

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Commerce and Tourism

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BILL: SB 90

INTRODUCER: Senator Stewart and others

SUBJECT: Discrimination in Labor and Employment

DATE: February 17, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McMillan	McKay	CM	<b>Pre-meeting</b>
2.			JU	
3.			RC	

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**I. Summary:**

SB 90 creates the “Senator Helen Gordon Davis Fair Pay Protection Act,” which prohibits an employer from providing a less favorable employment opportunity to an employee based on the employee’s sex, and prohibits an employer from paying an employee at a rate less than the employer pays an employee of the opposite sex for substantially similar work on a job that requires equal skill, effort, and responsibility. The bill narrows the exceptions to the prohibition to differential wages based on factors other than sex, including education, training, or experience.

An employee may file a civil action against an employer who violates the act to recover the difference between the amount the employee was paid and the amount he or she should have been paid, as well as liquidated damages. The bill also establishes that an employer who violates the act is subject to a civil penalty.

The bill provides that employers are prohibited from taking any retaliatory or discriminatory personnel action against an employee who voluntarily discusses their own or another employee’s wages, requests that the employer provide a reason for the amount of the employee’s own wages, or participates in certain investigations.

The bill provides that an employer may not:

- Rely on salary or wage history in determining an employee’s salary or wages;
- Request or require wage or salary history as a condition of being interviewed, considered for an offer of employment, or as a condition of employment or promotion;
- Request or require wage or salary history;
- Retaliate against or refuse to interview, hire, promote, or otherwise employ an employee based upon prior wage or salary history, because the employee did not provide wage or salary history, or because the employee filed a complaint alleging a violation of s. 448.111, F.S.; or

- Require an employee to sign a waiver that prohibits the employee from discussing or disclosing the employee's own wages, or another employee's wages, if such wages have been voluntarily disclosed.

The bill takes effect on July 1, 2020.

## II. Present Situation:

### Title VII of the Civil Rights Act of 1964<sup>1</sup>

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, religion, national origin, or sex. Title VII applies to employers having 15 or more employees and outlines a number of unlawful employment practices. For instance, it is unlawful for employers to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.<sup>2</sup> The status of pregnancy is subsumed as a protected class in the category of sex discrimination.<sup>3</sup> Currently, it is unclear if Title VII grants sexual orientation or gender identity protected status. Although the Equal Employment Opportunity Commission (EEOC) has produced guidelines stating that Title VII covers sexual orientation, many federal courts decline to interpret sexual orientation as protected under Title VII.<sup>4</sup>

### Florida Civil Rights Act

In 1992, the Florida Legislature enacted the Florida Civil Rights Act (FCRA) to protect persons from discrimination in education, employment, housing, and public accommodations. In addition to the classes of race, color, religion, sex, and national origin protected in Title VII, the FCRA includes age, handicap, and marital status as protected classes.<sup>5</sup> The Florida Legislature added pregnancy as a protected status under the FCRA in 2015.<sup>6</sup>

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, are considered unlawful employment practices.<sup>7</sup> Courts interpreting the FCRA typically follow federal precedent because the FCRA is generally patterned after Title VII. Still, differences between the state and federal law persist. As noted above, the FCRA includes age, handicap, and marital status as protected categories. Although Title VII does not include these statuses, other federal laws address age and disability.<sup>8</sup>

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<sup>1</sup> 42 U.S.C. 2000e et. seq.

<sup>2</sup> 42 U.S.C. 2000e-2.

<sup>3</sup> 42 U.S.C. 2000e(k).

<sup>4</sup> Katherine McAnallen, NCSL Legisbrief, *Sexual Orientation in Employment Discrimination Laws*, Vol. 23, No. 34 (Sept. 2015).

<sup>5</sup> Section 760.10(1)(a), F.S.

<sup>6</sup> Ch. 2015-68, Laws of Fla.

<sup>7</sup> Section 760.10(2) through (8), F.S.

<sup>8</sup> Kendra D. Presswood, *Interpreting the Florida Civil Rights Act of 1992*, 87 FLA. B.J. 36, 36 (Dec. 2013).

### ***Procedure for Filing Claims of Discrimination***

A person who believes that he or she has been the target of unlawful discrimination may file a complaint with the Florida Commission on Human Relations (FCHR) within 365 days of the alleged violation.<sup>9</sup> After a person files a claim of discrimination with the FCHR, the FCHR investigates the complaint.<sup>10</sup> The FCHR then must make a reasonable cause determination within 180 days after the filing of the complaint.<sup>11</sup> If the FCHR finds reasonable cause, the plaintiff may bring a civil action or make a request for an administrative hearing.<sup>12</sup> A plaintiff is required to file a state claim in civil court under the FCRA within 1 year of the determination of reasonable cause by the FCHR.<sup>13</sup>

If the FCHR returns a finding of no reasonable cause, the complainant may request an administrative hearing with the Division of Administrative Hearings (DOAH) within 35 days of the finding.<sup>14</sup> The DOAH will issue a recommended order, which the FCHR may reject, adopt, or modify by issuing a final order.<sup>15</sup>

