

**STATE and LOCAL
FISCAL IMPACT**

Drafting Number: LLS 12-0811

Prime Sponsor(s): Rep. Singer

Date: February 27, 2012

Bill Status: House Judiciary

Fiscal Analyst: Alex Schatz (303-866-4375)

TITLE: CONCERNING THE "INCOME PROTECTION ACT".

Fiscal Impact Summary	FY 2012-2013	FY 2013-2014
State Revenue		
Cash Funds		
Fines Collection Cash Fund	less than \$5,000	less than \$5,000
State Expenditures		
General Fund		\$20,706
FTE Position Change		
Effective Date: August 8, 2012, if the General Assembly adjourns on May 9, 2012, as scheduled, and no referendum petition is filed.		
Appropriation Summary for FY 2012-2013: See State Appropriations section.		
Local Government Impact: See Local Government Impact section.		

Summary of Legislation

This bill amends the criminal code to add the crime of wage theft. A person commits the offense of wage theft when:

- the person, or an entity under the person's financial control, is under a duty to pay wages or compensation to an employee; and
- the person fails to pay those wages or compensation, or falsely denies that the amount of wages is owed to the employee.

Wage theft is classified based on the amount of wages wrongly withheld, ranging from a class 2 misdemeanor to a class 3 felony. The offense is:

- a class 2 misdemeanor if the amount is less than \$500;
- a class 1 misdemeanor if the amount is between \$500 and \$999;
- a class 4 felony if the amount is between \$1,000 and \$19,999; and
- a class 3 felony if the amount is \$20,000 or more.

Wage theft is violated each month and with each employee that the employer fails to pay. The employer is presumed to have committed wage theft if the amount of wages was available to the employer at the time of the offense. An employer has an affirmative defense if they believed in good faith that they would pay when engaging the employee but do not have the ability to pay at the time of the offense.

Background

The National Employment Law Project and its affiliates have published multiple studies on the topic of nonpayment and underpayment of wages by employers. According to one of these studies, containing the findings of a 2008 survey of wage-earning employees in New York City, workers who experience underpayment of wages typically lost \$51, or 15 percent, on earnings of \$339 in the week of the survey. The study extrapolates this one-week sample to estimate that persons experiencing wage theft lost an average of \$2,634 annually on earnings of \$17,616. For the purposes of this fiscal note, and based on national trends, Colorado wages are assumed to lag behind wages in New York City.

Discussion regarding current Colorado wage-related law is found in the Comparable Crimes section below.

State Revenue

State revenue will increase minimally with the implementation of this bill. Under current law, individuals who are convicted of wage theft may be required to pay a fine. These fines range from \$250 to \$5,000 for misdemeanor offenses and from \$2,000 to \$750,000 for felony classes of theft. Fines imposed in state courts are paid to the Fines Collection Cash Fund in the Judicial Branch. To the extent that the bill increases the number of convictions for wage theft (see discussion in the State Expenditures section), state revenue to the fund will increase. This amount is estimated to be less than \$5,000 per year.

State Expenditures

Implementation of this bill results in costs that will be absorbed within existing appropriations in FY 2012-13 and increases expenditures in the Department of Corrections beginning in FY 2013-14.

This fiscal note assumes that the classification of wage theft, specifically, as a felony crime will increase prosecutions and convictions of offenders. However, the increase in convictions relative to current law will be small due to the following considerations:

- current law allows for prosecution and conviction of an employer who has converted the wages of an employee, as discussed in the Comparable Crimes section below;

- formalizing felony wage theft and enhancing misdemeanor penalties is assumed to have a deterrent effect on employers, who are generally motivated to avoid interruption of business and significant legal consequences; and
- based on the definition of felony wage theft, with the employer withholding \$1,000 or more in unpaid wages from a single employee in one month, felony wage theft will occur only when a minimum wage employee works most of an entire month without being paid, or when the employee is owed wages substantially above the minimum wage.

In addition to the above considerations, courts may opt to impose fines instead of incarcerating employers as a matter of public policy, which may minimize the impact of the bill on jails and prisons.

Judicial Branch. A small increase in the number of criminal cases filed in Colorado courts is anticipated under the bill. The expected increase in court workload is minimal and can be absorbed within existing appropriations.

The Office of the State Public Defender (OSPD) serves as legal defense counsel for indigent persons. The number of employers seeking representation by the OSPD is assumed to be small, and those that do qualify for representation by OSPD are assumed to have an affirmative defense under the bill, with relatively straightforward defense preparation. The increase in OSPD workload due to new wage theft cases prosecuted under the bill is anticipated to be minimal and will not require an increase in appropriations. This minimal impact, requiring no additional appropriations, also applies to the Office of Alternative Defense Counsel, which represents indigent clients in cases where the OSPD has a conflict.

