

**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.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 926

INTRODUCER: Commerce and Tourism Committee and Senator Storms

SUBJECT: Liability/Employers of Developmentally Disabled

DATE: April 1, 2011                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	<b>Fav/CS</b>
2.	Daniell	Walsh	CF	<b>Favorable</b>
3.	O'Connor	Maclure	JU	<b>Favorable</b>
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

This bill creates a new section of the Florida Statutes providing an employer who employs an individual who has a developmental disability immunity from liability for negligent or intentional acts or omissions by that individual if:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual notice of the employee's actions that created the unsafe conditions in the workplace.

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to be immune from liability for the actions or conduct of the person that occur within the scope of the person's employment.

This bill creates section 768.0895, Florida Statutes.

## II. Present Situation:

Section 393.063, F.S., defines “developmental disability” as “a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely.”

The Agency for Persons with Disabilities (APD or agency) has been tasked with serving the needs of Floridians with developmental disabilities.<sup>1</sup> The agency works in partnership with local communities and private providers to assist people who have developmental disabilities and their families. The agency also provides assistance in identifying the needs of people with developmental disabilities for support services.

### Supported Employment Services

Supported employment services are services offered to help an individual gain or maintain a job. Generally services include job coaching, intensive job training, and follow-up services. The federal Department of Education State Supported Employment Services Program defines “supported employment services” as on-going support services provided by the designated state unit to achieve job stabilization.<sup>2</sup> Section 93.063, F.S., defines “supported employment” to mean employment located or provided in an integrated work setting, with earnings paid on a commensurate wage basis, and for which continued support is needed for job maintenance.

The Division of Vocational Rehabilitation (DVR), within the Department of Education, administers an employment program that assists individuals with disabilities, including those with the most severe disabilities, to pursue meaningful careers appropriate for their abilities and capabilities.<sup>3</sup> In 2009-10, DVR helped 3,874 people with severe disabilities find jobs.<sup>4</sup> Florida law defines “supported employment services” as “ongoing support services and other appropriate services needed to support and maintain a person who has a most significant disability in supported employment.”<sup>5</sup> The service provided is based upon the needs of the eligible individual as specified in the person’s individualized plan for employment. Generally, supported employment services are provided in such a way as to assist eligible individuals in entering or maintaining integrated, competitive employment.

<sup>1</sup> Section 20.197, F.S.

<sup>2</sup> 34 C.F.R. s. 363.6(c)(2)(iii). “Under the State Supported Employment Services Program, the Secretary [of Education] provides grants to assist States in developing and implementing collaborative programs with appropriate entities to provide programs of supported employment services for individuals with the most severe disabilities who require supported employment services to enter or retain competitive employment.” 34 C.F.R. s. 363.1; *see also*, U.S. Dep’t of Education, *Supported Employment State Grants*, <http://www.ed.gov/programs/rsasupemp/index.html> (last visited Mar. 18, 2011).

<sup>3</sup> *See* Division of Vocational Rehabilitation, Florida Dep’t of Education, <http://www.rehabworks.org/> (last visited Mar. 18, 2011).

<sup>4</sup> Division of Vocational Rehabilitation, *2009-10 Performance Highlights, 2*, available at <http://www.rehabworks.org/docs/AnnualReport10.pdf> (last visited Mar. 18, 2011).

<sup>5</sup> Section 413.20(22), F.S. “Supported employment” is also defined in ch. 413, F.S., relating to vocational rehabilitation, to mean “competitive work in integrated working settings for persons who have most significant disabilities and for whom competitive employment has not traditionally occurred or for whom competitive employment has been interrupted or is intermittent as a result of such a disability. Persons who have most significant disabilities requiring supported employment need intensive supported employment services or extended services in order to perform such work.” Section 413.20(21), F.S.

Both DVR and APD provide supported employment services or connect individuals with private organizations that supply such services. There are several entities in Florida dedicated to providing these services. However, these entities do not share information about their customers with the employers that employ their customers. This is due to various reasons, including confidentiality concerns or contract agreements between the employer and the organization.

