

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR LEON COUNTY**

Marie Marthe CADET, Jennifer BONILLA,
Roberto RIOS, Isabel MERINO,
RESTAURANT OPPORTUNITIES CENTER
OF MIAMI, WECOUNT! INC., and
FARMWORKER ASSOCIATION OF
FLORIDA, INC.,

Plaintiffs,

CASE NO. _____

-v.-

FLORIDA AGENCY FOR WORKFORCE
INNOVATION, an Agency of the State of
Florida,

Defendant.

_____/

COMPLAINT AND
PETITION FOR ALTERNATIVE WRIT OF MANDAMUS

Plaintiffs Marie Marthe Cadet, Jennifer Bonilla, Roberto Rios, Isabel Merino, Restaurant Opportunities Center of Miami, WeCount! Inc., and Farmworker Association of Florida, Inc. (the “Plaintiffs”) by and through its undersigned attorneys, sues Defendant, FLORIDA AGENCY FOR WORKFORCE INNOVATION (the “Agency”), and state:

INTRODUCTION

1. This is an action for mandamus, and for declaratory and injunctive relief. Plaintiffs bring this action because for 2010 and 2011, Defendant has ignored its legally mandated duty to publish updated minimum wage rates under Florida’s state minimum wage law. Moreover, while Defendant has failed to publish the rates, it is clear that Defendant has, in

fact, calculated them internally but gotten them wrong. Specifically, Defendant has made a basic mistake in determining the rates for 2010 and 2011, and as a result erroneously concluded that the 2011 state minimum wage rate is less than the current federal minimum wage rate of \$7.25. In fact, the correct state minimum wage rate for 2011 is \$7.31 per hour – 6 cents more than the federal rate.

2. In 2004, the Florida electorate voted by a resounding 72% to 28% margin to amend the Florida constitution to establish for the first time a state minimum wage (“Minimum Wage Amendment”). The Minimum Wage Amendment provides that the state minimum wage will be increased each year to keep pace with the rising cost of living.

3. Section 448.110(4), Florida Statutes, which was enacted by the legislature to implement the Minimum Wage Amendment, imposes on Defendant the non-discretionary duty to calculate an adjusted state minimum wage rate each year based on the increase, if any, in the cost of living over the preceding year as measured using the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for the South Region. It requires the Department to publish the adjusted state minimum wage rate by October 15th of each year. Defendant has not published the adjusted state minimum wage rate for 2011 – and similarly failed to publish the rate for 2010.

4. Instead, on October 15, 2010, the Agency published a notice notifying employers that “on January 1, 2011, the minimum wage in Florida will remain unchanged at the federal rate of \$7.25 per hour.” The announcement further stated that “The federal minimum wage will prevail over the state rate until such time as the Florida minimum wage becomes higher than the federal rate.” October 2010 Announcement of 2011 Minimum Wage Rate, available at

<http://www.floridajobs.org/minimumwage/index.htm>, attached hereto and incorporated herein as Exhibit “A.”

5. Although Defendant failed to publish the state minimum wage rates for 2010 and 2011, documents obtained from the Agency indicate that it did, in fact, calculate those rates internally. However, the Agency did so incorrectly and therefore reached the erroneous conclusion that the state minimum wage rate for 2011 should be \$7.16 per hour, which is less than the \$7.25 federal minimum wage rate.

6. The error in Defendant’s internal calculations is that, after the cost of living decreased slightly from 2008 to 2009, the Agency determined that for 2010, the state minimum wage rate should similarly decrease from \$7.21 to \$7.06. However, that decrease in the minimum wage contravened the plain language of the Minimum Wage Amendment. As authoritatively construed by the Florida Supreme Court, the Amendment “clearly does not provide for decreases in the minimum wage in times of deflation.” *Advisory Opinion to the Attorney General Re Florida Minimum Wage Amendment*, 880 So.2d 636, 642 (2004). The state minimum wage thus should have remained at \$7.21 for 2010.

7. Defendant then used the erroneously reduced 2010 state minimum wage rate of \$7.06 to calculate an adjusted minimum wage rate for 2011. Because the cost of living increased by 1.4% from 2009 to 2010, the minimum wage for 2011 must increase by the same amount. Because, however, Defendant used \$7.06 as the applicable 2010 base rate for calculating the 2011 increase, it erroneously determined that the 2011 rate should be just \$7.16. Using instead the correct 2010 base rate of \$7.21 and increasing it by 1.4% yields the proper 2011 Florida hourly minimum wage rate of \$7.31.

8. Defendant's failure to publish the 2010 and 2011 Florida minimum wage rates was a clear abrogation of a ministerial duty imposed by state law. Minimum Wage Amendment, Fla. Const. art. X, § 24(c); Fla Stat. Ann. § 448.110(4)(b). Similarly, Defendant's erroneous decrease of the state minimum wage for 2010, and resulting improper calculation of the rate for 2011 were similarly clear derogations of ministerial duties imposed by state law. Minimum Wage Amendment, Fla. Const. art. X, § 24(c); Fla Stat. Ann. § 448.110(4)(a).

9. Defendant's derogation of its duties has led it to provide inaccurate guidance to thousands of employers across the state, and has caused the state's approximately 188,000 minimum wage workers not to receive the 6 cent increase to which they were entitled by law as of January 1, 2011.

JURISDICTION AND VENUE

10. This Court may issue a writ of mandamus pursuant to common law as provided by Article V, Section 5 of the Florida Constitution.

11. This Court has jurisdiction to grant declaratory relief pursuant to Section 86.011, Florida Statutes, and to grant injunctive relief pursuant to Section 26.012(3), Florida Statutes.

12. Venue is appropriate in Leon County pursuant to Section 47.011, Florida Statutes.

PARTIES

13. Plaintiff Marie Marthe Cadet is a farmworker who currently resides in Miami, Florida. She currently works in Florida and, at some point during the year, she is paid at or below the minimum wage.

14. Plaintiff Jennifer Bonilla is a farmworker who currently resides in Homestead, Florida. She currently works in Florida and, at some point during the year, she is paid at or below the minimum wage.