Department of Corrections. Operating costs for the Department of Corrections are unaffected by the bill in FY 2012-13 and then increase by \$20,706 in FY 2013-14 and by \$11,596 in FY 2014-15.

For the reasons stated above, this analysis finds that wage theft violations reaching the felony threshold and resulting in a prison sentence will be relatively unusual. The fiscal note concludes that a class 4 felony conviction under the bill will result in a new Department of Corrections (DOC) inmate once every four years. Due to the \$20,000 threshold for a single violation (converted wages of one employee in one month), no class 3 felony convictions are anticipated. Based on the length of time necessary to adjudicate new criminal cases, the first class 4 felony conviction is anticipated in FY 2013-14.

Current law prohibits the General Assembly from passing any bill to increase periods of imprisonment in state correctional facilities without appropriating an amount sufficient to cover the increased capital construction and operating costs of the bill in each of the first five fiscal years. However, current law also allows the DOC to place offenders classified as medium custody and lower risk in private contract prisons, for which no state capital construction costs are incurred.

Offenders sentenced under this bill to DOC may be placed in either a state-run or a private contract prison, depending on several factors. As state-run facilities are currently at or near capacity, any offenders that must be housed in a state-run prison will likely shift other inmates in that facility to private contract prisons. This fiscal note assumes, therefore, that the impact of this bill is accommodated through the use of private contract prisons, and that no new capital construction funds are necessary.

Offenders placed in a private contract prison cost the state \$56.73 per offender per day, according to common policy, which includes a daily bed rate of \$52.69 and \$4.04 per day for medical care. Table 1 shows the estimated cost of the bill over the next five fiscal years, based on an average length of stay of 570 days for inmates convicted under current law for the class 4 felony crime of theft.

Table 1. Five-Year Fiscal Impact On Correctional Facilities				
Fiscal Year	Inmate Bed Impact	Construction Cost	Operating Cost	Total Cost
FY 2012-13	0.0	\$0	\$0	\$0
FY 2013-14	1.0	-	20,706	20,706
FY 2014-15	0.6	-	11,596	11,596
FY 2015-16	0.0	-	0	0
FY 2016-17	0.0	-	0	0
Total		\$0	\$32,302	\$32,302

Local Government Impact

The penalty provisions of the bill may increase costs for county jails by increasing the number of persons convicted of misdemeanor wage theft. Misdemeanor penalties under the bill include fines or incarceration in a county jail in a range from 3 months to 18 months. Because the courts have the discretion of incarceration or imposing a fine, the impact at the local level cannot be determined. The cost to house an offender in county jails varies from \$45 to \$50 per day in smaller rural jails to \$62 to \$65 per day for larger Denver-metro area jails. For the current fiscal year, the state reimburses county jails a daily rate of \$50.44 to house state inmates. It is assumed that the impact of this bill on county governments will be minimal.

State Appropriations

No appropriation is required to implement this bill in FY 2012-13. The Department of Corrections will require the five-year costs detailed in Table 1, to be appropriated through the annual budget process.

Comparable Crimes

Pursuant to Section 2-2-322 (2.5), C.R.S., Legislative Council Staff is required to include certain information in the fiscal note for any bill that creates a new crime, changes the classification of an existing crime, or changes an element of the existing crime that creates a new factual basis for the offense.

House Bill 12-1296 creates a new crime, which crime is similar to refusal to pay wages under Section 8-4-114 (2), C.R.S. Under existing Section 8-4-114 (2), C.R.S., an employer is guilty of a misdemeanor if that employer is "able to pay wages or other compensation and being under a duty to pay, willfully refuses to pay as provided in this article [Colorado's wage statutes], or falsely denies the amount of a wage claim, or the validity thereof." The Division of Labor in the Department of Labor and Employment is responsible for civil enforcement of Colorado wage statutes, and the division also refers cases to prosecution. Judicial Branch records show no cases prosecuted under this statute in recent years.

Withheld wages are a thing of value to which an employee is entitled and, in practice, the offense specified by this bill may also be charged under the existing crime of theft, Section 18-4-401, C.R.S., which broadly encompasses crimes related to the conversion of property (e.g., theft, embezzlement, larceny). According to the Department of Labor and Employment, cases referred to prosecution are typically pursued under the theft statute due to the availability of enhanced penalties. Recent judicial decisions and legislation have clarified that Section 18-4-401, C.R.S., allows prosecutors to aggregate all theft incidents committed by the same person within a six-month period into a single charge. Colorado's theft statute includes various classifications of the crime, which are identical to the amounts by which the crime of wage theft is classified under the bill.

Departments Contacted

Judicial
Personnel and Administration
Higher Education

Corrections
Law
Labor and Employment

Local Affairs
Public Safety