

STORAGE NAME: h0495.go

DATE: April 9, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 495

RELATING TO: Representative Hill

SPONSOR(S): Fair Pay Act of 2000

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL OPERATIONS
 - (2) JUDICIARY
 - (3) GOVERNMENTAL RULES & REGULATIONS
 - (4) GENERAL GOVERNMENT APPROPRIATIONS
 - (5)
-

I. SUMMARY:

This bill states that “despite [existing] federal and state laws banning discrimination in both the public and private sectors, wage differentials persist between women and men and between minorities and non-minorities in the same jobs and in jobs that are dissimilar but that require equivalent composites of skill, effort, responsibility, and workings conditions...”

This bill targets jobs which are “dominated by employees of a particular sex, race, or national origin”, or those considered to be those that might be characterized by gender or race (“minority”).

The bill’s provisions, in the context of its stated purpose, suggests the solution is to find some factors in these targeted jobs which allow them to be compared to non-targeted, higher paying jobs. Presumably, then, employers of those employed in such targeted jobs would be required to increase wages for targeted jobs to correspond to those the criteria setters believe have a composite of skills, effort, responsibility, or working conditions which make them equivalent, or face litigation and penalties.

This bill requires the Commission on Human Relations (or Commission) to establish rules, including guidelines specifying the criteria for determining whether a job is dominated by employees of a particular sex, race, or national origin. This provision is related to the wage disclosure, recordkeeping, and reporting requirements, and includes (but is not limited to) whether a job has ever been formally, or traditionally considered to be a “male”, “female”, “white”, or “minority” job.

This bill further requires criteria related to “the demographic composition of the workforce in equivalent jobs, which may include numbers or percentages of women, men, Caucasians, and people of color working in equivalent jobs.”

This bill makes it unlawful for employers to provide lower compensation to employees on the basis of sex, race, color, religion, national origin, age, handicap, or marital status at a rate less than the rate at which an employer pays wages to employees of the opposite sex, of a different race, color, religion, national origin, age, or marital status, or without handicap for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

The bill specifies that a violation by an employer of the wage disclosure, recordkeeping, or reporting requirements under the bill gives rise to a cause of action for remedies including back pay, compensatory damages, and punitive damages, unless greater damages are provided for.

The bill provides an effective date of upon becoming a law.

It is not possible to estimate the direct and indirect fiscal impact on state and local governments, but it could be extremely high, depending on the number of people who must be paid additional amounts due to their location in jobs the Commission finds to be due higher pay, and the amount spent on litigation.

This bill may be in violation of Article VII, Section 18, Florida Constitution, related to mandates.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain: This bill states that "despite (existing) federal and state laws banning discrimination in both the public and private sectors, wage differentials persist between women and men and between minorities and nonminorities in the same jobs and in jobs that are dissimilar but that require equivalent composites of skill, effort, responsibility, and workings conditions..."

This bill creates additional law, and requires additional government resources to cause the removal of differentials in pay. Resultant increased payroll, and litigation costs could require significant tax increases to fund.

This bill targets jobs which are "dominated by employees of a particular sex, race, or national origin", or those considered to be those that might be characterized by gender or race ("minority").

The stated problem in the context of the bill's provisions suggests the solution is to find some factors in these targeted jobs which might be compared to non-targeted, higher paying jobs. Presumably, employers of those employed in such targeted jobs would be required to increase wages for targeted jobs to correspond to those with a "composite" of skills, effort, responsibility, or working conditions which, in the opinion of the Commission, would make them equivalent.

Imposing such solutions would require additional government oversight, and result in a potentially massive reallocation of limited resources to targeted groups, not only in the public sector, but in the private sector, alike. It is difficult to picture such a reallocation resulting in improving the individual freedom of those who must make such reallocations, nor does a system which shares elements of other "benefit" programs seem to support the principle of individual responsibility.