15. Plaintiff Roberto Rios is a farmworker who resides in Homestead, Florida. He currently works in Florida and, at some point during the year, he is paid at or below the minimum wage.

16. Isabel A. Merino is a tipped restaurant worker who resides in Sweetwater, Florida. She currently works in Florida and, at some point during the year, she is paid the tipped worker minimum wage.

17. Plaintiff Restaurant Opportunities Center of Miami (“ROC Miami”) is a restaurant workers’ organization based in Dade County, Florida, with over 700 members and is a project of Restaurant Opportunities Centers (ROC) United, Inc., a New York not for profit corporation maintaining Florida offices in Miami Beach. The mission of ROC Miami is to improve working conditions for restaurant workers in Miami-Dade County, including educating employees about the Florida minimum wage. Many of the members of ROC Miami are tipped employees who are employed at or below the minimum wage at some point during the year.

18. Plaintiff WeCount! Inc. (“WeCount!”) is a Florida not for profit membership organization in the area of Homestead, Florida with over 100 dues-paying members. The mission of WeCount! is to achieve social and economic justice by bringing immigrants, students and working people together to inform themselves about their rights, support each other, develop their leadership, and take action to improve their lives, and includes educating employees about the Florida minimum wage. The majority of the members of WeCount! work in low-wage industries and are farmworkers, nursery workers, day laborers and service workers who are employed at or below the minimum wage at some point during the year.

19. Plaintiff Farmworker Association of Florida, Inc. (“Farmworker Association”) is a Florida not for profit membership organization of over 6,000 farmworker families from across

the State of Florida. The mission of the Farmworker Association is to empower farmworkers to address the social, economic, and workplace issues that affect their lives, and includes educating employees about the Florida minimum wage. Many of the members of the Farmworker Association are employed at or below the minimum wage at some point during the year.

20. The Defendant is the Agency for Workforce Innovation (the “Agency”), an agency of the Department of Management Services of the State of Florida created pursuant to Section 20.50, Florida Statutes.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

21. The Minimum Wage Amendment, approved overwhelmingly by voters in 2004, established a state minimum wage for the first time in Florida. Currently, approximately 188,000 Floridians work for the minimum wage.

22. Shortly after its adoption in 2004, the legislature enacted Section 448.110(4), Florida Statutes, to codify the Amendment. Pursuant to Section 448.110(4)(a), Florida Statutes, and the Minimum Wage Amendment, the Agency is required to calculate an adjusted state minimum wage rate each September 30th by increasing the current state minimum wage rate by the increase, if any, in the cost of living during the twelve months prior to each September 1st.

23. Pursuant to Section 448.110(4)(b), Florida Statutes, and the Minimum Wage Amendment, the Agency is required to publish the adjusted state minimum wage rate and its effective date on the Internet home pages of the Agency by October 15th of each year.

24. The Agency’s failure to properly calculate and publish the adjusted state minimum wage rates for 2010 and 2011 is the subject of this dispute.

25. The Minimum Wage Amendment of the Florida Constitution and section 448.110(4)(a), Florida Statutes set forth the Agency’s non-discretionary duty to annually

calculate an adjusted state minimum wage by increasing the state minimum wage by the rate of inflation for the preceding year. Florida law provides as follows:

Beginning September 30, 2005 and annually on September 30 thereafter, the Agency for Workforce Innovation shall calculate an adjusted state minimum wage rate by increasing the state minimum wage rate by the rate of inflation for the 12 months prior to September 1. In calculating the adjusted state minimum wage rate, the agency shall use the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for the South Region or a successor index as calculated by the United States Department of Labor. Each adjusted state minimum wage rate shall take effect on the following January 1, with the initial adjusted minimum wage rate to take effect on January 1, 2006.

Fl. Stat. Ann. § 448.110(4)(a) (emphasis added). *Accord* Minimum Wage Amendment, Fla.

Const. art. X, § 24(c).

26. In an advisory opinion prior to the Minimum Wage Amendment's passage in November 2004, the Florida Supreme Court instructed that "[t]he amendment clearly does not provide for decreases in the minimum wage in times of deflation." *Advisory Opinion to the Attorney General Re Florida Minimum Wage Amendment*, 880 So.2d 636, 642 (2004).

27. Section 448.110(4)(b), Florida Statutes, sets forth the Agency's non-discretionary duty to annually publish the amount of the adjusted state minimum wage and states in pertinent part:

The Agency for Workforce Innovation and the Department of Revenue shall annually publish the amount of the adjusted state minimum wage and the effective date. Publication shall occur by posting the adjusted state minimum wage rate and the effective date on the Internet home pages of the agency and the department by October 15 of each year.

Fl. Stat. Ann. § 448.110(4)(b).

28. The Minimum Wage Amendment created a state minimum wage of \$6.15, effective May 2, 2005. After that, in accordance with its non-discretionary duty pursuant to Section 448.110(4)(a), Florida Statutes, to calculate an adjusted minimum wage rate each year,

the Agency calculated the following annual adjustments to the state minimum wage from January 1, 2006 through January 1, 2009:

January 1, 2006: \$6.40 per hour

January 1, 2007: \$6.67 per hour

January 1, 2008: \$6.79 per hour

January 1, 2009: \$7.21 per hour

29. On July 24, 2009, the federal minimum wage rose from \$6.55 to \$7.25 per hour, a rate that exceeded the Florida state minimum wage for the first time since the Florida minimum wage took effect in 2005.

30. Section 448.110(3), Florida Statutes, states that the Florida state minimum wage covers the same workers that are covered by the federal Fair Labor Standards Act.

31. On or about July 24, 2009, the Agency published a notice telling employers that “On July 24, 2009, the new Federal minimum wage of \$7.25 per hour will replace Florida’s minimum wage. This wage rate will be effective until the Florida rate exceeds the Federal rate.” However, this notice failed to inform employers what the state minimum wage was. *See* October 2009 Notice to Employees, available at www.floridajobs.org/minimumwage/Poster-FL_MinWage2009.doc, attached hereto and incorporated herein as Exhibit “B.”

