



Legal Alert: Miami-Dade County Enacts "Wage Theft" Ordinance

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Miami-Dade has become the first county in the nation to adopt a countywide wage theft law, although it likely will not be the last. The Ordinance, which became effective on March 1, 2010, applies to private sector employees and employers, prohibits wage theft, and provides administrative procedures and private causes of action. An employer found to be in violation of the wage theft Ordinance will be required to pay the actual administrative processing and hearing costs as well as restitution to the employee, which would include back wages owed as well as liquidated damages of double that amount and possibly treble damages. What this means for employers in Miami-Dade County is that a simple oversight or misunderstanding regarding which employees can be classified as exempt or as independent contractors under the Fair Labor Standards Act ("FLSA"), may now lead to a finding that the employer has committed "wage theft." According to a report from the Office of Commission Auditor, which accompanied the Ordinance, for the past five years the Southern District of Florida (the federal trial court with jurisdiction over Miami-Dade County) has had a disproportionately high number of FLSA cases filed. Nevertheless, the summary that accompanied the Ordinance reflects the Commission's belief that the requirement for employees to opt-in to a FLSA class action lawsuit hampers their ability to seek remedial action in courts. Thus, the summary states that the Ordinance "is intended to be a tool to root out violations of U.S. labor laws occurring in Miami-Dade County." According to the Ordinance, a "wage theft violation" occurs when an employer fails to pay any portion of the wages due to an employee, according to the wage rate applicable to the employee, within a reasonable time from the date on which that employee performed the work for which the wages are compensation. The Ordinance defines reasonable time as no later than 14 calendar days from the date the work was performed; however, this time may be modified to no longer than 30 days by an express agreement between the employer and employee that has been reduced to writing and signed by the employee. The Ordinance defines wage rate as "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." Thus, this provision could be interpreted more broadly than the employee's "regular rate" under the FLSA. Once an employee brings a timely claim that wage theft has occurred, the accused employer will have to defend itself before a county-appointed hearing examiner. The Ordinance does not set out requirements or qualifications a person must possess to be appointed a hearing examiner; thus, it is possible the hearing examiner may not be a judge or attorney or have a background in labor and employment law. The mechanics of the hearing as set out in the Ordinance will be like a trial, including discovery in accordance with the Florida Rules of Civil Procedure. Employers will have to be very careful with this process because an

employee can choose at any time to stop the proceedings under the Ordinance and file a civil action in State or Federal Court (for violation of state or federal wage/hour laws, which would likely be the basis for the wage theft allegation). Also, should a hearing examiner find the employer in violation of the wage theft Ordinance, the hearing examiner can award damages of up to three times the amount of the unpaid wages.

Employers' Bottom Line: Employers in Miami-Dade County need to be more vigilant than ever to ensure that employees are properly classified and promptly paid for all work performed. A stringent review of employees currently classified as exempt or as independent contractors, conducted at the direction and supervision of experienced employment law counsel, is recommended to ensure complete compliance with the FLSA. Employers should also set out in writing when wages will be paid and have the employees sign this written timeline of payments. (Note that the Ordinance only permits the employer to extend the time for payment of wages to up to 30 days from the date the work is performed and then only with the written agreement of the employee.) Additionally, employers will need to review their time keeping policies and make sure that accurate time records are being kept and that all time worked by employees is being recorded. While most employers only keep time records for nonexempt employees, it may be prudent to require exempt employees to do so as well. If a hearing officer determines that an employee is improperly classified as exempt, the employer will have the burden of proving actual time worked. Without accurate records, the employee can estimate the time and the hearing officer will base the wage calculation on that estimated time. If you have any questions regarding this Ordinance or other labor or employment law issues, please contact the author of this Alert, Michelle Tatum, mtatum@fordharrison.com, 904-357-2018 or the Ford & Harrison attorney with whom you usually work.