

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 717 Discrimination

**SPONSOR(S):** Civil Justice Subcommittee; Berman and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/CS/SB 774

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Ward	Bond
2) State Affairs Committee	15 Y, 0 N, As CS	Stramski	Camechis
3) Judiciary Committee			

### SUMMARY ANALYSIS

The Florida Civil Rights Act of 1992 was enacted to “secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status...”

Similar to federal law, the Florida Civil Rights Act provides a number of actions that, if taken by an employer, are unlawful employment practices. For example, it is unlawful to discharge or fail to hire, or otherwise discriminate against, an individual with respect to compensation, terms, conditions, or privileges of employment based on that individual’s race, color, religion, sex, national origin, age, handicap, or marital status.

Unlike federal law, the Florida Civil Rights Act has not been amended to specifically include a prohibition against employment discrimination on the basis of pregnancy.

The bill provides that an employer or potential employer may not discriminate on the basis of pregnancy or a related medical condition. This affirmatively brings the Florida provision in line with the federal provisions. The bill additionally precludes any discrimination based on pregnancy in:

- Public lodging and food establishments.
- Places of public accommodation.
- Hiring, compensation, and other terms, conditions, benefits, or privileges of employment.
- Membership and participation in a labor organization.
- Professional training or apprenticeship programs.
- Licensing, certification, or other credentialing as may be necessary to engage in a trade.

The bill may have an indeterminate fiscal impact on the state and local governments.

The bill is effective July 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

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

Title VII of the Civil Rights Act of 1962 (Title VII) prohibits discrimination on the basis of race, color, religion, national origin, or sex. Title VII covers employers with 15 or more employees and outlines a number of unlawful employment practices. For example, Title VII makes it 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.

##### **Pregnancy Discrimination Act<sup>2</sup>**

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*<sup>3</sup> that Title VII did not include pregnancy under its prohibition against unlawful employment practices. The Pregnancy Discrimination Act (PDA), passed in 1978, amended Title VII to define the terms “because of sex” or “on the basis of sex,” to include pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.<sup>4</sup> Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, and any other term or condition of employment.<sup>5</sup>

##### **Florida Civil Rights Act of 1992**

The Florida Civil Rights Act of 1992 (FCRA) was enacted to “secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status...”<sup>6</sup> The FCRA provides protection from discrimination in the areas of employment, licensing, professional training or apprenticeship, and places of public accommodation.

Similar to Title VII, the FCRA applies to employers with 15 or more employees.<sup>7</sup> It specifically provides a number of actions that, if taken by an employer, are considered unlawful employment practices.<sup>8</sup> For example, it is unlawful to discharge or fail to hire an individual, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on an individual’s race, color, religion, sex, national origin, age, handicap, or marital status. Unlike Title VII, the FCRA has not been amended to specifically include a prohibition against pregnancy discrimination.

##### **Pregnancy Discrimination in Florida**

Although Title VII expressly includes pregnancy status as a component of sex discrimination, the FCRA does not. The fact that the FCRA is patterned after Title VII but failed to include this provision has

---

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

<sup>2</sup> Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978).

<sup>3</sup> 429 U.S. 125, 145 (1976).

<sup>4</sup> The PDA defines the terms “because of sex” or “on the basis of sex” to include pregnancy, childbirth, or related conditions and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so infected but has similar ability or inability to work.

<sup>5</sup> For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, <http://www.eeoc.gov/facts/fs-preg.html> (last visited March 13, 2013).

<sup>6</sup> Section 760.01, F.S.

<sup>7</sup> Section 760.02(7), F.S.

<sup>8</sup> Section 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.

caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection on the basis of pregnancy status. Since the Florida Supreme Court has not yet considered the issue, the ability to bring a claim based on pregnancy discrimination varies among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under the FCRA was *O'Laughlin v. Pinchback*.<sup>9</sup> In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeal (DCA) held that the Florida Human Rights Act was preempted by Title VII, as amended, as it stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination."<sup>10</sup> By preempting the Florida statute, the court did not reach the question of whether the Florida law prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.

The Fourth DCA in *Carsillo v. City of Lake Worth*<sup>11</sup> found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination. The court recognized that the Florida statute had never been amended, but concluded that since Congress' original intent was to prohibit this type of discrimination it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.