32. Despite the fact that the Florida and federal minimum wages cover the same workers, there remain important differences between the two laws.

33. For example, the statute of limitations under the federal minimum wage is two years (and three years for willful violations), while it is four years under the Florida law (and five years for willful violations). *Compare* 29 U.S.C. § 255(a) *with* Fla. Const. art. X, § 24(e).

34. Additionally, the Florida minimum wage may be enforced through an ordinary class action, while the federal minimum wage allows only for collective actions. *Compare* Fla. Const. art. X, § 24(e); FLA. STAT. ANN. § 448.110(9) *with* 29 U.S.C. § 216(b).

35. The Florida Attorney General is authorized to enforce only the Florida minimum wage rate, not the federal minimum wage rate. *See* Fla. Const. art. X, § 24(e); FLA. STAT. ANN. § 448.110(7).

36. Moreover, even when Florida employers are required to pay a higher federal rate, the minimum wage recoverable in an enforcement action brought under the Florida minimum wage law is the state minimum wage rate.

37. Therefore, the rate of the Florida minimum wage retains independent significance even when the level of the federal minimum wage rate is higher.

38. In October 2009, the Agency published a notice to employees stating that “the 2010 minimum wage in Florida is the federal minimum wage of \$7.25 per hour.” The notice also stated the following: “In deciding whether the federal or state minimum wage applies, federal law directs that businesses must pay the higher of the two. The federal minimum wage will prevail over the state rate until such time as the Florida minimum wage becomes higher than the federal rate.” However, the Agency did not publish its calculation of what the state minimum wage rate for 2010 would be, as it was required to do by Section 448.1104(b), Florida Statutes. Exhibit B.

39. Although the Agency did not publish its calculation of what the state minimum wage rate for 2010 would be, it did calculate the rate internally. Those calculations were disclosed to Plaintiffs’ counsel in October and November 2010, pursuant to records requests made under Chapter 119, Florida Statutes.

40. The Agency's unpublished internal calculation of the state minimum wage rate for 2010 was \$7.06 per hour. An internal Agency memorandum prepared by Deputy General Counsel James E. Landsberg and dated October 7, 2009 states that "on September 30, 2009, Florida's adjusted minimum wage rate was calculated to have decreased from \$7.21 to \$7.06." Florida Agency for Workforce Innovation, Memorandum on Florida's Minimum Wage Calculation, prepared by James E. Landsberg, Deputy General Counsel (October 7, 2009), attached hereto and incorporated herein as Exhibit "C."

41. The Agency determined that the state minimum wage rate for 2010 would decrease to \$7.06 per hour from \$7.21 per hour because the cost of living had declined slightly during the 12 month period preceding September 1, 2009.

42. This determination that the state minimum wage rate for 2010 was \$7.06 per hour violated the plain language of the Florida Constitution and the Florida Statutes, which do not allow for decreases in Florida's minimum wage rate, even during rare periods of deflation.

43. As mandated by Florida's constitutional and statutory minimum wage provisions, the 2010 state minimum wage rate should have remained at \$7.21 per hour.

44. Indeed, the Agency has already recognized that the plain language of the Minimum Wage Amendment does not permit decreases in the state minimum wage rate. For example, the October 7, 2009 Agency Memo states that "[t]he constitutional provision does not contemplate the Florida minimum wage ever decreasing and, given its plain meaning, would not permit a decrease in the adjusted minimum wage." Exhibit C. Similarly, in an internal Agency email dated October 6, 2009, with an email subject line entitled "Florida minimum wage does not go down when consumer price index goes down," an attorney within the Agency's Office of the General Counsel informed Deputy General Counsel James Landsberg of the 2004 Florida

Supreme Court decision interpreting the Minimum Wage Amendment as not providing for decreases in the minimum wage in times of deflation. *See* Florida Agency for Workforce Innovation, Email from James E. Landsberg, Deputy General Counsel to Wilhelmina Randtke (October 6, 2009), attached hereto and incorporated as Exhibit “D.” This email noted that the dissenting opinion in this Supreme Court decision expressly contemplated the scenario where the state minimum wage would remain constant even as the cost of living as measured by the Consumer Price Index decreased.

45. A day later, in his October 7, 2009 Agency Memo, Deputy General Counsel James E. Landsberg acknowledged that the Florida Supreme Court had already construed the Minimum Wage Amendment as never authorizing decreases, even during times of deflation. The Agency Memo states that “the Florida Supreme Court addressed the potential scenario of deflation and the minimum wage. In an advisory opinion to the Attorney General determining whether the summary of the constitutional amendment for the ballot was misleading, the Court stated that the provision does not provide for decreases in the minimum wage in times of deflation.” Exhibit C.

46. As acknowledged by Defendant, therefore, the Minimum Wage Amendment as authoritatively construed by the Florida Supreme Court simply does not allow for decreases in the state minimum wage rate even during those rare periods when the cost of living declines. Accordingly, the state minimum wage rate for 2010 should have remained at \$7.21 per hour, rather than decreasing to \$7.06.

47. On October 15, 2010, Defendant announced on its website that “on January 1, 2011, the minimum wage in Florida will remain unchanged at the federal rate of \$7.25 per hour.” The announcement further stated that “The federal minimum wage will prevail over the state rate until such time as the Florida minimum wage becomes higher than the federal rate.” Exhibit A.

48. In publishing the notice the Agency failed to publish its calculation of the state minimum wage rate for 2011, once again in violation of Section 448.110(4)(b), Florida Statutes.

49. The rate of inflation during the twelve months prior to September 1, 2010, as measured by the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for the South Region, was 1.4%. Applying this 1.4% rate of inflation to the correct 2010 minimum wage rate of \$7.21 per hour yields an adjusted minimum wage rate of \$7.31 per hour – the correct rate for 2011.

50. \$7.31 per hour is 6 cents higher than the current federal minimum wage rate of \$7.25 per hour.

