HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 519 Military Affairs
SPONSOR(S): Veteran & Military Affairs Subcommittee; Moraitis, Jr., and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1290

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	11 Y, 0 N, As CS	Stramski	Williamson
2) Veteran & Military Affairs Subcommittee	11 Y, 0 N, As CS	Thompson	De La Paz
3) Appropriations Committee	26 Y, 0 N	Delaney	Leznoff
4) State Affairs Committee	13 Y, 0 N	Stramski	Camechis

SUMMARY ANALYSIS

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide up to 12 weeks of unpaid leave to eligible employees who are family members of a servicemember deployed on covered active duty, in certain circumstances. In addition, eligible employees who are family members of a covered servicemember may take up to 26 weeks of FMLA leave to care for the servicemember who is undergoing medical treatment for a serious injury or illness incurred or aggravated in the line of duty on active duty.

The FMLA generally applies to employees of state and local governments, as well as private employers.

The bill provides that an employee of the state or any county, municipality, or other political subdivision who is entitled to overtime protection under the federal Fair Labor Standards Act and who is the spouse of a servicemember of the United States Armed Forces may not be compelled by his or her employing authority to work overtime or extended hours during a period in which his or her spouse is deployed on active duty military service. The bill prohibits an employing authority from imposing a sanction or penalty upon such employee for failure or refusal to work overtime or extended work hours during a period in which his or her spouse is deployed on active duty military service.

The bill requires an employing authority to grant a request by an employee who is a spouse of a servicemember of the United States Armed Forces deployed on active duty military service for unpaid leave not to exceed four working days for the purpose of attending to matters directly related to the implementation of deployment orders of the spouse.

The bill provides a finding of an important state interest.

The bill provides an effective date of July 1, 2013.

The bill may have an indeterminate, but likely insignificant, negative fiscal impact on state and local governments. *See* Fiscal Comments section for further details.

The bill may be a county or municipal mandate. *See* Section III.A.1. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Federal Family and Medical Leave Act

The federal Family and Medical Leave Act (FMLA)[1] contains two leave entitlements that benefit families of servicemembers in the United States Armed Forces, qualifying exigency leave and military caregiver leave.

For qualifying exigency leave, eligible employees who are the spouse, son, daughter, or parent of a military member may take up to 12 weeks of FMLA leave during any 12-month period to address the most common issues that arise when a military member is deployed to a foreign country, such as attending military sponsored functions, making appropriate financial and legal arrangements, and arranging for alternative childcare.[2] For military caregiver leave, eligible employees who are the spouse, son, daughter, parent or next of kin of a covered servicemember may take up to 26 weeks of FMLA leave during a single 12-month period to care for the servicemember who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred or aggravated in the line of duty on active duty.[3] These provisions apply to the families of members of both the active duty and reserve components of the Armed Forces.

An employer may require that an employee seeking leave under the FMLA provide certification to substantiate the reason for taking leave.[4]

In order to be considered an "eligible employee", the employee must have at least 12 months of service with the employer and have worked at least 1,250 hours within the previous 12 months.[5] Employers subject to the FMLA include all state and local public agencies and private employers with more than 50 employees.[6]

Covered active duty under the FMLA is defined by rule as follows:

- Covered active duty or call to covered active duty status in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Armed Forces will generally specify if the member is deployed to a foreign country.
- Covered active duty or call to covered active duty status in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation.[7]

[1] 29 U.S.C. s. 2601, *et seq*.
[2] 29 U.S.C. s. 2612(a)(1)(E).
[3] *See* 29 C.F.R. s. 825.126(b) for a more detailed list of exigent circumstances that entitle an eligible employee to FMLA military leave.
[4] 29 U.S.C. s. 2613.
[5] 29 U.S.C. ss. 2611(2)(A).
[6] 29 U.S.C. s. 2611(4)(A)(iii), defining "public agency" by cross-reference to 29 U.S.C. s. 203(x) .
[7] *See* 29 C.F.R. s. 825.126(a).

