

## **Miami-Dade County, Florida Refines Its Aggressive Employer Wage Theft Ordinance**

**June 15, 2010**

Miami-Dade County, Florida has amended its recently enacted Wage Theft Ordinance to redefine the “reasonable time” for the payment of wages. The ordinance now requires employers to pay wages to employees within 14 days of the work completed, unless the employer has established by policy or practice a pay schedule whereby employees earn and are paid wages according to regularly recurring pay periods.

The Wage Theft Ordinance (No.10-16), which became effective on March 1 and is believed to be the first county law of its nature in the country, was amended by a final vote of 11-0 on June 3 by the Board of County Commissioners. The Amendment (No. 10-37) became effective June 14.

### **Policy of the Wage Theft Ordinance**

The stated policy of the Wage Theft Ordinance is to “eliminate and prevent wage theft,” to promote “business and economic development through the elimination of unfair economic competition by unscrupulous businesses that do not pay or that underpay their employees,” and to relieve “the burden on the public that subsidize unscrupulous employers whose employees are forced to rely on public assistance because of unpaid or underpaid wages.” An employer that is found to have violated the Wage Theft Ordinance by unlawfully failing to pay any portion of wages due will have to pay back pay and liquidated damages to the employee in addition to administrative fees and hearing costs.

### **Coverage of the Wage Theft Ordinance**

The Wage Theft Ordinance applies to any employer that fails to pay any portion of wages due to an employee, within a reasonable time from the date on which the employee performed the work. The term “employer” includes “any person who, acting individually or as an officer, agent, or employee of another person, acts directly or indirectly in the interest of a person or entity employing an employee.” Thus, individuals can be liable under the Wage Theft Ordinance. The Wage Theft Ordinance excludes limited categories of employers, namely certain government entities and Indian tribes.

The term “employee” is defined as “a natural person who performs work within the geographic boundaries of Miami-Dade County,” but excludes bona fide independent contractors. The term “independent contractor” has the “same meaning as in the Internal Revenue Code and implementing federal regulations.”

The recent amendment broadens the definition of reasonable time for payment of wages. As amended, employers that have established by either policy or practice a pay schedule with regularly recurring pay periods may continue to allow such pay schedules to govern. But employers without a consistent, recurring pay schedule in place will be bound by the 14-calendar-day time frame to pay wages.

Pay schedules are simply defined as situations in which “employees earn and are consistently paid wages according to regularly recurring pay periods.” Employers who, for example, regularly disperse wages on a biweekly or monthly basis are not confined to the strict 14-day time frame for payment of wages. Originally, the employer and employee were permitted to modify the 14-day time frame by an express agreement to extend the time, not to exceed 30 days after the date on which the work was performed. The amendment, however, eliminates the language permitting the extension of time by express agreement.

The ordinance’s definition of “wage rate” specifically states: “Wage rate shall mean any form of monetary compensation which the employee agreed to accept in exchange for performing work for the employer, whether daily, hourly, or by piece but in all cases shall be equal to no less than the highest applicable rate established by operation of any federal, state or local law.” This definition does not identify “salary” as a form of payment of wages. As a result, it is unclear if the ordinance applies to salaried employees who are not paid in accordance with a consistent, recurring pay schedule. Moreover, because it addresses wage rates only, it is not clear whether the ordinance applies to other forms of compensation, such as bonuses, commissions, severance, and vacation pay.

### **Policy of Promoting Conciliation**

The Wage Theft Ordinance establishes a procedure designed to encourage conciliation of wage theft disputes. If a complaint is filed, the County will work with the parties to attempt to reconcile the matter before the dispute is referred to a hearing examiner. In the event a party believes the conciliation agreement has been breached, the party may seek enforcement of the agreement by filing a civil action in a court of competent jurisdiction.

### **Procedure for Filing Wage Theft Complaints**

The Wage Theft Ordinance provides a procedure for filing and adjudicating wage theft claims. An aggrieved person may file a complaint with the County if the amount of unpaid wages meets a threshold amount of \$60. All complaints must be filed no later than one year after the work was performed and not properly compensated, except in the cases of ongoing violations in which the County’s enforcement is limited only by the applicable statutes of limitations.

If the County determines that the complaint alleges wage theft and meets the threshold amount, it will serve the complaint and written notice on the accused employer. A party may then request a hearing before a hearing examiner appointed by the County within 15 days after service. Upon motion by either party, discovery is permitted as provided by the Florida Rules of Civil Procedure.

The burden of proof by a preponderance of the evidence rests on the complaining employee. However, when an employer has an obligation to keep records of compensation paid and hours worked, the burden of such imprecision falls on the employer. The employer’s burden is triggered when the records are imprecise, inadequate, or nonexistent, and the complaining employee presents sufficient evidence upon which a reasonable inference can be drawn as to the work done and unpaid compensation. In that case, the employer must provide evidence of the amount of work performed or other evidence to negate the

inference favoring the employee, or the hearing examiner may award approximate damages based on the employee's evidence. The hearing examiner's decision is subject to appeal in a court of competent jurisdiction.

The hearing examiner has the authority to consolidate two or more complaints "where such complaints name the same respondent(s) and involve sufficiently similar allegations of fact to justify consolidation." If, however, a case is filed by the employee in another court, or if he or she opts in to another case based on the same allegations, the case before the hearing examiner will be dismissed.

## **Damages and Enforcement**

Once a hearing examiner finds a wage theft violation, the employer must pay to the complainant employee an amount equal to three times the amount of back wages, which includes "liquidated damages as compensation for the economic losses suffered by reason of the employee not receiving his or her wage at the time it was due." The employer must also pay to the Board of County Commissioners an assessment of costs in an amount not to exceed actual administrative processing costs, and costs of the hearing. If an employer fails to comply with the hearing examiner's order, the County may extend the time to comply up to 45 days upon request of the employer, if an extension has not previously been granted. Thereafter, the hearing examiner shall order the employer to pay the accrual of interest on the delinquent damage award and the cost assessment of the hearing.

## **Next Steps for Employers**

Even with the recent amendment, the Wage Theft Ordinance still exposes many employers in Miami-Dade County to liability, and employers should take necessary steps to comply. When possible, employers should adopt a policy or practice of paying employees on a consistent, recurring basis. In the event that employees are not paid on a regular pay schedule, employers should adjust their practices to conform to the requirement to pay employees within 14 days of the performance of the work. As usual, employers should continue to meet their statutory and/or regulatory obligations to keep adequate records.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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