### ***Remedies***

#### **Administrative Remedies If the Commission Pursues Administrative Action**

Affirmative relief includes prohibition of the wrongful practice and back pay. The FCHR may also award reasonable attorney's fees to the prevailing party.<sup>16</sup>

#### **Civil Remedies If the Person Pursues a Legal Action**

State law authorizes awards of back pay, compensatory damages, and punitive damages.<sup>17</sup> Compensatory damages include damages for mental anguish, loss of dignity, and any other intangible injuries.<sup>18</sup> Punitive damages are capped at \$100,000 regardless of the size of the employer.<sup>19</sup> The state and its agencies and subdivisions of the state are not liable for punitive damages<sup>20</sup> or recovery amounts in excess of the limited waiver of sovereign immunity.<sup>21</sup>

### **Equal Pay Act (EPA)**

The EPA requires that men and women in the same workplace be given equal pay for completing the same work.<sup>22</sup> The factors taken into consideration when determining if jobs are equal are

<sup>9</sup> Section 760.11(1), F.S.

<sup>10</sup> Section 760.11(3), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> Section 760.11(4), F.S.

<sup>13</sup> Section 760.11(5), F.S.

<sup>14</sup> Section 760.11(7), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> Section 760.11(6), F.S.

<sup>17</sup> Section 760.11(5), F.S.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Section 768.28(5), F.S., provides that damages against a state, its agencies, or subdivisions are capped at \$200,000 per claim or \$300,000 per incident. A plaintiff may pursue a claim bill to recover in excess of these caps, but claim bills are subject to the prerogative of the Legislature.

<sup>22</sup> EEOC, *Facts About Equal Pay and Compensation Discrimination*, available at <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> (last visited Feb. 17, 2020).

skill, effort, responsibility, working conditions, and establishment.<sup>23</sup> Pay differences are only permitted when they are based on seniority, merit, quantity of production, or a factor other than sex, and an employer bears the burden of proving that one of those affirmative defenses apply.<sup>24</sup> Under the EPA, a prevailing employee can potentially receive back pay, attorney's fees, litigation costs, and liquidated damages.<sup>25</sup>

### **Worker Protections in Florida**

In Florida, Complaints of discrimination or harassment in the workplace are typically handled by the FCHR and the EEOC.<sup>26</sup>

Florida law provides that an employer cannot discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate the employer pays to employees of the opposite sex for equal work on jobs that require equal skill, effort, responsibility, and similar working conditions.<sup>27</sup> However, exceptions exist when payments are made based upon a seniority system, a merit system, a system which measures earnings by quantity or quality of product, or if there is a differential based on a reasonable factor other than sex when exercised in good faith.<sup>28</sup> Additionally, Section 448.07, F.S. provides the potential remedy of a civil action for unpaid wages.<sup>29</sup>

#### ***Florida Whistleblower's Act***

Florida's Whistleblower's Act (FWA) protects employees from certain retaliatory personnel actions taken by an employer. Sections 448.101- 448.105, F.S., prohibit employers from taking any retaliatory personnel action against an employee who has refused to participate in any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation. Employers are also prohibited from taking any retaliatory personnel action against an employee who has disclosed, threatened to disclose, provided information to, or testified before, any appropriate governmental agency or investigative entity, regarding an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation.<sup>30</sup> The FWA applies to private employers with 10 or more employees<sup>31</sup> and provides employees with a civil cause of action as a remedy for relief.<sup>32</sup>

### **Other Worker Protections**

The federal Fair Labor Standards Act (FLSA) requires covered employees to comply with minimum wage, overtime pay, recordkeeping, and child labor standards. Employers that do not comply with the FLSA or take prohibited adverse action against an employee who reports

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> The roles of Florida's agencies are specified under ch. 20, F.S.

<sup>27</sup> Section 448.07(2), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> Section 448.07(3), F.S.

<sup>30</sup> Section 448.102, F.S.

<sup>31</sup> Similarly, provisions under s. 112.3187, F.S., protect public employees from adverse personnel action if the employee discloses information pertaining to an employer's alleged violation of law.

<sup>32</sup> Section 448.103, F.S.

information pertaining to a violation of the FLSA may be subject to a suit for relief. Remedies for an employee under the FLSA include reinstatement, payment of lost wages, and damages.<sup>33</sup>

The Occupational Safety and Health Administration (OSHA) is an agency under the USDOL, and is responsible for establishing health and safety standards in the workplace.<sup>34</sup> Employers that fail to meet these standards may be subject to inspection and penalties. Employees who report unsafe workplace issues to the OSHA are protected from retaliatory action taken by employers under whistleblower provisions.<sup>35</sup>

### III. Effect of Proposed Changes:

**Section 1** creates the “Senator Helen Gordon Davis Fair Pay Protection Act.”

**Section 2** amends s. 448.07(1), F.S. to add the following definitions;

- “Business necessity” means an overriding legitimate business purpose that relies on a bona fide factor to effectively fulfill such business purpose; and
- “Less favorable employment opportunity” means:
  - Assigning or directing an employee to a position or career track in which the work performed requires substantially less skill, effort, and responsibility than the work performed by the majority of individuals in the employee’s same occupation and labor market area;
  - Failing to provide an employee with information about promotions or advancement in the full range of career tracks offered by the employer;
  - Assigning the employee work less likely to lead to a promotion or career advancement opportunity; or
  - Limiting or depriving an employee of a promotion or career advancement opportunity that would otherwise be available to the employee but for the employee’s sex.