Overtime, Extended Work Hours, and Public Employees

The federal Fair Labor Standards Act (FLSA)[8] provides that covered employees[9] of public agencies[10] who work in excess of the standard amount of hours in a given work period are entitled to either overtime pay or, if there is an applicable agreement, to special compensatory leave.[11]

Florida law governing compensation and work hours of state employees is controlled by the requirements of the FLSA. Career service employees are entitled to special compensatory leave for overtime hours worked; however, senior management service and selected exempt service employees are expected to work the hours necessary to complete their tasks, and generally are not entitled to overtime pay.[12] Counties, municipalities, or other political subdivisions likewise are bound by the FLSA. Counties, municipalities, or other political subdivisions may require executive and professional workers to work extended hours as necessary absent an agreement or ordinance to the contrary.

Chapter 115, F.S.

Chapter 115, F.S., provides certain leave protections for state and local employees who are called to active military service. Current law, however, does not provide special considerations in working conditions for an employee of the state or local government who is the spouse of a servicemember of the United States Armed Forces if the servicemember is deployed on active duty military service.

Effect of Bill

This bill provides that an employee of the state or any county, municipality, or other political subdivision who is entitled to overtime protection under FLSA and who is the spouse of a servicemember of the United States Armed Forces may not be compelled by his or her employing authority to work overtime or extended hours during a period in which his or her spouse is deployed on active duty military service. It prohibits an employing authority from imposing a sanction or penalty upon such employee for failure or refusal to work overtime or extended work hours during a period in which his or her spouse is deployed on active duty military service.

The bill requires an employing authority to grant a request by an employee who is a spouse of a servicemember of the United States Armed Forces deployed on active duty military service for unpaid leave not to exceed four working days for the purpose of attending to matters directly related to the implementation of deployment orders of his or her spouse.

The bill also provides that the act fulfills an important state interest.

B. SECTION DIRECTORY:

Section 1: Creates s. 115.135, F.S; relating to overtime and leave considerations; spouses of military servicemembers on active duty.

Section 2: Provides a finding of an important state interest.

Section 3: Provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[8] 29 U.S.C. s. 201, *et seq.*

[9] Certain classes of employees, such as those working in executive and professional capacities, are excluded from the wage and hour provisions of the FLSA. 29 U.S.C. s. 213.

[10] 29 U.S.C. s. 203(x), defining "public agency" as "the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency."

[11] 29 U.S.C. s. 207.

[12] Rule 60L-34.0031(3), Fla. Admin. Code.

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Prohibiting state and local governments from requiring a spouse of a deployed service member from working extended or overtime hours and having to provide up to a maximum of four days of leave without pay may have an indeterminate, but likely insignificant, fiscal impact.

According to the Department of Military Affairs, due to the lack of data regarding the pool of spouses who would be eligible under the bill, the economic impact cannot be estimated at this time.[13] However, due to the relatively small number of individuals currently deployed (5,268), which is reduced further by those who are not married or whose spouse does not work for a public employer, it is unlikely that any individual public employer will be significantly impacted.

According to the Department of Management Services, agencies will need to establish procedures for identifying and tracking the spouses who are deployed on active duty military service, which may increase administrative work.[14] However, as the FMLA currently provides for up to 12 weeks for similar situations, it is likely much of this work is currently being done.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision of Art. VII, s. 18 of the State Constitution may apply because this bill could cause counties and municipalities to incur additional expenses associated with the requirement that employers provide four days of unpaid leave to employees who are spouses of servicemembers of the United States Armed Forces deployed on active duty military service. In addition, counties and municipalities may incur additional expenses being unable to require certain employees to work extra hours or overtime. However, an exemption to the mandate may apply if the bill results in an insignificant fiscal impact to county or municipal governments. Given the relatively small number of deployed personnel, it appears the exemption may apply. If an exemption does not apply, an exception may still apply if the bill articulates a finding of serving an important state interest and if the

[13] According to the Department of Military Affairs, there are 5,268 men and women residing in Florida from all active and reserve service components who are currently deployed. The marital status of these servicemembers is unknown, as is the number of spouses who are employed by the state or a county, municipality, or other political subdivision. (HB 519 Analysis by the Florida Department of Military Affairs, on file with the Government Operations Subcommittee.)

[14] Department of Management Services Bill Analysis of HB 519, January 30, 2013, at 2 (on file with the Government Operations Subcommittee).

bill applies to all persons similarly situated. The bill articulates a finding of serving an important state interest and it applies to all state and local government employers. Therefore, an exception appears to apply.

