees engaged in commerce or handling goods moved in commerce; and 2) that have an annual gross volume of sales or business of at least \$500,000.³⁴ Even if an employer is not covered under these jurisdictional thresholds, the FLSA also extends to employees on an individual basis if the employee is engaged in commerce or engaged in the production of goods for commerce, a much broader jurisdictional category into which many employers fall.³⁵ Additionally, partial exemptions from the FLSA's coverage requirements do not result in a wholesale exemption of employers from minimum wage requirements, nor does it affect an employee's ability to recover wages using the state minimum wage law.

Putting aside the narrow coverage gaps of the FLSA, those who claim that, because the FLSA exempts *any* employer, wage theft ordinances are a necessity blatantly ignore the numerous other causes of action that afford relief to employees who

have not received full and fair compensation. The most significant remedy that wage theft ordinance advocates overlook, whether on purpose or out of ignorance, is the remedy provided by Section 448.08, Florida Statutes. This statutory provision, discussed in more detail above, authorizes actions for unpaid wages, contains no jurisdictional thresholds at all, and provides an award of attorney's fees and costs to the attorney of the aggrieved employee should he or she prevail. It is noteworthy that there is no measure of relief contained in the Miami-Dade Ordinance or the proposed Palm Beach County ordinance that is not already available in Section 448.08. However, even if there was, the web of laws and regulations created by federal law, as well as those that arise under state law, is more than sufficient to ensure that unpaid and underpaid employees receive all the wages to which they are legally entitled.

The exponential increase in claims filed under the FLSA in the last decade also belies the argument of wage theft advocates that employees who are wrongfully denied their pay do not have sufficient recourse to obtain the monies they are owed. Indeed, the explosion of FLSA claims is, among other things, evidence that private sector attorneys representing employees have entered the marketplace and are not at all reluctant to file suit on behalf of individuals who are not paid wages owed to them. For example, from 2000 to 2008, FLSA claims filed in United States District Courts increased threefold, climbing from 1,935 claims filed in 2000 to 5,393 in 2008.³⁶ In Florida, FLSA claims filed in the United States District Court, Southern District of Florida, which includes both Miami-Dade and Palm Beach counties, were the highest in the country at 1,609, with the Middle District of Florida coming in a close second with

1,419 FLSA claims filed.³⁷ As such, it is clear that the employees' bar in Florida is not shy about pursuing claims against employers for unpaid and underpaid wages.

Moreover, between August 2006 and August 2010, there were approximately 3,697 overtime and minimum wage violations reported in Miami-Dade and Palm Beach counties. Of these, 3,350 were documented by the Wage and Hour Division of the United States Department of Labor.³⁸ Of course, these statistics solely encompass FLSA-based claims and do not include those claims not reported but enforced through demand letters, or those claims for unpaid wages made under the host of other laws that exist. At the end of the day, any argument that inadequate procedures presently exist or that employees are not availing themselves of the remedies that are in place is simply not borne out by the realities of the litigation and regulatory landscape.

Another oft-cited argument for the enactment of wage theft ordinances is that they will give broader protections than existing state and federal laws. This argument is, to put it mildly, mistaken and misguided. For example, the Miami-Dade Ordinance only provides relief to those workers that have been denied wages over \$60.00.³⁹ Therefore, if an employee works a full eight-hour day at minimum wage and is not compensated, he or she would not be able to seek recovery for wage theft under the Miami-Dade Ordinance. This is not the case under federal and state laws, or under Florida common law, which have no such minimum dollar threshold. Furthermore, these federal and state laws apply equally to *all* Florida residents, regardless of their county of residence, or work or legal status. Accordingly, employees who happen to work in a particular county do not enjoy the rights provided to other employees simply on the basis of geography.

Furthermore, although proponents also assert that wage theft ordinances provide a faster and simpler process to resolve wage claims than filing suit in court, the labyrinth through which an employee must travel at the County level is anything but streamlined, and is certainly no less cumbersome than the non-litigation, enforcement mechanism provided to employees by the United States Department of Labor. Among other things, the Department of Labor allows employees to file complaints online by using a simple, straightforward form, available in several languages, that initiates a review by a federal agency that, unlike Miami-Dade's Department of Small Businesses, has a well-developed expertise and singular focus with respect to labor and employment law issues generally, and wage issues specifically. In contrast, the Miami-Dade County Ordinance requires the complaint to be filed in person with the County, and the complainant to be present at all stages of the process, thereby making the process more cumbersome for aggrieved individuals than the processes already established by the United States Department of Labor.⁴⁰