51. Pursuant to the Minimum Wage Amendment, the state minimum wage rate for tipped workers is the full state minimum wage rate minus a tip credit of up to \$3.02 per hour. Employees who receive tips may be paid that amount, provided that they receive enough in tips to bring their income up to at least the full minimum wage rate.

52. Regarding tipped workers, Defendant stated in its October 2010 Notice to Employees that “The 2011 minimum wage in Florida is the federal minimum wage of \$7.25 per hour, with a minimum wage of at least \$4.23 per hour for tipped employees, in addition to tips.” Exhibit A (emphasis added). Defendant further explained in its October 2010 announcement that “The direct wage [for tipped employees] is calculated as equal to the minimum wage (\$7.25) minus the 2003 tip credit (\$3.02), or a direct hourly wage of \$4.23 as of July 24, 2009.” Exhibit E.

53. Because the correct state minimum wage rate for 2011 is \$7.31 per hour, the correct state tipped worker minimum wage for 2011 is \$7.31 minus \$3.02 per hour, or \$4.29 per hour.

54. The correct 2011 tipped worker minimum wage of \$4.29 is 6 cents higher than the \$4.23 rate that Defendant announced.¹

55. Because the Agency did not publish the 2010 state minimum wage rate, its erroneous decision to decrease the state minimum wage rate from \$7.21 to \$7.06 for that year went undetected. It was not until October 15, 2010, when the Agency announced that the state minimum wage would remain lower than the federal minimum wage for 2011, that it became clear that something was wrong with the way Defendant was calculating the minimum wage. The actual details of the Agency's erroneous calculation were not disclosed until October and November 2010, when pursuant to a request the Agency disclosed internal documents.

56. Once the Agency disclosed these internal documents to Plaintiffs' counsel, Plaintiffs' counsel, in correspondence on October 27, 2010 alerted the Agency to its error in miscalculating and failing to publish the 2010 and 2011 state minimum wage rates, and demanded that the Agency comply with the provisions of the Florida Constitution and the Florida Code by properly calculating and publishing these state minimum wage rates. The Agency responded on November 19, 2010 by asserting that its erroneous calculations of the state minimum wage rates for 2010 and 2011 were valid, thus refusing to correct its error. The Agency has yet to publish its calculations of the 2010 and 2011 state minimum wage rates.

¹ The Agency's calculation of the 2010 tipped worker minimum wage rate was correct. The Minimum Wage Amendment provides that "For tipped Employees meeting eligibility requirement for the tip credit under the [federal Fair Labor Standards Act (FLSA)], Employers may credit towards satisfaction of the Minimum Wage tips up to the amount of the allowable FLSA tip credit in 2003. In 2003, the allowable federal tip credit was \$3.02. The Agency has interpreted this provision as defining the maximum tip credit that Florida employers may claim – regardless of whether the minimum wage that they are paying is the state rate or the federal rate (as is the case during those periods when the federal rate is higher). Thus, during 2010 when the federal minimum wage was \$7.25 and the state minimum wage was lower, the Agency instructed that employers could take only up to a \$3.02 tip credit against the \$7.25 federal minimum wage rate. *See* Exhibit C. As a consequence, the Agency determined that the tipped worker minimum wage rate for 2010 was \$4.23 per hour (\$7.25 minus \$3.02). *See* Exhibit B. That determination was correct.

57. Defendant's failure to publish the 2010 and 2011 state minimum wage rates was a clear abrogation of a ministerial duty imposed by state law. Minimum Wage Amendment, Fla. Const. art. X, § 24(c); Fla Stat. Ann. § 448.110(4)(b). Defendant's erroneous decrease of the state minimum wage for 2010, and resulting improper calculation of the rate for 2011 were similarly clear violations of state law. Minimum Wage Amendment, Fla. Const. art. X, § 24(c); Fla Stat. Ann. § 448.110(4)(a).

COUNT I—
FOR A WRIT OF MANDAMUS, WITH
INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF PETITION

58. The allegations contained in paragraphs 1 through 57 are re-alleged and incorporated herein.

59. This is a civil action by Plaintiffs against the Agency for a writ of mandamus compelling the Agency to perform certain ministerial and nondiscretionary duties.

60. A writ of mandamus lies to enforce an established legal right by compelling public officers to perform a ministerial duty required by law. A party petitioning for a writ of mandamus "must show that he has a clear legal right to the performance of a clear legal duty by a public officer and that he has no other legal remedies available to him." *Hatten v. State*, 561 So.2d 562, 563 (1990). The legal duty must be ministerial and not discretionary. *Smith v. State*, 696 So.2d 814, 815 (Fla. 2d DCA 1997). If the petition is facially sufficient, the court must issue an alternative writ ordering the respondent to show cause why the writ should not be granted. Fla. R. Civ. P. 1.630(d)(3); *Holcomb v. Dep't of Corrections*, 609 So.2d 751, 753 (Fla. 1st DCA 1992), citing *Conner v. Mid-Fla. Growers, Inc.*, 541 So.2d 1252, 1256 (Fla. 2d DCA 1989).

61. Defendant has a clear, non-discretionary legal duty to publish an adjusted state minimum wage rate each year that increases the minimum wage to reflect the rate of inflation, if any, during the preceding year. Fla. Stat. Ann. § 448.110(4)(a) (the Agency “shall calculate an adjusted state minimum wage rate by increasing the state minimum wage rate by the rate of inflation for the 12 months prior to September. In calculating the adjusted state minimum wage rate, the agency shall use the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for the South Region.”); Fla. Stat. Ann. § 448.110(4)(b) (“The Agency for Workforce Innovation and the Department of Revenue shall annually publish the amount of the adjusted state minimum wage and the effective date.”). *Accord* Minimum Wage Amendment, Fla. Const. art. X, § 24(c). The Agency’s publication of an adjusted state minimum wage that increases the minimum wage to reflect the rate of inflation, if any, during the preceding year is thus a ministerial act that the Agency has failed to perform as required by law.