In contrast, the Third DCA held in *Delva v. Continental Group, Inc.*<sup>12</sup> that FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court's analysis that the FCRA had not been amended to include pregnancy status. The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin*. The court certified the conflict with the *Carsillo* case to the Florida Supreme Court.<sup>13</sup>

Federal courts interpreting the FCRA have similarly wrestled with whether pregnancy status is covered by its provisions.<sup>14</sup> Like the state courts, the federal courts finding that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is patterned after Title VII, which bars pregnancy discrimination. The courts finding that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status.

## Florida Commission on Human Relations

The Florida Commission on Human Relations (commission) is an administrative body that is charged with carrying out the purposes of the FCRA. The commission is comprised of 12 members who are appointed by the Governor, subject to Senate confirmation.<sup>15</sup> The commission is administratively housed within the Department of Management Services (department); however, the commission is not subject to the control, supervision, or direction of the department.<sup>16</sup> The commission is statutorily

---

<sup>9</sup> 579 So.2d 788 (Fla. 1st DCA 1991). This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, and was also patterned after Title VII.

<sup>10</sup> *Id.* at 792.

<sup>11</sup> 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).

<sup>12</sup> 96 So.3d 956 (Fla. 3d DCA 2012), *reh'g denied*.

<sup>13</sup> The case was filed with the Florida Supreme Court on October 16, 2012 and assigned case number SC12-2315.

<sup>14</sup> Federal courts finding that the FCRA does not include a prohibition against pregnancy discrimination include: *Frazier v. T-Mobile USA, Inc.*, 495 F.Supp.2d 1185, (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011). Federal courts finding that FCRA does provide protection against pregnancy discrimination include *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), and *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011).

<sup>15</sup> Section 760.03, F.S.

<sup>16</sup> Section 760.04, F.S.

authorized to receive, initiate, investigate, hold hearings on, and act upon complaints alleging any discriminatory practice under the FCRA.<sup>17</sup>

## Employment Complaint Process

Any person who believes that there has been unlawful discrimination in violation of the FCRA, may file a verified complaint with the commission within 365 day of the alleged violation.<sup>18</sup> The commission will, by registered mail, send a copy of the complaint to the person alleged to have committed the discriminatory practice, within 5 days of the complaint being filed. The person alleged to have committed the discriminatory practice may file a verified answer to the complaint within 25 days of the date the complaint was filed with the commission. If there is another state agency or other unit of government that has subject matter jurisdiction and has legal authority to investigate the complaint, the commission may refer the complaint to such agency for an investigation.<sup>19</sup>

For complaints that are not referred to another agency, as provided above, the commission has 180 days from the date the complaint was filed to complete an investigation to determine whether reasonable cause exists to believe that a discriminatory practice has occurred in violation of the FCRA.<sup>20</sup> If the commission determines that reasonable cause exists, the complainant may either bring a civil action against the person named in the complaint or request an administrative hearing under ch. 120, F.S.<sup>21</sup>

A civil action must be filed no later than 1 year after the commission issues the reasonable cause determination.<sup>22</sup> Available remedies include an order prohibiting the discriminatory practice and affirmative relief, such as back pay. A judge may also award compensatory damages for the aggrieved person's mental anguish, loss of dignity, and any other intangible injury, as well as punitive damages. Punitive damages are capped at \$100,000. The court may award reasonable attorney's fees to the prevailing party.

An administrative hearing under ch. 120, F.S., must be requested within 35 days after the commission issues its reasonable cause determination.<sup>23</sup> A commissioner may hear the case or the commission can request the case be heard by an administrative law judge (ALJ). If the commissioner finds that a violation of the FCRA has occurred, he or she will issue a proposed order prohibiting the practice and providing affirmative relief, such as back pay. The prevailing party may also be entitled to reasonable attorney's fees. If an ALJ finds that a violation of the FCRA has occurred, he or she will issue a recommended order prohibiting the practice and providing affirmative relief. The commission must issue a final order adopting, rejecting, or modifying the recommended order within 90 days of the issuance of the recommended or proposed order.

