HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 105 Florida Civil Rights Act
SPONSOR(S): Civil Justice Subcommittee; Berman and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 1 N, As CS	Ward	Bond
2) State Affairs Committee	15 Y, 1 N	Stramski	Camechis
3) Judiciary Committee			

SUMMARY ANALYSIS

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Title VII was amended in 1978 to specifically include discrimination based on pregnancy, childbirth, and related medical conditions as prohibited forms of sex discrimination.

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 prohibits a number of actions by employers as unlawful employment practices. 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 that individual's race, color, religion, sex, national origin, age, handicap, or marital status. However, unlike Title VII of the Civil Rights Act of 1964, the Florida Civil Rights Act has not been amended to specifically include a prohibition against pregnancy discrimination. State and federal courts in Florida to consider the issue have reached different conclusions as to whether the Florida Civil Rights Act prohibits discrimination based on pregnancy.

The bill specifically prohibits pregnancy discrimination in:

- Public lodging or food service establishments;
- Hiring for employment;
- Compensation for employment;
- Professional licensing; and
- Terms, conditions, benefits, or privileges of employment, including participation in labor organizations and labor-management committees.

The bill does not appear to have a fiscal impact on the state or local governments; however, it could have an indeterminate direct economic impact on the private sector.

The bill is effective July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Title VII of the Civil Rights Act of 1964[1]

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment 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 an employer 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[2]

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*[3] that Title VII did not include pregnancy discrimination as a form of sex discrimination 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 prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[4] 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, or any other term or condition of employment.[5]

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…"[6] The FCRA provides protection from discrimination in employment and public accommodations.

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, would be considered unlawful employment practices.[7] 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, although the question of whether the FCRA impliedly covers pregnancy discrimination is currently pending before the Florida Supreme Court.[8]

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[1] 42 U.S.C. s. 2000e. *et seq*.
[2] Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978), codified as 42 U.S.C. s. 2000e(k).
[3] 429 U.S. 125, 145 (1976).
[4] 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 affected but has similar ability or inability to work.
[5] For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, http://www.eeoc.gov/facts/fs-preg.html (last visited February 18, 2014).
[6] Section 760.01, F.S.
[7] 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.
[8] *Delva v. The Continental Group, Inc*., Fla.Sup.Ct. Case No. SC12-2315. Oral argument was held Nov. 7, 2013.

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 has not been amended to include this provision has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection from discrimination on the basis of pregnancy under state law. Since the Florida Supreme Court has not yet decided 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 Florida law was *O'Laughlin v. Pinchback*.[9] 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 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."[10] By finding the Florida Human Relations Act[11] to be preempted by federal law, the court did not reach the question of whether the Florida law on its own 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 District Court of Appeal in *Carsillo v. City of Lake Worth*[12] 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, as expressed by the PDA, 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 District Court of Appeal in *Delva v. Continental Group, Inc.*[13] held that the 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, where the case has been fully briefed and argued before the Court.[14] A decision in the case has not been issued.

Federal courts interpreting the FCRA have similarly wrestled with whether pregnancy status is covered by its provisions.[15] Like the state courts, the federal courts that have found 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.

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[9] 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.
[10] *Id.* at 792.
[11] The Florida Human Relations Act was the precursor to FCRA. Chs. 69-287, 72-48, and 77-341, L.O.F.
[12] 995 So.2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So.3d 848 (Fla. 2009).
[13] 96 So.3d 956 (Fla. 3d DCA 2012), *reh'g denied*.
[14] The case was filed with the Florida Supreme Court on October 16, 2012, and assigned case number SC12-2315.
[15] 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).

Most recently, a Florida federal court concluded that the Florida Legislature intended to include pregnancy in its definition of 'sex,' and therefore discrimination based on pregnancy is an unlawful employment practice under the FCRA.[16]

Procedures for Filing Claims under Title VII and the FCRA

A Florida employee may file a charge of an unlawful employment practice with either the federal Equal Employment Opportunity Commission (EEOC) or the Florida Commission on Human Relations (FCHR).

