# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 410

SPONSOR: Judiciary Committee and Senator Wasserman Schultz

SUBJECT: Employment Practices; Discrimination

DATE: March 5, 2002 REVISED: _____ _____ _____ _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | Rhea | Wilson | GO | Favorable |
| 2. | Matthews | Johnson | JU | Favorable/CS |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:

The bill amends Florida law relating to state, municipal and county employment discrimination policies, to add that pregnancy, childbirth, or related medical conditions are inclusive in the class of activities that are subject to the prohibition against discrimination on the basis of sex. Additionally, the bill clarifies that these amendments do not obligate employers to pay for health insurance benefits for abortions, except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.

This bill amends the following sections of the Florida Statutes: 110.105; 110.233; 112.042; and 760.11, F.S. This bill reenacts ss. 104.31, and 760.10, F.S., to incorporate the amendments to ss. 11.233, and 760.11, respectively.

## II. Present Situation:

**Florida Civil Rights Act**

It is the employment policy of Florida that appointments, terminations, assignments and maintenance of status, compensation, privileges, and other terms and conditions of employment in state government are to be made without regard to sex. This policy is patterned after the federal Civil Rights Act of 1964, as amended in1978.[1] This policy is also reflected in the Florida Civil Rights Act of 1992. *See* Part I, chapter 760, F.S. (ss.760.01-760.11, F.S.) The Florida Civil Rights Act's general purposes are,

> . . . 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

[1] 42 U.S.C. s. 2000e-2, Title VII

> 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.

The Act does not reflect an amendment made to the federal act by Congress in 1978 when it enacted the Pregnancy Discrimination Act. The Pregnancy Discrimination Act was enacted in response to a U.S. Supreme Court decision that held that pregnancy discrimination was not sex discrimination protectible under Title VII. *See General Electric Company v. Gilbert*, 429 U.S. 124 (1976). The Pregnancy Discrimination Act expressly stated that discrimination on the basis of pregnancy *is* sex discrimination and therefore violative of Title VII. Although the state act has not yet been amended to reflect this change, the state is currently being interpreted like the federal act such discrimination based on sex encompasses pregnancy, childbirth, or related medical conditions[2].

Section 760.02, F.S., contains definitions that are applicable to the chapter, including "discriminatory practice,"[3] "national origin,"[4] and "employer."[5] The section does not contain definitions for the phrases "because of sex" or "on the basis of sex." However, s. 760.10, F.S., of the Florida Civil Rights Act, has been held to be pre-empted by Title VII of the Civil Rights Act of 1984 to the extent that Florida's law currently offers less protection to its citizens than does the corresponding federal law. *See O'Loughlin v. Pinchback*, 579 So. 2d 788 (Fla. 1st DCA 1991).

Section 760.10, F.S., designates unlawful employment practices and the remedies for unlawful discrimination are set forth in s. 760.07, F.S. That section provides:

> Any violation of any Florida statute making 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), unless greater damages are expressly provided for. If the statute prohibiting unlawful discrimination provides an administrative remedy, the action for equitable relief and damages provided for in this section may be initiated only after the plaintiff has exhausted his or her administrative remedy. The term "public accommodations" does not include lodge halls or other similar facilities of private organizations which are made available for public use occasionally or periodically. The right to trial by jury is preserved in any case in which the plaintiff is seeking actual or punitive damages.

**State Employment**

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[2] *Kidd v. City of Jacksonville*, 97 Fla. 297, 120 So. 556 (1929); *Massie v. University of Florida*, 570 So. 2d 963 (Fla. 1st DCA 1990); *Holland v. Courtesy Corporation*, 563 So. 2d 787 (Fla. 1st DCA 1990).

[3] Section 760.02(4), F.S., defines "discriminatory practice" to mean any violation of the Florida Civil Rights Act of 1992.

[4] Section 760.02(5), F.S., defines "national origin" to include ancestry.

[5] Section 760.02(7), F.S., defines "employer" to mean any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

Chapter 110, F.S., regulates state employment. The application of chapter 110, F.S., to state employees is constrained by the statement that ". . . nothing in this chapter shall be construed either to infringe upon or to supersede the rights guaranteed public employees under chapter 447," relating to labor organizations. *See* s.110.105(5), F.S. Section 110.105(2) , F.S., prohibits discrimination as follows:

> All appointments, terminations, assignments and maintenance of status, compensation, privileges, and other terms and conditions of employment in state government shall be made without regard to age, sex, race, religion, national origin, political affiliation, marital status, or handicap, except when a specific sex, age, or physical requirement constitutes a bona fide occupational qualification necessary to proper and efficient administration.

The chapter does not include a definition for the phrase "without regard to sex." Section 110.233, F.S., prohibits certain employment acts, including favoritism toward or discrimination against a person in the career service because of their race, color, national origin, sex, handicap, religious creed, or political opinion or affiliation.

**County and municipal employment**

Chapter 112, F.S., regulates public officers and employees. Section 112.042, F.S., prohibits discrimination in county and municipal employment based solely on race, color, national origin, sex, handicap, or religious creed of any individual.