62. Plaintiffs have a clear legal right to have the Agency perform its nondiscretionary duty of publishing the state minimum wage for 2010 and 2011, as Plaintiffs are workers who at times earn the minimum wage, and organizations that include individual members who at times earn the minimum wage, work to inform their members and the public about their rights under the state minimum wage law, and advocate to ensure that those rights are protected.

63. Plaintiffs have no other adequate remedy to compel the Agency to perform its nondiscretionary duty to properly calculate and publish the state minimum wage rates for 2010 and 2011.

64. Plaintiffs have stated a prima facie case for the relief requested in that they have a clear legal right to have the Agency perform the ministerial act of publishing the state minimum wage rates for 2010 and 2011 and the Agency has refused to perform this ministerial act.

Therefore, Plaintiffs are entitled to an alternative writ of mandamus commanding the Agency to perform its nondiscretionary duty to publish the state minimum wage rate for 2010 and 2011, or to show cause why it should not do so.

WHEREFORE, Plaintiffs pray that this honorable Court:

- a. Issue an ALTERNATIVE WRIT OF MANDAMUS directed at the Agency and commanding it to perform its nondiscretionary duty under the Minimum Wage Amendment, Fla. Const. art. X, § 24(c), and its implementing legislation, Section 448.110(4), Florida Statutes, to publish the adjusted state minimum wage rates for 2010 and 2011; or in default thereof to appear before this honorable Court on a day certain to be named in such Writ and further to show cause why Defendant should not be required to do so by issuance by this Court of a Peremptory Writ of Mandamus; and
- b. Grant such other and further relief as may be just and proper.

COUNT II –

FOR DECLARATORY AND INJUNCTIVE RELIEF

65. The allegations contained in paragraphs 1 through 64 are re-alleged and incorporated herein.

66. There is a present, genuine dispute between Plaintiffs and Defendant regarding Defendant's failure to properly calculate the state minimum wage rate for 2010 and 2011. Defendant has thus far refused to correct its unlawful reduction in the state minimum wage rate for 2010. It has similarly refused to apply the correct 2010 state minimum wage rate of \$7.21

per hour in determining the 2011 rate which, properly calculated, is \$7.31 per hour. Instead, Defendant has asserted that its calculations of these rates are correct.

67. This refusal creates a bona fide conflict giving rise to a present, practical need for a declaration concerning Plaintiffs' right to the proper calculation of the state minimum wage rates for 2010 and 2011, based upon the ascertained state of facts.

68. Plaintiffs have a clear legal right to the proper calculation of the state minimum wage rates for 2010 and 2011. They will suffer irreparable harm if these calculations do not occur because the properly calculated state minimum wage rate for 2011 is \$7.31 per hour, which is higher than the current federal minimum wage rate of \$7.25 per hour. Plaintiffs therefore stand to lose 6 cents per hour for every hour that they work at the minimum wage this year. Similarly, the properly calculated state minimum wage rate for tipped workers is \$4.29 per hour, which is higher than the \$4.23 per hour rate that Defendant has calculated. There too Plaintiffs stand to lose 6 cents per hour if the error is not promptly rectified.

69. Plaintiffs' injuries will be compounded and increased in future years. Unless corrected, future years' wage rates will be calculated based upon the improperly calculated 2011 minimum wage rate. This will result in future hourly minimum rates being 15 cents lower than Florida law provides, since Defendant's incorrect 2011 rate of \$7.16 is 15 cents lower than the correct rate of \$7.31.

70. Plaintiffs have no other adequate remedy.

71. Plaintiffs are entitled to a declaration that the proper 2010 Florida minimum wage rate is \$7.21 per hour, and that the proper current rate for 2011 is \$7.31 per hour. As noted above, Plaintiffs do not challenge the Agency's calculation of the 2010 tipped worker minimum

wage rate as \$4.23 per hour, which is correct. *See supra* note 1. However, the 2011 minimum wage rate for tipped workers, properly calculated, should be \$4.29 per hour.

72. Plaintiffs are entitled to supplementary injunctive relief ordering the Agency to refrain from continuing to withhold from Plaintiffs a properly calculated state minimum wage rate, and ordering the Agency to properly calculate the 2010 state minimum wage rate as \$7.21 per hour, the 2011 minimum wage rate as \$7.31 per hour, and the 2011 tipped minimum wage rate as \$4.29 per hour.

WHEREFORE, Plaintiffs pray that this honorable Court enter an ORDER:

- a. Declaring that:
 - i. The Florida minimum wage rate for 2011 is seven dollars and thirty-one cents (\$7.31) per hour, and four dollars and twenty-nine cents (\$4.29) per hour for tipped workers;
 - ii. The Florida minimum wage rate for 2010 was seven dollars and twenty-one cents (\$7.21) per hour, and four dollars and twenty-three cents (\$4.23) per hour for tipped workers.
- b. Enjoining the Agency from continuing to withhold from Plaintiffs a properly calculated Florida minimum wage rate and compelling the Agency to properly calculate the state minimum wage rates for 2010 and 2011 in the manner prescribed above; and
- c. Granting Plaintiffs such other and further relief as the Court may deem just and proper.

Dated: January 10, 2011

Respectfully submitted,

PLAINTIFFS BY THEIR ATTORNEYS,



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EXHIBITS

- A. Florida Agency for Workforce Innovation, October 2010 Announcement of 2011 Minimum Wage Rate
- B. Florida Agency for Workforce Innovation, July 2009 Notice to Employees of New Minimum Wage Rate
- C. Florida Agency for Workforce Innovation, Memorandum on Florida's Minimum Wage Calculation, prepared by James E. Landsberg, Deputy General Counsel (October 7, 2009)
- D. Florida Agency for Workforce Innovation, Email from James E. Landsberg, Deputy General Counsel to Wilhelmina Randtke (October 6, 2009)

EXHIBIT A

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FLORIDA'S MINIMUM WAGE

(Updated October 2010)

On January 1, 2011, the minimum wage in Florida will remain unchanged at the federal rate of \$7.25 per hour. The current federal minimum wage went into effect July 24, 2009. Federal law requires that employers pay the higher of the federal or state minimum wage. The federal minimum wage will prevail over the state rate until such time as the Florida minimum wage becomes higher than the federal rate.