The bill revises the standards and applicability of s. 448.07(2), F.S., to prohibit an employer from providing less favorable employment opportunities to an employee based on their sex or pay the employee at a rate less than the rate the employer pays to an employee of the opposite sex for substantially similar work on a job that requires equal skill, effort, and responsibility, and which is performed under similar working conditions.

The bill amends a current exception to the above prohibition by requiring a “bona fide factor” other than sex. The bill also establishes that such exception will only apply if the employer demonstrates that the factor is not based on a sex-based wage differential, is job-related, and is consistent with a business necessity. However, if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing a wage differential, then the exception does not apply.

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<sup>33</sup> USDOL Wage and Hour Division, *Handy Reference Guide to the FLSA*, available at <https://www.dol.gov/whd/regs/compliance/hrg.htm> (last visited Feb. 17, 2020).

<sup>34</sup> USDOL Occupational Safety and Health Administration, *About OSHA*, available at <https://www.osha.gov/about.html> (last visited Feb. 17, 2020).

<sup>35</sup> USDOL Occupational Safety and Health Administration, *All About OSHA*, available at [https://www.osha.gov/Publications/all\\_about\\_OSHA.pdf](https://www.osha.gov/Publications/all_about_OSHA.pdf) (last visited Feb. 17, 2020).

The bill amends s. 448.07(3), F.S., to provide that any employer who violates s. 448.07, F.S., is liable to the employee for the difference between the amount the employee was paid and the amount he or she should have been paid, as well as, liquidated damages.

The bill changes the time limit that an aggrieved employee has to file a civil action from 6 months after termination of employment to 3 years after the date of the alleged violation.<sup>36</sup>

The bill creates s. 448.07(4), F.S., to provide the following civil penalties for employer's who violate s. 448.07, F.S.:

- Not to exceed \$2,500 for a first violation;
- Not to exceed \$3,000 for a second violation; and
- Not to exceed \$5,000 for a third or subsequent violation.

**Section 3** amends s. 448.102, F.S., to add that an employer may not take any retaliatory or discriminatory personnel action against an employee based upon s. 448.102(1)-(4), F.S.

The bill creates s. 448.102(4), F.S., which adds that an employer may not take any retaliatory or discriminatory personnel action against an employee who discussed or disclosed the employee's own wages, inquired about another employee's wages, discussed another employee's wages, if such wages have been voluntarily disclosed, requested that the employer provide a reason for the amount of the employee's own wages, or testified or will testify, assisted, or participated in an investigation or proceeding under s. 448.102, F.S.

**Section 4** creates s. 448.111, F.S., to provide that an employer may not:

- Rely on salary or wage history in determining an employee's salary or wages;
- Orally or in writing seek, request, or require wage or salary history as a condition of being interviewed, as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion;
- Orally or in writing seek, request, or require wage or salary history;
- Retaliate against or refuse to interview, hire, promote, or otherwise employ an employee based upon prior wage or salary history, because the employee did not provide wage or salary history, or because the employee filed a complaint alleging a violation of s. 448.111, F.S.; or
- Require an employee to sign a waiver or any other document that prohibits the employee from discussing or disclosing the employee's own wages, inquiring about another employee's wages, or discussing another employee's wages, if such wages have been voluntarily disclosed.

The bill clarifies that s. 448.111, F.S., does not prevent an employee from voluntarily disclosing salary or wage history, and establishes that an employer may confirm salary or wage history only if, at the time an offer of employment with compensation is made, the prospective employee

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<sup>36</sup> The bill provides that a "violation" occurs when a discriminatory compensation decision or other practice is adopted, when an employee becomes subject to a discriminatory compensation decision or other practice, or when an employee is affected by the application of a discriminatory compensation decision or other practice, including each time wages are paid, resulting in whole or in part from such a decision or other practice.

responds to the offer by providing prior wage information to support a wage higher than that offered by the employer.

**Section 5** provides that the bill takes effect on July 1, 2020.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may expand the population of employees authorized to bring claims based on employment wage discrimination, which could increase costs in litigation for employers.

C. Government Sector Impact:

The bill may expand the population of employees authorized to bring claims based on employment wage discrimination, which could increase costs in litigation for employers.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends ss. 448.07 and 448.102 of the Florida Statutes.  
This bill creates s. 448.111 of the Florida Statutes.

**IX. Additional Information:**

A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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