B. PRESENT SITUATION:

The private sector, state and local government employers generally compensate workers based primarily on such elements as market conditions (supply and demand), and objective competencies, including knowledge, skills, and abilities,

Over time, there has been considerable governmental interjection to mitigate social and market factors in the workplace. Laws such as the Equal Pay Act of 1963, and other portions of the Fair Labor Standards Act of 1938; Age Discrimination in Employment Act; National Labor Relations Act; Title VII of the Civil Rights Act of 1964; the Florida Civil

Rights Act of 1992; and many others, are intended to ensure certain targeted population groups are protected from not only social factors, but often market factors, as well.

Florida Civil Rights Act of 1992

The "Florida Civil Rights Act of 1992" consists of ss. 760.01-760.11 and 509.092, F.S. The purpose of the act is to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." Specifically, the act provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Section 760.07, F.S., provides remedies for unlawful discrimination. Any unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations, gives rise to a cause of action for all relief and damages described in s. 760.11(5), F.S., unless greater damages are expressly provided for.

Section 760.01, F.S., provides that the Florida Civil Rights Act of 1992 will be construed according to the fair import of its terms and be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved. The Commission on Human Relations, assigned to Department of Management Services for administrative purposes, is authorized to receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice in both the public and private sector.

Federal Employment Discrimination Provisions

The U.S. Equal Employment Opportunity Commission (EEOC) was established by Title VII of the Civil Rights Act of 1964 and began operating on July 2, 1965. The EEOC enforces the principal federal statutes prohibiting employment discrimination. Federal statutes governing employment discrimination include:

- Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. s. 2000e et al.), which prohibits employment discrimination based on race, color, religion, sex, and national origin.
- The Equal Pay Act of 1963 (EPA) (29 U.S.C. s. 206(d)), which is part of the Fair Labor Standards Act of 1938, as amended (FLSA), prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions. Under this act, employers may not reduce wages of either sex to equalize pay between men and women; a violation of the law may occur where a different wage is paid to a person who worked in the same job before or after an employee of the opposite sex; and a violation may also occur where a labor union causes the employer to violate the law. The EPA covers all employees who are covered by the FLSA, and virtually all employers are subject to the provisions of the FLSA.

- The Civil Rights Act of 1991 made major changes in the federal laws against employment discrimination enforced by the EEOC. Enacted in part to reverse several Supreme Court decisions that limited the expansion of the rights of certain groups of persons these laws were intended to help, the act also provides additional protections, including the authorization of compensatory and punitive damages in cases of intentional discrimination, and providing for attorneys' fees and the possibility of jury trials. It also directs the EEOC to expand its technical assistance and outreach activities.

Federal Initiatives

The Equal Pay Initiative focuses on ending pay discrimination, eliminating occupational segregation, and promoting pension equity. The U.S. President's budget proposal to Congress for fiscal year 2001 includes \$17 million for the U.S. Department of Labor (USDOL) to continue the initiative. Of this amount, the proposal dedicates \$7 million to help employers assess and improve their pay policies, increase nontraditional apprenticeships, and support public education efforts. (See Alexis M. Herman, Secretary of Labor, Statement before the Subcommittee on Labor, Health and Human Services, and Education, Committee on Appropriations, United States House of Representatives, March 22, 2000)

In addition to existing federal and state laws and initiatives, employers are subject to the pressures of the availability and willingness of workers to work in certain occupations. Occupations which require more limited experience, education, skill, abilities, or responsibility require less effort and time to prepare for, and, therefore, invariably have a larger labor pool available to fill them. Vacancies for such jobs generally have more applicants, and employers can fill them at lower wage rates.

Similarly, when economic conditions exist in which unemployment is particularly high, even workers with higher levels of experience, education, skills, and abilities are more plentiful, creating opportunities for employers to secure highly qualified workers at lower wage rates.