Florida law requires the Agency for Workforce Innovation to calculate an adjusted minimum wage rate each year and to publish the minimum wage in Florida on October 15. The annual calculation is based on the percentage change in the federal Consumer Price Index for urban wage earners and clerical workers in the South Region for the 12-month period prior to September 1, 2010. With the higher federal minimum wage taking precedence over the state rate, that calculation will not affect the 2011 minimum wage in Florida.

On November 2, 2004, Florida voters approved a constitutional amendment which created Florida's minimum wage. The minimum wage applies to all employees in the state who are covered by the federal minimum wage.

Employers must pay their employees the hourly state minimum wage for all hours worked in Florida. The definitions of "employer", "employee", and "wage" for state purposes are the same as those established under the federal Fair Labor Standards Act (FLSA). Employers of "tipped employees" who meet eligibility requirements for the tip credit under the FLSA, may count tips actually received as wages under the FLSA. However, the employer must pay "tipped employees" a direct wage. The direct wage is calculated as equal to the minimum wage (\$7.25) minus the 2003 tip credit (\$3.02), or a direct hourly wage of \$4.23 as of July 24, 2009.

Employees who are not paid the minimum wage may bring a civil action against the employer or any person violating Florida's minimum wage law. The state attorney general may also bring an enforcement action to enforce the minimum wage. FLSA information and compliance assistance can be found at: <http://www.dol.gov/dol/compliance/comp-flsa.htm>.

Florida Statutes require employers who must pay their employees the Florida minimum wage to post a minimum wage notice in a conspicuous and accessible place in each establishment where these employees work. This poster requirement is in addition to the federal requirement to post a notice of the federal minimum wage. Florida's minimum wage poster is available for downloading in English and Spanish from the Agency for Workforce Innovation's website at: <http://www.floridajobs.org/workforce/posters.html>.

The federal poster can be downloaded from the U.S. Department of Labor's website at: <http://www.dol.gov/whd/regs/compliance/posters/flsa.htm>.

FLORIDA'S MINIMUM WAGE RESOURCES

- [2011 Notice to Employees Poster \(English\)](#)

- [2011 Notice to Employees Poster \(Spanish\)](#)
- [2010 Notice to Employees Poster \(English\)](#)
- [2010 Notice to Employees Poster \(Spanish\)](#)

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As an employer, we are an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this website may be reached by persons using TTY/TDD equipment via the Florida Relay

Service at 711.

Programa/Empresa que ofrece igualdad de oportunidades. Los asistentes y servicios auxiliares están disponibles a pedido de personas con incapacidades. Aquellas personas que usen equipos TTY/TTD a través del Servicio de Retransmisión de Florida llamando al 711 pueden acceder a todos los números telefónicos de voz en este sitio Web.

*.floridajobs.org: UA-4182001-1

EXHIBIT B

NOTICE TO EMPLOYEES FLORIDA MINIMUM WAGE

On July 24, 2009 the new Federal minimum wage of \$7.25 will replace Florida's minimum wage. This wage rate will be effective until the Florida rate exceeds the Federal rate.

The minimum wage is different for tipped employees. On July 24, 2009 the new Florida minimum wage for tipped employees will be \$4.23 per hour plus tips.

The Florida minimum wage is recalculated yearly on September 30, based on the Consumer Price Index. Every year on January 1, the new Florida minimum wage takes effect unless the Federal rate is greater.

An employer may not retaliate against an employee for exercising his or her right to receive the minimum wage. Rights protected by the State Constitution include the right to:

1. File a complaint about an employer's alleged noncompliance with lawful minimum wage requirements.
2. Inform any person about an employer's alleged noncompliance with lawful minimum wage requirements.
3. Inform any person of his or her potential rights under Section 24, Article X of the State Constitution and to assist him or her in asserting such rights.

An employee who has not received the lawful minimum wage after notifying his or her employer and giving the employer 15 days to resolve any claims for unpaid wages may bring a civil action in a court of law against an employer to recover back wages plus damages and attorney's fees.

An employer found liable for intentionally violating minimum wage requirements is subject to a fine of \$1,000 per violation, payable to the state.

The Attorney General or other official designated by the Legislature may bring a civil action to enforce the minimum wage.

For details, see Section 24, Article X of the State Constitution and Section 448.110, Florida Statutes.

EXHIBIT C



Charlie Crist
Governor
Cynthia R. Lorenzo
Director

FLORIDA'S MINIMUM WAGE CALCULATION

In 2009, two relevant events occurred for the first time since the Florida Constitution was amended to establish a state minimum wage. First, in July 2009, the federal minimum wage was increased to \$7.25 and thus exceeded Florida's minimum wage which was \$7.21. Second, on September 30, 2009, Florida's adjusted minimum wage rate was calculated to have decreased from \$7.21 to \$7.06. Florida's minimum wage has never been lower than the federal minimum wage rate and it has never decreased. These events raise several questions concerning the meaning and application of Florida's minimum wage law. Whatever the answers to these questions are determined to be, two groups, employers and employees, will be financially impacted.

Issue

Whether the calculation of the Florida minimum wage for tipped employees should be calculated using the federal minimum wage rate.

The Florida Minimum Wage Law

On November 2, 2004, after an initiative led by the Association of Community Organizations for Reform Now (ACORN), Florida voters approved an amendment to the Florida Constitution to establish a state minimum wage. The amendment, Article X, section 24(c) of the Florida Constitution, established the minimum wage as \$6.15/hour effective May 2, 2005. Prior to this amendment, Florida did not have a state minimum wage.

Article X, section 24(c) also directs that on September 30 of each year, the "...Agency for Workforce Innovation shall calculate an adjusted Minimum Wage rate by increasing the current Minimum Wage rate by the rate of inflation during the twelve months prior to each September 1 using the consumer price index . . ." (Emphasis supplied.) The adjusted minimum wage rate becomes effective on January 1 of each year. The constitutional provision does not contemplate the Florida minimum wage ever decreasing and, given its plain meaning, would not permit a decrease in the adjusted minimum wage.