Finally, advocates of wage theft ordinances assert that they are necessary to help primarily low-income individuals who tend to be more impacted by "wage theft." However, in addition to the redundancy of such ordinances, the *adverse* effect that these ordinances can have on low-income individuals is palpable. First, employers who are required to litigate under both state and federal laws, as well as defend claims under a wage theft ordinance, may pass the cost of this increased regulation onto the consumers, which often impacts low-income individuals first.⁴¹ Furthermore, commentators have opined that establishing a new quasi-judicial framework at the city or county level will likely cost a local government far more than alternative subsidies that

target only low-income families, which could lead to the potential for higher taxes or reductions in government services.⁴² In reality, creating additional and different regulations throughout Florida's cities and counties will create burdens and expenses for Florida employers, which may potentially dissuade companies from locating their businesses in the state, as well as for local governments who are already facing serious budgetary issues. The addition of a quasi-judicial mechanism for resolving wage theft claims at the local level means real costs which local governments can hardly afford.

Legal Challenges To Wage Theft Ordinances

On August 4, 2010, the Florida Retail Foundation (“FRF”) filed a five-count complaint in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, seeking to declare the Miami-Dade Ordinance unconstitutional, and requesting an injunction prohibiting its enforcement.⁴³ FRF asserts that the County’s ordinance violates those provisions of the Florida Constitution guaranteeing the right to due process, requiring separation of powers, securing the right to a jury trial, and prohibiting local governments from creating their own courts. FRF also argues that the ordinance is preempted by the FLSA and Florida’s minimum wage laws. According to the docket in the case, Miami-Dade County has filed a motion to dismiss the lawsuit, which has not yet been heard. The case remains pending as of the submission of this paper.

Similar litigation regarding intrusion by local governments into the wage arena has taken place in other parts of the Country. For example, in New Orleans opponents challenged the constitutionality of a municipal minimum wage ordinance that imposed a higher minimum wage than that established by federal law. The Louisiana Supreme Court, in New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002), grappled with concepts such as: the breadth and scope of home rule; the extent to which local wage ordinances generate statewide effects that preclude local regulation; the ability of municipalities to regulate private activity, and the appropriate role of the court systems in engaging those issues. The majority opinion of the deeply divided court held that the State Constitution placed wage regulation beyond the reach of municipal authority. The Court also held that the statute prohibiting local government

subdivisions from establishing minimum wage rate was a legitimate exercise of the state's police power.

An Unnecessary And Redundant Remedy

Despite statements to the contrary by proponents of wage theft ordinances, a legal framework currently exists for claims of "wage theft." In Florida specifically, Section 448.08, Florida Statutes, provides the most effective cause of action for unpaid wages.⁴⁴ Importantly, Section 448.08, like several of the previously referenced state and federal statutes, includes a fee-shifting provision that provides for an award of attorney's fees for the prevailing employee.⁴⁵ These fee-shifting provisions are designed to ensure private enforcement of wage claims, much like actions brought under various federal civil rights statutes. Irrespective of a party's intentions, as the experience of federal courts in Florida relative to FLSA claims has borne out, these fee shifting provisions incentivize plaintiff's counsel to file suits for unpaid wages. Allowing additional causes of action to exist will serve to increase litigation, creating a lucrative cottage industry for the employees' bar. Indeed, the deluge of quasi-judicial litigation that has resulted from passage of the Miami-Dade Ordinance is all the proof one needs to see the effect newly passed laws and regulations have on the Florida's employers: a swarm of litigation, arguably much of it unsupported.

Administrative mechanisms also exist through the United States Department of Labor and other governmental entities to investigate and resolve allegations of unpaid wages short of litigation. Many non-governmental entities also exist to assist workers with wage theft claims, such as the Migrant Worker Project and Florida Immigrant Advocacy Coalition, as well as to provide legal representation when pursuing their claims in court, such as Legal Aid in Palm Beach County. Furthermore, in contrast to the currently existing legal framework, the Miami-Dade County Ordinance, as well as

the proposed ordinance in Palm Beach County, do not contain an anti-retaliation provision that protects employees from being adversely affected in their employment if they were to file a wage theft claim.

The enactment of wage theft ordinances also poses challenges to businesses by increasing regulations, which may cause them to take their business to local governments that have not enacted such laws.⁴⁶ Furthermore, with the potential for all local governments across the state to enact their own wage theft ordinances, businesses employing workers in multiple cities and/or counties could be required to comply with a distinct local ordinance for each of its locations, as well as existing federal and state laws. For larger employers especially, this scenario would be unworkable as they would be required to comply with a hodgepodge of different ordinances, solely based on geography. In practical application, these same statewide employers would face the possibility of discrimination litigation – including lawsuits alleging disparity in pay because of a protected characteristic – because different wages may be paid to different employees simply because of geography. While compliance with a wage theft ordinance might serve as a legitimate, non-discriminatory reason for the difference in pay, the reality is that for most employers, achieving a victory based upon that defense would come only after expending tens of thousands of dollars securing an order granting summary judgment. Similarly, for statewide businesses that are unionized, having to administer a collective bargaining agreement with a variety of wage levels would be cumbersome at best.