The principles of qualifications and competencies, play against supply and demand, and predictably work to regulate wages. **Governmental intervention has been used to improve the opportunities of workers with certain sets of knowledge, skills and abilities to be able to compete fairly in the marketplace. Most federal and state labor laws are intended to make workers as free as possible from discrimination which is truly based on their race, sex, or other factors irrelevant to their ability to perform the work called for in any particular occupation.**

In Florida, the law expressly forbids making any appointment, or providing any compensation, or other terms or conditions of employment based on sex, race or national origin.

C. EFFECT OF PROPOSED CHANGES:

This bill seems to be a dramatic departure from traditional approaches to protecting or enhancing workers' compensation. Illegal discrimination categories would be expanded from a focus on individuals with competencies who are discriminated against because of irrelevant factors, to entire groups. It creates illegal discrimination when pay differentials exist in entire occupational groups which happen to be dominated by employees of a

particular sex, race, or national origin, regardless market conditions, and specific education, experience, knowledge, or competencies related to specific vacancies.

Section 1 - Provides that this act may be cited as the “Fair Pay Act of 2000”.

Section 2 - Amends s. 760.02, F.S., of the Florida Civil Rights Act, to add definitions:

“Employ”, “Employee”, “Wages” and “Wage Rates”, are defined to be generally the same as those found in the Fair Labor Standards Act of 1938;

“Equivalent Jobs”, is defined as jobs or occupations that are equal within the meaning of the Equal Pay Act of 1963, **OR jobs or occupations that are dissimilar but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.**

Defining equivalent jobs this way presents some disturbing potential issues, such as:

- What can be done to prevent someone who may be biased, or bigoted, or prejudiced, or has a personal “agenda” from getting into the position of deciding exactly which skills, effort levels, responsibility levels, or working conditions, are worth more than others?;
- What will the basis be for determining how to value *any* particular skill, effort, or responsibility level, or set of working conditions?;
- What provisions will be made to assist private sector employers who eventually are forced to use limited resources to dramatically modify their compensation structures, potentially forcing them to terminate workers who they no longer are able to employ?;
- What provisions will be made for displaced workers (after their unemployment compensation payments terminate) who lose their jobs due to such layoffs?;
- What effect will increased layoffs cause on the state’s ability to provide unemployment compensation payments to terminated workers?;
- Since the federal law prohibits employers from lowering employee’s pay (even new employees going into the same position) in order to “equalize” pay to the formerly underpaid workers, what will happen to the higher paid workers who may have to be terminated in order for employers not to appear to be discriminating against those who will be required to be paid more?; and
- How will state and local governments fund the costs of lawsuits and payroll increases?

Section 3 - Amends s. 760.06, F.S., referencing rule making pursuant to ss. 120.536(1) and 120.54, F.S.; and providing certain requirements of rules.

This Section requires that rules include guidelines specifying the criteria for determining whether a job is dominated by employees of a particular sex, race, or national origin. This provision is related to the wage disclosure, recordkeeping, and reporting requirements of s. 760.105, F.S, and includes (but is not limited to) whether a job has ever been formally, or traditionally considered to be a “male”, “female”, “white”, or “minority” job.

(NOTE: there is no provision here which would parallel earlier references to nationality)

It is possible that such provisions may violate federal statutes which attempt to prevent discrimination based on race, gender, and ethnicity by prohibiting collecting and maintaining such data in official (or other) employer records.

This Section further requires criteria related to “a history of discrimination against women and/or people of color with regard to wages, assignment or access to jobs, or other terms and conditions of employment.”

This Section further requires criteria related to “the demographic composition of the workforce in equivalent jobs, which may include numbers or percentages of women, men, Caucasians, and people of color working in equivalent jobs.”

The primary concern to this bill applies, again, to this Section. The basic criteria are subject to biased views as to the elements used to determine what is “equivalent”.