### **Employer Liability**

Under common law principles, an employer is liable for acts of its employee that cause injury to another person if the wrongful act was done while the employee was acting within the apparent scope of employment, serving the interests of his employer.<sup>6</sup> An employee is not acting within the scope of his employment, and therefore the employer is not liable, if the employee is acting to accomplish his own purposes, and not serving the interests of the employer.<sup>7</sup> “The test for determining if the conduct complained of occurred within the scope of employment is whether the employee (1) was performing the kind of conduct he was employed to perform, (2) the conduct occurred within the time and space limits of the employment, and (3) the conduct was activated at least in part by a purpose to serve the employer.”<sup>8</sup>

An employer may be held liable for an intentional act of an employee when that act is committed within the real or apparent scope of the employer’s business.<sup>9</sup> An employer may be held liable for a negligent act of an employee committed within the scope of his employment even if the employer is without fault.<sup>10</sup> “This is based on the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer.”<sup>11</sup> An employer is liable for an employee’s acts, intentional or negligent, if the employer had control over the employee at the time of the acts. “Absent control, there is no vicarious liability for the act of another, even for an employee. Florida courts do not use the label ‘employer’ to impose strict liability under a theory of respondeat superior<sup>12</sup> but instead look to the employer’s control or right of control over the employee at the time of the negligent act.”<sup>13</sup> Employer fault is not an element of vicarious liability claims.<sup>14</sup>

Employers may also be liable for the negligent hiring of an employee. Negligent hiring is defined as an “employer’s lack of care in selecting an employee who the employer knew or should have known was unfit for the position, thereby creating an unreasonable risk that another person

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<sup>6</sup> *Gowan v. Bay County*, 744 So. 2d 1136, 1138 (Fla. 1st DCA 1999) (quoting *Stinson v. Prevatt*, 94 So. 656, 657 (Fla. 1922)).

<sup>7</sup> *Id.*

<sup>8</sup> *Gowan*, 744 So. 2d at 1138.

<sup>9</sup> *Garcy v. Broward Process Servers, Inc.*, 583 So. 2d 714, 716 (Fla. 4th DCA 1991). The term “intentional” means done with the aim of carrying out the act. BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>10</sup> *Makris v. Williams*, 426 So. 2d 1186, 1189 (Fla. 4th DCA 1983). The term “negligent” is characterized by a person’s failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance. BLACK’S LAW DICTIONARY (9th ed. 2009). A negligent act is one that creates an unreasonable risk of harm to another. BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>11</sup> *Makris*, 426 So. 2d at 1189.

<sup>12</sup> “Respondeat superior” means the doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency. BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>13</sup> *Vasquez v. United Enterprises of Southwest Florida, Inc.*, 811 So. 2d 759, 761 (Fla. 3d DCA 2002).

<sup>14</sup> *Makris*, 426 So. 2d at 1189.

would be harmed.”<sup>15</sup> An action for negligent hiring is based on the direct negligence of the employer.<sup>16</sup> However, in order to be liable for an employee’s act based upon a theory of negligent hiring, the plaintiff must show that the employee committed a wrongful act that caused the injury.<sup>17</sup> “The reason that negligent hiring is not a form of vicarious liability is that unlike vicarious liability, which requires that the negligent act of the employee be committed within the course and scope of the employment, negligent hiring may encompass liability for negligent acts that are outside the scope of the employment.”<sup>18</sup>

In *Williams v. Feather Sound, Inc.*, the Second District Court of Appeal discussed the responsibility of the employer to be aware of an employee’s propensity to commit an act at issue:

Many of these cases involve situations in which the employer was aware of the employee’s propensity for violence prior to the time that he committed the tortious assault. The more difficult question, which this case presents, is what, if any, responsibility does the employer have to try to learn pertinent facts concerning his employee’s character. Some courts hold the employer chargeable with the knowledge that he could have obtained upon reasonable investigation, while others seem to hold that an employer is only responsible for his actual prior knowledge of the employee’s propensity for violence. The latter view appears to put a premium upon failing to make any inquiry whatsoever.<sup>19</sup>

Section 768.096, F.S., creates an employer presumption against negligent hiring if “before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general.”<sup>20</sup> There is no existing provision in Florida law that would specifically limit the liability of an employer if the employer has hired an individual with disabilities.