Imposition of yet another regulation, and the creation of a quasi-judicial process within the county or city, also threatens to greatly increase costs to local governments

based on enforcement costs and give those governments "a financial interest in finding employers guilty of wage theft."⁴⁷ Once again, in the span of only a few months following the enactment of the ordinance in Miami-Dade County, hundreds of claims were filed, necessarily requiring the County to have the resources to deal with these cases.

While perhaps unnecessary in other areas of law, on matters of wages, uniformity of the law is essential. Additionally, a less decentralized process would ensure that all individuals are treated equally, provided equivalent remedies for the same violations of law, and provide clarity as to the mechanisms available for wage theft claims.

Two other states, South Carolina and Louisiana, have already passed statutes similar to the proposed bills in the Florida Legislature which prohibit governmental subdivisions from enacting minimum wage rates.⁴⁸ Florida should similarly enact such a statute to preempt the enactment of wage ordinances, such as the wage theft ordinance passed in Miami-Dade County, to assure uniformity of wage laws across the state.

Conclusion

The Florida Legislature should enact S.B. 982 or H.B. 241 to make wage recovery laws uniform throughout the state. Workers and businesses will benefit by having a more uniform mechanism through which employees are able to pursue unpaid wage claims. Moreover, the enactment of wage theft ordinances such as those in Miami-Dade and Palm Beach counties is redundant and unnecessary given the existing framework of wage laws at both the federal and state level. Although the theft of wages is a significant issue for which aggrieved workers should be provided a remedy, a multitude of counties and cities enacting different wage theft ordinances would result in confusion and unnecessarily increase litigation. As an alternative, local governments should consider the collaborative approach proposed by stakeholders in Palm Beach County, which is designed to educate employers and workers on the existing remedies for wage claims.

¹ Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. 115/1 *et seq.* (2010); Md. Code Ann., Lab. & Empl. § 3-501(c) (2010); N.M. Stat. Ann. § 50-4-26 (West 1978) (passed 2009); "Wage Theft Prevention Act," N.Y. Lab. Law § 219-c (McKinney 2011); Wash. Rev. Code. Ann. § 49.52.070 (West 2010).

² David Hammer, "New Orleans Day Laborers Want Wage Theft Made a Crime." *The Times-Picayune*, June 12, 2009. Available at: http://www.nola.com/news/index.ssf/2009/06/new_orleans_day_laborers_want.html.

³ "Activists Push City Council to Punish LA Wage Theft," CBS Los Angeles, Nov. 18, 2010. Available at: <http://losangeles.cbslocal.com/2010/11/18/activists-push-city-council-to-punish-la-wage-theft/#>

⁴ Ord. No. 10-16, §1, Miami-Dade County Florida (Feb. 18, 2010), codified at Ch. 22, Code, Miami Dade County, Fla. (A copy of the Miami-Dade ordinance is included in the attached Appendix at Tab A; the proposed ordinance from Palm Beach County may be found at Tab B).

⁵ See list of local governments with ordinances impacting wage related issues (Appendix at Tab C).

⁶ H.B. 241, 2011 Leg., Reg. Sess. (Fla. 2011). See also S.B. 982, 2011 Leg., Reg. Sess. (Fla. 2011). (The current versions of these bills as of March 4, 2011 are included in the Appendix at Tab D).

⁷ Florida Retail Federation, Q & A on Wage Theft Ordinances, at p. 2 (Appendix at Tab E).

⁸ Florida Retail Federation, Q & A on Wage Theft Ordinances, at p. 1.

⁹ See, e.g., Complaint for Declaratory and Injunctive Relief at ¶11, Fla. Retail Federation, Inc. v. Miami-Dade County, Fla., Case No. 10-42326CA30 (11th Jud. Cir. August 4, 2010); other municipalities with ongoing campaigns advocating the enactment of similar wage theft ordinances include Los Angeles and New Orleans. (Appendix at Tab F).

¹⁰ Ord. No. 10-16, §1, Miami-Dade County Florida (Feb. 18, 2010).

¹¹ Id.

¹² Id.

¹³ Id.; Florida Retail Federation, Wage Theft Summary, at p. 1 (Appendix at Tab G).

¹⁴ Ord. No. 10-16, §1, Miami-Dade County Florida (Feb. 18, 2010).

¹⁵ Id.

¹⁶ Id.

¹⁷ Nirvi Shah, "In South Florida Wage Theft at All Levels," *The Miami Herald*, Nov. 16, 2010. Available at: <http://www.miamiherald.com/2010/11/16/v-print/1928207/in-south-florida-wage-theft-at.html>.