If during its initial investigation, the commission determines that no reasonable cause exists to believe that a violation of the FCRA has occurred, the commission will dismiss the complaint.<sup>24</sup> The complainant then has 35 days in which to request an administrative hearing before an ALJ. Failure to timely file a request for a hearing bars the claim. If the ALJ finds that a violation of the FCRA has occurred, he or she will issue a recommended order prohibiting the practice and providing affirmative relief. The ALJ may also award attorney's fees to the prevailing party. The commission must issue a final order adopting, rejecting, or modifying the recommended order within 90 days of the issuance of the recommended order. If the final order issued by the commission determines that a violation of the FCRA occurred, a party has 1 year from the date of the final order to initiate a civil action or accept the

---

<sup>17</sup> Section 760.06, F.S.

<sup>18</sup> Section 760.11(1), F.S. In lieu of filing a complaint with the commission, a complainant may file a complaint with the Equal Employment Opportunity Commission.

<sup>19</sup> Section 760.11(2), F.S.

<sup>20</sup> Section 760.11(3), F.S.

<sup>21</sup> Section 760.11(4), F.S.

<sup>22</sup> Section 760.11(5), F.S.

<sup>23</sup> Section 760.11(6), F.S.

<sup>24</sup> Section 760.11(7), F.S.

relief offered by the commission. However, an aggrieved person cannot file both a private action and accept the relief offered by the commission.

If the commission fails to make a determination as to whether reasonable cause exists within 180 days of the date the complaint was filed, a complainant may either bring a civil action against the person named in the complaint or request an administrative hearing under ch. 120, F.S.<sup>25</sup>

### **Effect of the Bill**

The bill provides that discrimination on the basis of pregnancy is illegal in areas covered by the FCRA. This brings the Florida provision in line with the federal provisions. The bill precludes any discrimination on the basis of pregnancy in:

- Public lodging and food establishments.
- Places of public accommodation.
- Hiring, compensation, and other terms, conditions, benefits, or privileges of employment.
- Membership and participation in a labor organization.
- Professional training or apprenticeship programs.
- Licensing, certification, or other credentialing as may be necessary to engage in a trade.

Notwithstanding these prohibitions, it is not an unlawful employment practice to take or fail to take any action on the basis of pregnancy when such status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 509.092, F.S., prohibiting discrimination on the basis of pregnancy in public food and lodging establishments.

Section 2 amends s. 760.08, F.S., prohibiting discrimination on the basis of pregnancy in public accommodation establishments.

Section 3 amends s. 760.10, F.S., prohibiting employment discrimination on the basis of pregnancy, childbirth, or related medical conditions and prohibiting discrimination on the basis of pregnancy by labor organizations, joint labor-management committees, employment agencies, or in licensing.

Section 4 provides that the bill is effective July 1, 2013.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

##### **2. Expenditures:**

See FISCAL COMMENTS.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate fiscal impact on the private sector, as it potentially subjects covered employers to a new state cause of action in those appellate court districts that do not recognize the FCRA to prohibit discrimination on the basis of pregnancy. However, as the bill merely brings the FCRA in line with the federal Civil Rights Act, the new state cause of action will be one that is already cognizable in federal law, and should not lead to any significant increase in litigation.

D. FISCAL COMMENTS:

The bill may have an indeterminate fiscal impact on state and local governments, as it potentially subjects state and local governments to a new state cause of action in those appellate court districts that do not recognize the FCRA to prohibit discrimination on the basis of pregnancy. However, as the bill merely brings the FCRA in line with Title VII of the federal Civil Rights Act, the new state cause of action will be one that is already cognizable in federal law and should not lead to any significant increase in litigation.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 27, 2013, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Removing a definition of "sex" which included a pregnant female;
- Removing a provision which would have extended the time for investigation of a discrimination complaint from 180 days to 240 days;
- Removing provisions that would authorize the Commission or an ALJ to award compensatory damages and punitive damages not to exceed \$100,000 in discrimination cases; and
- Providing that employment discrimination on the basis of pregnancy is added to other employment discrimination prohibitions.

On April 9, 2013, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment clarifies that discrimination on the basis of pregnancy is prohibited in: public lodging and food establishments; places of public accommodation; hiring, compensation, and other terms, conditions, benefits, or privileges of employment; membership and participation in a labor

organization; professional training or apprenticeship programs; and licensing, certification, or other credentialing as may be necessary to engage in a trade. Notwithstanding these prohibitions, it is not an unlawful employment practice to take or fail to take any action on the basis of pregnancy when such status is a bona fide occupational qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

This analysis is drafted to the committee substitute as passed by the State Affairs Committee.