The Department of Management Services, private human resources professionals, representatives of state and local government, and representatives of private sector employers fear that in creating new categories of illegal discrimination based on simple statistical or demographic data (factors which are irrelevant to a worker’s qualifications, knowledge, skills, abilities and duties required to perform in certain jobs), this bill will undermine years of progress toward equal opportunity for jobs, compensation based on competencies, and equal pay for equal work. Subjective criteria, especially criteria simply statistically related to gender, race, or national origin, would call for a radical departure from what human resource professionals believe to be best practices, and, in the case of the State of Florida, would conflict with current statute.

Section 4 - Amends s. 760.10, F.S., providing as unlawful, lower compensation paid to employees of sex, race, color, religion, national origin, age, handicap, or marital status, at a rate less than the rate at which an employer pays wages to employees of the opposite sex, of a different race, color, religion, national origin, age, or marital status, or without handicap for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. (see **Section 3** for discussion)

Section 5 - Creates s. 760.105, F.S., requiring employers to:

- Upon commencement of an individual’s employment, and at least annually thereafter, provide to each employee a written statement sufficient to inform the employee of his or her job title, wage rate, *and the manner or method in which the wage is calculated*; and
- Make, preserve, and report on records that document the wages paid to employees *and that document and support the method, system, calculations, and other bases used to establish, adjust, and determine the wage rates paid to the employer’s employees.*

This Section requires that rules must be adopted by the Commission to provide for protection of the confidentiality of employees, and must expressly require that reports not include the names or other identifying information from which readers could discern the identities of employees. The rules may also identify circumstances that warrant a prohibition on disclosure of reports or information identifying the employer.

The Commission is authorized to use the information and data it collects from employers for statistical and research purposes, and may compile and publish such studies, analyses, reports, and surveys based on the information and data, as it may consider appropriate.

The bill specifies that a violation by an employer of the wage disclosure, recordkeeping, or reporting requirements under the bill gives rise to a cause of action for all the remedies found in s. 760.11(5). These could include back pay, compensatory damages, and punitive damages, unless greater damages are expressly provided for.

Section 6 - Amends s. 760.11, F.S., incorporating the procedures found in s. 760.11 to apply to this bill, including that a complaint to the Commission may be filed within 365 days.

Section 7 - Provides an effective date of upon becoming a law.

D. SECTION-BY-SECTION ANALYSIS:

Please see Section II. C., Effects of Proposed Changes.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

It is not possible to estimate the fiscal impact this bill will have on state government. In the near term, costs will result from developing rules, for accomplishing or contracting for the collection, storage and analysis of data.

Tasks and costs related to data collection, storage and analysis would be associated with a continuing process due to changing demographics, and the continuing consequences of the provisions of this bill.

Litigation costs, and the payroll costs of "equalizing" pay could eventually be very significant. The critical element is the group who will make the decisions regarding the criteria to be used in valuing jobs, and groups of jobs. No estimate can be made since such criteria are essentially subjective, and would be different for each person.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

It is not possible to estimate the fiscal impact this bill will have on local government, but like state government, and the private sector, litigation and payroll costs will be determined by those deciding what criteria will be used in valuing jobs, occupations, and occupational groups.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is not possible to estimate the fiscal impact this bill will have on the private sector, but like state and local government, litigation and payroll costs will be determined by those deciding what criteria will be used in valuing jobs, occupations, and occupational groups.

D. FISCAL COMMENTS:

Due to the obvious exposure the state and local governments, and the private sector will have to litigation, the Department of Management Services believes this issue needs to be subjected to legal analysis.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The Florida Constitution provides that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest, and unless funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure.

Based on the near certainty that local governments will eventually be required to increase wages of minorities, women, and persons of various nationalities, passage of this legislation may be considered a violation of the Florida Constitution unless the state makes an appropriation, prior to enactment, which will be sufficient to fund such expenditures.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

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V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill may create a violation of Article VII, Section 18, Florida Constitution, with regard to an indirect requirement of the expenditure of funds by local government, without a provision for funding such expenditures.

B. RULE-MAKING AUTHORITY:

This bill provides for rule-making authority.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

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