2. Other:

Federal Preemption

Pursuant to the Supremacy Clause of the United States Constitution, state laws that are contrary to valid federal laws are preempted.[15]

Currently, the federal FMLA entitles eligible employees who are the spouse, son, daughter, or parent of a military member to take up to 12 weeks of FMLA leave during any 12-month period to address the most common issues that arise when a military member is deployed to a foreign country. This bill sets the limit on the amount of job protected leave to only four days. In order to avoid any conflict with federal law, this provision would have to be implemented as an additional benefit, over and above what the federal law requires.[16]

B. RULE-MAKING AUTHORITY:

The bill does not provide for rule-making authority. Rule-making authority may be necessary to specify procedures to be followed by employees and employers in order to secure the protections provided for in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Applicability of the FMLA to State and Local Governments

While all FMLA leave provisions purport to apply to state and local governments, Congress is limited in its ability to subject state and local governments to potential litigation.

The United States Supreme Court recently clarified that the power of the federal government to abrogate state sovereign immunity through the FMLA, by way of Congress' power under the Fourteenth Amendment to enact prophylactic anti-discriminatory legislation, is limited to those instances where Congress can identify a pattern of constitutional violations and tailor a remedy that is congruent and proportional to the harm addressed.[17] While the United States Supreme Court has held that the family care leave provision, as applicable to the states, is valid under this analysis because there is sufficient evidence that state family care leave policies historically have detrimentally affected women,[18] the Court held that states could not be forced to comply with the self-care provision because it was not directed at an identified pattern of gender-based discrimination. In other words, there was not sufficient evidence that self-care sick leave policies of state and local government employers historically affected one gender more so than the other. As a result, the application of the self-care sick leave provision to the states was not found to be congruent and proportional to any pattern of sex-based discrimination demonstrated by the states, and was found to be unconstitutional to the extent it purports to apply to the states.[19]

The FMLA provisions that apply to spouses of servicemembers of the Armed Forces have not been challenged by any state. Therefore, it is unclear if these provisions are directed at an identified pattern of gender-based discrimination and if they are sufficiently congruent and proportional to a pattern of sex-discrimination as to survive constitutional scrutiny.

Other Comments: Department of Management Services

The Department of Management Services provided the following comments regarding the bill:

[15] Art VI, cl.2, U.S. Const.; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).
[16] Department of Management Services Bill Analysis of HB 519, January 30, 2013, at 3 (on file with the Government Operations Subcommittee).
[17] *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 728 (2003); *Coleman v. Maryland Court of Appeals*, -- U.S.--, 132 S.Ct. 1327, 1338 (2012) (plurality opinion).
[18] *Hibbs*, supra at fn. 8.
[19] *Coleman*, supra at fn. 9.

Proposed section 115.135(2) provides job protected leave, not to exceed four days, for the purpose of attending to matters directly related to the implementation of deployment orders for his or her spouse. While this provision would not deviate from current practice for employees covered by FMLA leave, since the number of job protected days under FMLA actually exceeds the proposed benefit, the practical effect of this provision would be to extend job protected leave to employees not eligible for FMLA leave (i.e., employees that do not have 12 months of service with the employer or employees that have not worked 1,250 hours in the previous 12 months) and to extend the benefits of FMLA eligible employees by another four days.[20]

Other Comments: Procedure for Securing Leave

The bill does not specify a procedure by which a spouse of a servicemember of the United States Armed Forces must notify an employer that his or her spouse is deployed on active duty military service. The bill does not provide any rulemaking authority for employers to specify what procedures must be followed in order to secure leave or notify an employer that the employer may not require the employee to work overtime or extended work hours.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2013, the Government Operations Subcommittee adopted an amendment and reported House Bill 519 favorably with committee substitute. The amendment provides that the act fulfills an important state interest.

On March 27, 2013, the Veteran & Military Affairs Subcommittee adopted an amendment and reported House Bill 519 favorably with committee substitute. The amendment restricts the overtime prohibition in the bill to only apply to employees entitled to overtime protection under the federal Fair Labor Standards Act, thereby excluding senior management service and selected exempt service employees, and thus, continues their requirement to work the hours necessary to complete their tasks. The amendment conforms the finding of important state interest to reflect this change.

[20] Department of Management Services Bill Analysis of HB 519, January 30, 2013, at 2 (on file with the Government Operations Subcommittee).