¹⁸ The authors wish to thank Christine D Hanley of Christine D. Hanley & Associates, P.A., for providing specific information and insight regarding the proposed ordinance in Palm Beach County.

¹⁹ Jennifer Sorentrue, "Palm Beach County Commission Postpones Vote on Wage Theft Law but Directs Staff to Study and Report," *The Palm Beach Post News*, February 1, 2011. Available at: http://www.palmbeachpost.com/news/palm-beach-county-commission-postpones-vote-on-wage-1224613.html?cxtype=rss_news.

²⁰ See Proposed Ordinance No. 2011, Palm Beach County Board of Commissioners (Tab B).

²¹ Id.; Palm Beach County Board of County Commissioners, Agenda Item Summary (Appendix at Tab H).

²² Id.

²³ Id.; see also, November 24, 2010 letter from the Business forum of Palm Beach County to Assistant County Attorney, Ernie Chasseur (Appendix at Tab I).

²⁴ See H.B. 241, 2011 Leg., Reg. Sess. (Fla. 2011). See also S.B. 982, 2011 Leg., Reg. Sess. (Fla. 2011) (Tab D).

²⁵ For example, aggrieved individuals are able to avail themselves of complaint procedures available through the United States Department of Labor. See, e.g., www.dol.gov/oasam/programs/crc/internal-enforc-complaints.htm.

²⁶ 29 U.S.C. §§ 201 *et seq.*

²⁷ 40 U.S.C. §§ 276a *et seq.*

²⁸ 41 U.S.C. § 351.

²⁹ 29 U.S.C. §§ 1801 *et. seq.*

³⁰ 40 U.S.C. §§ 3701-3708.

³¹ Federal anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, would also provide a remedy to employees who allege that the failure to pay wages is based upon a protected characteristic (i.e., race, sex, national origin, color, religion, age, disability, etc.).

³² See, Florida's Civil Theft Statute, Section 772.11, Florida Statutes, which, in addition to providing prevailing party attorney's fees and costs, allows for an award of "threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of \$200..." §772.11(1), Fla. Stat. (2010).

³³ November 24, 2010 letter from the Business forum of Palm Beach County to Assistant County Attorney, Ernie Chasseur (Tab I).

³⁴ 29 U.S.C. § 207(a)(1); 29 U.S.C. § 203(s)(1)(A).

³⁵ 29 U.S.C. § 207(a)(1). Furthermore, even if a worker is not covered by the FLSA, the Department of Labor administers and enforces more than 180 federal laws, such as the Davis-Bacon Act and Copeland Act which cover many workplace activities for about 10 million employers and 125 million workers. See U.S. Dept. of Labor website. Found at: www.dol.gov.

³⁶ U.S. District Courts – Civil Cases Filed, by Nature of Suit, Table 4.4.

³⁷ Administrative Office of the United States Courts.

³⁸ Cynthia S. Hernandez, *Wage Theft in Florida: A Real Problem with Real Solutions*, Research Institute on Social and Economic Policy, Florida Wage Theft Task Force, Nov. 16, 2010.

³⁹ Ord. No. 10-16, §1, Miami-Dade County Florida (Feb. 18, 2010).

⁴⁰ Id.

⁴¹ David Macpherson, *The Employment Impact of a Comprehensive Living Wage Law, Evidence from Florida*, Employment Policies Institute (June 2002) (commenting on Stanford University study finding that only 1 of 4 poor households would see any benefit from a minimum wage ordinance, the other 3 would end up paying higher prices); David Neumark & William Wascher, *Minimum Wages and Low-wage Workers: How Well Does Reality Match the Rhetoric?*, 92 Minn. L. Rev. 1296 (2008) (virtually no evidence exists showing that minimum wages reduce proportion of families with incomes near or below the poverty line; instead, may adversely affect low income families).

⁴² Macpherson at p. 3-4.

⁴³ Fla. Retail Federation, Inc. v. Miami-Dade County, Fla., Case No. 10-42326CA30 (11th Jud. Cir. August 4, 2010).

⁴⁴ Hingson v. MMI of Fla, Inc., 8 So. 3d 398, 400 (2d DCA 2009), citing §448.08, Fla. Stat. (2010).

⁴⁵ §448.08, Fla. Stat. (2010).

⁴⁶ Clayton P. Gillette, *Local Wage Redistribution, Living Wage Ordinances, and Judicial Intervention*, Northwestern Univ. Law Review (Spring 2007).

⁴⁷ Florida Retail Federation, Wage Theft Summary, at p. 1 (Tab G).

⁴⁸ S.C. Code Ann. section 6-1-130 (2009); La. Rev. Stat. Ann. section 23:642(B) (West 2009).