### III. Effect of Proposed Changes:

This bill creates s. 768.0895, F.S., providing an employer who employs an individual who has a developmental disability immunity from liability for negligent or intentional acts or omissions<sup>21</sup> by that individual if:

- The employee receives or has received supported employment services through a supported employment service provider; and
- The employer does not have actual notice of the employee’s actions that created the unsafe conditions in the workplace.

<sup>15</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>16</sup> *Anderson Trucking Service, Inc. v. Gibson*, 884 So. 2d 1046, 1052 (Fla. 5th DCA 2004).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at n.1.

<sup>19</sup> *Williams v. Feather Sound, Inc.*, 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980) (internal citations omitted).

<sup>20</sup> Section 768.096(1), F.S. This section provides that a background investigation must include contacting references, interviewing the employee, or obtaining a criminal background check from the Florida Department of Law Enforcement. However, the election by an employer not to conduct the investigation is not a presumption that the employer failed to use reasonable care in hiring an employee.

<sup>21</sup> An omission is defined as the “failure to do something; esp., a neglect of duty.” BLACK’S LAW DICTIONARY (9th ed. 2009).

The bill also allows a supported employment service provider that has provided employment services to a person with a developmental disability to be immune from liability for the actions or conduct of the person that occur within the scope of the person's employment.

The bill provides definitions for "developmental disability" and "supported employment service provider" within the newly created s. 768.0895, F.S. Specifically:

- "Developmental disability" has the same meaning as provided in s. 393.063, F.S.;<sup>22</sup> and
- "Supported employment service provider" means a not-for-profit public or private organization or agency that provides services for persons in supported employment, as defined in s. 393.063, F.S.

The bill provides an effective date of July 1, 2011, and specifies that the bill only applies to causes of action occurring on or after that date.

#### **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:**

This bill possibly implicates the right of access to the courts under Article I, section 21 of the Florida Constitution by eliminating or circumscribing an individual's right of action against an employer of a person with developmental disabilities. Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."<sup>23</sup> Constitutional limitations were placed on the Legislature's right to abolish a cause of action in the Florida Supreme Court case *Kluger v. White*, 281 So. 2d 1 (Fla. 1973). The Court held:

<sup>22</sup> Section 393.063, F.S., defines "developmental disability" as "a disorder or syndrome that is attributable to retardation, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely."

<sup>23</sup> 10A FLA. JUR 2D *Constitutional Law* s. 360. When analyzing an access to courts issue, the Florida Supreme Court clarified that 1968 is the relevant year in deciding whether a common law cause of action existed. *Eller v. Shova*, 630 So. 2d 537, 542 n. 4 (Fla. 1993).

[W]here a right of access ... has been provided ..., the Legislature is without power to abolish such a right without providing a reasonable alternative ... unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>24</sup>

To the extent that this bill is seen as depriving a person who is injured of the right to go to court to pursue a claim against an employer of a person with developmental disabilities, the bill may face constitutional scrutiny.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

An employer's liability in hiring individuals with disabilities through supported employment service providers may be reduced. This may help employers feel more comfortable hiring individuals with disabilities.<sup>25</sup> In turn, more individuals using supported employment services may find employment opportunities available to them. An individual's liability for negligent or intentional acts or omissions will not change.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Commerce and Tourism on March 16, 2011:**

The committee substitute made four clarifying changes from the bill as originally filed:

- Defines “supported employment service provider;”

<sup>24</sup> *Kluger*, 281 So. 2d at 4.

<sup>25</sup> See Agency for Persons with Disabilities, *2011 Bill Analysis, SB 926* (Mar. 10, 2011) (on file with the Senate Committee on Children, Families, and Elder Affairs).

- Simplifies the definition of the term “person with a developmental disability” to “developmental disability;”
- Simplifies the reference to the person/employee by using the term “person” throughout; and
- Clarifies that the bill only applies to causes of action arising on or after the effective date of the bill.

B. Amendments:

None.