## III. Effect of Proposed Changes:

The bill amends the following four sections of law to provide the definition for the phrase "without regard to sex," "because of sex," or "on the basis of sex" to also include without regard to pregnancy, childbirth, or related medical conditions, for purposes of the prohibition against sex-based discrimination:

- Section 110.105, F.S., relating to state employment policies.
- Section 110.233, F.S., relating to career service appointments.
- Section 112.042, F.S., relating to county and municipal employment policies.
- Section 760.10, F.S., relating to unlawful employment practices.

As a result, women affected by pregnancy, childbirth, or related medical conditions would be required to be treated the same as all other persons not so affected but similar in their ability or inability to work for all employment-related purposes. This requirement would extend to receipt of health insurance or fringe benefits. However, these provisions do not obligate an employer to pay for health insurance benefits for abortion except under two conditions:

< Where the life of the mother would be endangered if the fetus were carried to term or
< Except where medical complications have arisen from an abortion.[6]

[6] The Florida Supreme Court has recently held that although the right of privacy under the *Florida Constitution* guarantees a woman the right choose to abortion, it does not create an entitlement to the financial resources to avail herself of that choice. *See Renee B. v. Florida Agency for Health Care Administration*, 790 So.2d 1035 (Fla. 2001). The Court did not preclude the possibility that a future challenge could be made on the grounds that the applicable Medicaid provisions restricting benefits

Nonetheless, an employer is not precluded from providing abortion benefits nor does it affect bargaining agreements in regard to abortion.

Two sections of law, s. 104.31, F.S., relating to a state, county or municipal employee or officer's political activities, and s. 760.11, F.S., relating to administrative and civil remedies are the Florida Civil Rights Act, are re-published to incorporate amendments to s. 110.233, F.S., and s. 760.10, F.S., respectively, through cross-references thereto.

The act takes effect July 1, 2002.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

### B. Public Records/Open Meetings Issues:

None.

### C. Trust Funds Restrictions:

None.

### D. Other Constitutional Issues:

It is unclear whether the discrimination based on a woman's pregnancy, childbirth or related medical condition is appropriately cognizable and distinctive as sex discrimination or gender discrimination. The phrase "sex discrimination" and "gender discrimination" appear to be used interchangeably in court cases when determining whether the discrimination "based on sex" or "because of sex" deprives, tends to deprive or otherwise adversely affects an individual's employment opportunities or access to benefits. The clear exception appears to be in cases of discrimination arising from sexual harassment which is clearly to be classified as sex discrimination. At any rate, any equal protection challenge for gender or sex discrimination would not likely be subject to strict scrutiny because the female gender is not recognized as a special protected class such as those who are protected because of race, religion, national origin, or physical disability under s. 2, art. I, of the *Florida Constitution*. Therefore, the test of any state law would be based on whether there was a rational relationship in which the state would have to show that the classification resulting in discrimination advances important governmental

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for medical necessary abortions only in cases of endangerment to the mother's life or in cases of rape or incest constitute gender discrimination violative of the equal protection clause under s. 2, art. I of the *Florida Constitution*. Section 2, article I of the *Florida Constitution*, was amended in 1992 by the adoption of a constitution revision ballot initiative, to include further clarification that all female and male alike are equal before the law. Although the equal protection claim was made in *Renee B.*, the Court did not rule on the merit of the claim citing the inadequate court record and the lower court's failure to rule on the claim.

objectives and the discriminatory means are substantially related to the those objectives. *See Frandsen v. County of Brevard*, 800 So.2d 757 (Fla. 5th DCA 2001).

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

According to the Florida Commission on Human Relations[7], no increase in cases would be expected if this bill were enacted into law because the term "sex" is already construed by the courts to include pregnancy, childbirth, and related medical conditions.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

The bill provides that its provisions against employment discrimination based on sex do not obligate state employers to pay for health insurance benefits for abortion except under two conditions: 1) Where the life of the mother would be endangered if the fetus were carried to term or 2) Where medical complications have arisen from an abortion. This language mirrors a provision in the federal labor relations law. *See* 42 U.S.C. s. 2000e(k). Notably, in contrast, however, federal law governing Medicaid and other federal health insurance benefits and state law on Medicaid exclude coverage for abortion except if necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest. *See e.g.*, 42 U.S.C. s.1397ee(c) (no children health insurance funds available to perform abortions except may be used to perform an abortion except when mother's life would be endangered by carrying the pregnancy to term, or in case of rape or incest); 42 U.S.C. s.1093 (no funds available to the Department of Defense can be used to perform abortions except when mother's life would be endangered by carrying the pregnancy to term, no medical treatment facility or other department facility may be used to perform an abortion except when mother's life would be endangered by carrying the pregnancy to term, or in case of rape or incest); s. 409.815, F.S. (no Medicaid funds available for abortion other than in case of mother's life threatened by term pregnancy). To the extent that current law on Medicaid and other health insurance policy provides coverage for abortions based on different or additional conditions, it is uncertain whether the inconsistency in this bill could be construed

[7] The Commission is the administrative body created by the Legislature to administer the Florida Civil Rights Act. Part of its duties include holding hearings and rendering decisions on claims alleging discrimination.

to deny or conflict with coverage provided by other law or rule. *also e.g.* R. 59 G-4230, F.A.C. At any rate, it is an inconsistency in existing federal and state law.

## VIII. Amendments:

None.