Agency for Workforce Innovation

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With respect to tipped wages, Article X, section 24(c) provides, "For tipped Employees meeting the eligibility requirements for the tip credit under FLSA, Employers may credit towards satisfaction of the Minimum Wage tips up to the amount of the allowable FLSA tip credit in 2003." The FLSA tip credit in 2003 was \$3.02.

Article X, section 24(g) expressly provides that federal case law, administrative interpretations, and other guiding standards developed under the Fair Labor Standards Act (FLSA) shall guide the construction of the amendment and any implementing statutes or regulations. Article X, section 24 (b) also provides that the terms "Employer," "Employee" and "Wage" shall have the same meanings established under the FLSA.

Sections 448.109 and 448.110, Florida Statutes, were enacted to address notification requirements, annual adjustments and civil remedies to enforce the minimum wage law. Under sections 448.109 and 448.110, Florida Statutes, the Agency is required to post the State's adjusted minimum wage rate by October 15th of each year and to create and make available a poster giving notice to employees by December 1st of each year.

And while Article X, section 24(f) provides the Agency authority to adopt rules to implement the constitutional amendment, Section 448.110(11), Florida Statutes, contains the following express limitation on the Agency's authority.

Except for calculating the adjusted state minimum wage and publishing the initial state minimum wage and any annual adjustments thereto, the authority of the Agency for Workforce Innovation in implementing s. 24, *Art. X of the State Constitution*, pursuant to this section, shall be limited to that authority expressly granted by the Legislature.

Thus, the Agency's role at this point in time is to calculate and publish any annual adjustments to the Florida minimum wage. The Agency has not adopted any rules to implement the amendment.

Current Situation

At issue in the current situation is Florida's minimum wage for tipped employees. It is clear that when the federal minimum wage for non-tipped employees exceeds Florida's minimum wage for non-tipped employees, the federal rate controls. See United States Department of Labor Employment Law Guide available at: <http://www.dol.gov/compliance/guide/minwage.htm#Relation>, which provides that when both the FLSA and a state law apply, the law setting the higher standards must be observed. As a result, on July 24, 2009, the higher federal minimum wage rate of \$7.25 became the minimum wage that Florida employers must pay hourly employees.

However, it is not clear, whether Florida should use the higher federal minimum wage to calculate the wage rate for tipped employees or use the state adjusted minimum wage. Constitutional and statutory provisions direct the Agency to calculate the minimum wage adjusted to the rate of inflation and can be read to require that the adjusted rate be used to calculate the minimum wage for tipped employees.

How the Tip Credit is Calculated

Under the FLSA, employers are allowed to claim a "tip credit" toward satisfying minimum wage laws for their tipped employees. This means that tips are credited against the employer's obligation to pay the minimum wage. An employer may pay a tipped employee not less than \$2.13 an hour in direct wages if that amount plus the tips received equal at least the federal minimum wage. The current federal tip credit is \$5.12 ($\$7.25 - \$2.13 = \5.12.)

Florida calculates its tip credit differently from the federal government. Article X, section 24(c) provides that employers may credit towards satisfaction of the minimum wage, tips up to the amount of the allowable FLSA tip credit in 2003, which is \$3.02. Therefore, under the Florida Constitution, the tip credit can be no more than \$3.02. The result is that as the minimum wage increases in Florida, the \$3.02 tip credit stays the same, and the direct wage that employers must pay to employee increases. As of January 1, 2009, the direct wage equaled the Florida minimum wage (\$7.21) minus the 2003 tip credit (\$3.02), or \$4.19. The effect of the federal increase in July of 2009 is discussed below.

Published Position of the Agency

In response to the federal minimum wage increase, the Agency's Labor Market Statistics (LMS) Office, the program unit that calculates the minimum wage, announced that on July 24, 2009, Florida's wage rate would become the federal wage rate and that the wage rate for tipped employees would likewise increase by \$0.04 from \$4.19 to \$4.23 ($\$7.25 - \$3.02 = \4.23). Subsequently, the Agency's Office of General Counsel (OGC) received correspondence from a labor law firm that represents employers stating that the wage rate for tipped employees should have remained \$4.19. A copy of that inquiry and the Agency's response is attached. Upon review of the issue, raised by the law firm, the OGC thought that the LMS method of calculating the wage rate for tipped employees was the most logical and legally correct position. We responded to the inquiry and have received no further correspondence from the law firm. A copy of that inquiry and the Agency's response is attached.

Subsequently, on September 30, 2009, LMS calculated the adjusted minimum wage and determined that it had dropped. This is a unique occurrence, apparently unanticipated by the drafters of the constitutional amendment and the statutory provisions. A notice must be posted on October 15, 2009, providing the minimum wage calculation on September 30, 2009.

The plain language of the constitutional and statutory provisions only addresses increases in Florida's minimum wage. Article X, section 24(c) states that the Agency "shall calculate an adjusted Minimum Wage rate by increasing the current Minimum Wage rate by the rate of inflation during the twelve months prior to each September 1st using the consumer price index . . ." In addition, the Florida Supreme Court addressed the potential scenario of deflation and the minimum wage. In an advisory opinion to the Attorney General determining whether the summary of the constitutional amendment for the ballot was misleading, the Court stated that the provision does not provide for decreases in the minimum wage in times of deflation. Advisory Op. to Att'y Gen. re Fla. Minimum Wage Amendment, 880 So. 2d 636, 639 (Fla. 2004).

The Agency has taken the position (included in a posted notice in July 2009) that Florida's minimum wage becomes the federal minimum wage by operation of law when the federal wage exceeds the State wage. The OGC has reviewed and supports this as the most legally correct position. This interpretation allows for consistent treatment of tipped and non-tipped employees. As the minimum wage increases for one group, it increases the same amount for the other. This interpretation also is in accord with the intent of the constitutional amendment and federal guidance. However, due to the express limitation on the Agency found in section 448.110(11), Florida Statutes, it is not clear that the Agency has authority to make this interpretation.