A person who wishes to file a complaint with the EEOC must do so within 300 days of a violation in a jurisdiction with a fair employment practices agency (such as Florida, which has the FCHR), or within 180 days in a jurisdiction with no such agency.[17]

The EEOC may then investigate the charge of discrimination, or refer it to a local fair employment practices agency.[18] The EEOC may also refer the charge for mediation. If within 180 days of the claim the EEOC dismisses a charge under Title VII, or if the EEOC has not conciliated a charge or filed suit within that time, the EEOC may issue upon request a notice to the complainant that the complainant may file suit against the alleged offending party. If the EEOC finds reasonable cause to believe that a violation of Title VII occurred, it may likewise issue a right to sue notice to the complainant if the claim cannot be resolved informally. The suit must then be filed within 90 days of the notice.[19]

A person who wishes to file a complaint with the FCHR must do so within 365 days of a violation. If a complaint is filed with the FCHR, the FCHR has 180 days to conciliate the claim or determine whether there is reasonable cause to conclude that a discriminatory practice prohibited by FCRA took place, at which point it must notify the complainant and respondent of its determination.[20] If the FCHR concludes that there is reasonable cause to conclude that a violation took place, or if it fails to make any determination as required, the aggrieved person may either bring a civil action in an appropriate court, which may be filed within one year of the determination of reasonable cause, or request an administrative hearing under sections 120.569 and 120.57, Fla. Stat., within 35 days of the determination of reasonable cause.[21]

If the FCHR determines that there is no reasonable cause to believe a violation of the FCRA occurred, a complainant may only request an administrative proceeding under sections 120.569 and 120.57, Fla. Stat. If the complainant prevails, a final order from the FCHR may be entered requiring affirmative relief, including back pay. The complainant then has one year to accept the affirmative relief offered, or to bring a civil action in state court as if there had originally been a determination of reasonable cause.[22]

[16] *Glass v. Captain Katanna's, Inc*., 950 F.Supp.2d 1235 (M.D. Fla. 2013).
[17] EEOC Compliance Manual, Chapter 2-IV. The enforcement procedures referenced in this paper do not apply to individuals affected by federal agencies, who have a separate process. 29 C.F.R. part 1614.
[18] 29 C.F.R. s. 1601.70.
[19] 42 U.S.C. s. 2000e-5(f)(1); 42 U.S.C. s. 12117.
[20] Section 760.11(3), F.S.
[21] Section 760.11(6), F.S.
[22] Section 760.11(7), F.S.

Remedies under Title VII and the FCRA

Remedies available to persons who bring employment discrimination claims differ depending on whether the claim is brought under Title VII or under the FCRA. If a plaintiff prevails under Title VII or the FCRA in an employment discrimination case, the plaintiff might be entitled to an order prohibiting the discriminatory practice, as well as reinstatement or hiring, with or without back pay.[23] The amount of additional damages available, however, differs under the FCRA and Title VII.

A claimant who prevails in a discrimination claim against a private entity under the FCRA may recover up to $100,000 in punitive damages.[24] Compensatory damages against private entities, such as damages for mental anguish, loss of dignity, and other intangible injuries, are not limited under the FCRA. However, the total recovery, including back pay, for a claimant who brings a discrimination claim against the state or its subdivisions is limited under the FCRA to $300,000.[25]

By contrast, the total amount of punitive and compensatory damages available to a prevailing plaintiff under Title VII depends on the size of the offending employer as follows: for employers with between 15 and 100 employees, the cap on compensatory and punitive damages is $50,000; for employers with between 101 and 200 employees, the cap is $100,000; for employers with between 201 and 500 employees, the cap is $200,000; and for employers with more than 500 employees, the cap is $300,000.[26] Unlike the FCRA, there apparently is no limitation on total recovery, including back pay, for a claimant who brings suit against the state or its subdivisions under Title VII, though the caps on compensatory and punitive damages would apply.

Effect of the Bill

The bill provides that pregnancy discrimination in employment and in public lodging and food service establishments is unlawful. The bill prohibits discrimination based on pregnancy in:

- Public lodging or food service accommodations;
- Hiring for employment;
- Compensation for employment;
- Professional licensing;
- Terms, conditions, benefits, or privileges of employment, including participation in labor organizations, employment agencies, and labor-management committees.