Potential Issues

Employers may argue that Florida's minimum wage for tipped employees must be calculated using Florida's adjusted minimum wage rate. They may contend that as long as Florida's minimum wage for tipped employees exceeds the federal amount (currently \$2.13), then Florida should calculate the wage rate for tipped employees using the State's adjusted minimum wage rate. Under this theory, employers could support two possible outcomes. One outcome would be that effective January 1, 2010, the adjusted minimum wage rate of \$7.06 should be used to calculate the wage rate for tipped employees ($\$7.06 - \$3.02 = \$4.06$). The second outcome, accepting that there could be no decrease in Florida's minimum wage, would be to use Florida's 2009 adjusted minimum wage rate (\$7.21) to calculate the wage rate for tipped employees ($\$7.21 - \$3.02 = 4.19$).

These outcomes do not appear to be the most logical for the following reasons:

The Florida Constitution incorporates and relies extensively on the federal Fair Labor Standards Act and its regulations in order to implement Florida's minimum wage law. Article X, section 24(c) states:

It is intended that case law, administrative interpretations, and other guiding standards developed under the federal FLSA shall guide the construction of this amendment and any implementing statutes or regulations.

Furthermore, a Florida Attorney General Advisory Opinion states:

[I]t appears that the constitutional amendment was intended to incorporate the federal FLSA provisions, including its exceptions and exemptions, into the Florida minimum wage amendment, unless Article X, section 24, Florida Constitution specifically provides otherwise. AGO 2005-64 (emphasis added).

Florida's minimum wage law applies only to those individuals entitled to receive the federal minimum wage under the federal FLSA, unlike some other states, and it provides no basis to allow the State's minimum wage to be less than the federal minimum wage.

Florida law does, however, specifically provide for a tip credit that is calculated differently from the federal tip credit. The "cash wage" or "direct wage" in Florida is calculated by subtracting \$3.02 from the State's minimum wage. As a result, the direct or cash wage for tipped employees in Florida changes by operation of law when the State minimum wage increases, also by

operation of law, to meet the federal minimum wage. In other words, the federal minimum wage affects Florida's direct wage for tipped employees when it surpasses Florida's minimum wage.

The incorporation of federal law into Florida's minimum wage law allows for the automatic increase of Florida's minimum wage to meet the Federal wage. The United States Department of Labor's Employment Law Guide states, "When both [the FLSA] and a state law apply, the law setting the higher standards must be observed." (The Guide is available at: <http://www.dol.gov/compliance/guide/minwage.htm#Relation>) In Florida's case, the "higher standard" is incorporated and becomes the State's law. If Florida's AMWR is higher than the federal minimum wage on January 1, that higher rate will take effect. If it is lower, then the State's minimum wage should remain equal to the federal wage.

We hope that this is a helpful summary of the law, the issues and the published position taken by the Agency in July 2009. While we feel that the Agency's position is the legally correct position, there is concern that the Agency may not have the authority to implement the constitutional provision other than by calculating an increase in the adjusted minimum wage and publishing the adjusted rate.

Prepared 10/7/09 by Deputy General Counsel James E. Landsberg with review and approval of General Counsel Rosa N. McNaughton, Agency for Workforce Innovation.

EXHIBIT D

From: Randtke, Wilhelmina

Sent: Tuesday, October 06, 2009 11:07 AM

To: Landsberg, James

Subject: Florida minimum wage does not go down when consumer price index goes down.

Jim Landsberg,

Whether the Florida minimum wage could go down if the consumer price index goes down was addressed by the Florida Supreme Court in Advisory Opinion to the Attorney General Re: Florida Minimum Wage Amendment, 880 So.2d 636 (Fla. 2004). I have put relevant quotes below.

-Wilhelmina Randtke

"Next, the opponents contend that the ballot summary is also deceptive because it states that the new Florida minimum wage law will be indexed to inflation each year, thus indicating that when inflation is positive (i.e., price of consumer ^{***18} goods and services increases), the minimum wage will increase, and when inflation is negative, the minimum wage will decrease. We disagree.

The amendment clearly does not provide for decreases in the minimum wage in times of deflation, nor does the summary create this impression. Specifically, the summary states: "The state minimum wage will start as \$ 6.15 per hour six months after enactment, and thereafter be indexed to inflation each year." (Emphasis added.) The plain meaning of "inflation," however, refers only to the "continuing rise in the general price level." See Merriam Webster's Collegiate Dictionary 599 (10th ed. 1993) (defining "inflation" as "an increase in the volume of money and credit relative to available goods and services resulting in a continuing rise in the general price level"). Accordingly, we do not believe that the summary is inaccurate or misleading in this regard." Advisory Opinion to the Attorney General Re: Florida Minimum Wage Amendment, 880 So.2d 636 at 642 (Fla. 2004).

Justice Cantero dissented based on a different interpretation of the language in the ballot summary. He and the majority had the same interpretation of the language of the proposed amendment. Here are his elaborations on the proposed amendment:

"Thus, pursuant to the amendment, the new Florida minimum wage could never decrease, even if the United States experiences a period of negative inflation." Id. at 644.

"The consequences of the misleading ballot summary can be seen from the following example:

Year 1: CPI-W = 0 Minimum wage = 100%

Year 2: CPI-W = -2 Minimum wage = 100%

Year 3: CPI-W = +1 Minimum wage = **101%**

In this example, inflation drops two percent in Year 2 and increases one percent in Year 3, for a net decrease of one percent over two years. A voter reading the ballot summary would assume that the minimum wage will drop correspondingly--two percent downward in Year 2 and one percent upward in Year 3. Under the actual amendment, however, the minimum wage in Year 2 remains the same, but in Year 3 it increases by one percent. Thus, while the real inflation rate *decreased* by a net of one percent over two years, the minimum wage *increased* by a net of one percent over two years. In other words, in Year 3, the actual CPI-W is still one percent *below* its starting point in Year 1, yet the minimum wage has increased to one point *above* its starting point in Year 1." Id. at 644.