The bill also adds "benefits" to the existing list of employment perquisites that may not be used to discriminate for any of the prohibited reasons. The addition of the term "benefits" (line 102) may have no practical effect since courts routinely use the term "benefits" interchangeably with the existing statutory language "terms, conditions, or privileges of employment."[27] Courts have awarded employment "benefits" as damages without finding the word in the statute.[28] The term "benefits" is not included in the federal equivalent to this statute,[29] but is included in the federal provision which includes pregnancy in the definition of "sex."[30]

[23] Section 760.11(5), F.S.; 42 U.S.C. s. 2000e-5(g).
[24] Section 760.11(5), F.S.
[25] Section 760.11(5), F.S., referring to the limited waiver of sovereign immunity in section 768.28, F.S.
[26] 42 U.S.C. s. 1981a(b).
[27] *See,* e.g., *Sunbeam Television Corp. v. Mitzel*, 83 So.3d 865 (Fla. 3d DCA 2012) and *Duchateau v. Camp, Dresser & McKee, Inc*., 713 F.3d 1298,1300 (11th Cir. 2013) (". . .a position that did not affect her compensation, benefits, or the terms of her employment.").
[28] *Sunbeam Television Corp. v. Mitzel*, 83 So.3d 865 (Fla. 3d DCA 2012).
[29] *See* 42 U.S.C. s. 2000e-2, which provides, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . ."
[30] 42 U.S.C. s. 2000e (k).

Title VII provides that discrimination on the basis of sex includes "pregnancy, childbirth, or related medical conditions."[31] This bill does not include a definition of pregnancy. As a result, it is unclear if the prohibition against pregnancy discrimination under this bill would prohibit discrimination against, or require accommodation for, women with certain conditions that are related to pregnancy. [32]

B. SECTION DIRECTORY:

Section 1 amends s. 509.092, F.S., relating to public lodging establishments and public food service establishments.

Section 2 amends s. 760.01, F.S., revising the general purpose of the FCRA.

Section 3 amends s. 760.05, F.S., relating to functions of the Florida Commission on Human Relations.

Section 4 amends s. 760.07, F.S., providing civil and administrative remedies for pregnancy discrimination.

Section 5 amends s. 760.08, F.S., prohibiting discrimination on the basis of pregnancy in places of public accommodation.

Section 6 amends s. 760.10, F.S., prohibiting discrimination of the basis of pregnancy in employment and employment related matters.

Section 7 reenacts s. 760.11, F.S., to incorporate pregnancy discrimination into provisions relating to administrative and civil remedies for violations of the FCRA.

Section 8 provides an effective date of July 1, 2014.

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:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate economic impact on some private entities in those jurisdictions where courts interpret the FCRA as not covering claims of pregnancy discrimination. Private entities in those jurisdictions may be subject to increased liability for pregnancy discrimination as a result of this

[31] 42 U.S.C. s. 2000e.

[32] For example, an adverse employment action against an employee because she was lactating was held to violate Title VII's prohibition on sex discrimination, as the lactation was a "related medical condition" of pregnancy and childbirth. *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th. Cir. 2013).

bill, due to the potential for higher compensatory damages awards under the FCRA than those available under Title VII. Additionally, some potential pregnancy discrimination claimants may have more time to file suit under state law as a result of this bill, as a claimant who receives a right to sue under state law has one year to file suit after receiving a right to sue notice, while a claimant who receives a right to sue notice from the federal EEOC under federal law must file suit within 90 days.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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:

Other Comments: Scope of the Prohibition of Discrimination on the Basis of Pregnancy

Title VII provides that discrimination on the basis of sex includes "pregnancy, childbirth, or related medical conditions."[33] This bill does not include a definition of pregnancy. As a result, it is unclear if the prohibition against pregnancy discrimination under this bill would prohibit discrimination against, or require accommodation for, women with certain conditions that are related to pregnancy. [34]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 13, 2014, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed the definition of pregnancy. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

[33] 42 U.S.C. s. 2000e.
[34] *See supra*, fn. 32.