

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 220

INTRODUCER: Senator Thompson

SUBJECT: Florida Civil Rights Act

DATE: January 13, 2014

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Siples</u>	<u>Hrdlicka</u>	<u>CM</u>	<b>Favorable</b>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<b>Pre-meeting</b>
3.	_____	_____	<u>CA</u>	_____

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**I. Summary:**

SB 220 amends the Florida Civil Rights Act (FCRA) by expressly prohibiting discrimination because of pregnancy. The FCRA currently prohibits discrimination based on race, creed, color, sex, physical disability, or national origin in the areas of education, employment, housing, and public accommodation. Courts are split regarding whether a cause of action may exist for pregnancy discrimination under state law.

The definition of the term “pregnancy” in the bill is the substance of the definition of the same term in the federal Pregnancy Discrimination Act, incorporated into Title VII of the federal Civil Rights Act (Title VII) in 1978. “Pregnancy” means a woman affected by pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

Existing law prohibits an employer from discriminating against a member of a protected class with respect to compensation, terms, conditions, or privileges of employment. The bill adds the term “benefits” to this list. However, discrimination with respect to benefits may already be covered by terms or conditions of employment.

By ensuring a state cause of action for pregnancy discrimination claims, plaintiffs will have more time to file suit than under federal law. After the Equal Opportunity Employment Commission concludes an investigation of a complaint and issues a “right-to-sue” letter, the plaintiff has 90 days to file an action in federal court. Plaintiffs having pregnancy discrimination cases in state court would have up to a year to file after a determination of reasonable cause by the Florida Commission on Human Relations (FCRA). Also, plaintiffs filing against a small-sized employer may be able to recoup greater punitive damages in state court, due to the difference in caps on punitive damages in state and federal court.

As stated above, case law indicates a conflict among circuits on whether under the FCRA a plaintiff may bring a state claim for pregnancy discrimination. The Florida Supreme Court

recently heard oral arguments on the issue. The Court's forthcoming decision will likely determine whether the cause of action exists under Florida law.

## II. Present Situation:

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

Title VII of the Civil Rights Act of 1962 (Title VII) prohibits discrimination based on race, color, religion, national origin, or sex. Title VII applies to employers with 15 or more employees and outlines a number of unlawful employment practices. 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.<sup>2</sup>

### **Pregnancy Discrimination Act<sup>3</sup>**

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert* that Title VII did not provide protection based on pregnancy discrimination.<sup>4</sup> In response, in 1978, Congress passed the Pregnancy Discrimination Act (PDA). The PDA amended Title VII to expressly provide that discrimination because of sex includes discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.<sup>5</sup>

### **Americans with Disabilities Act<sup>6</sup>**

The Americans with Disabilities Act (ADA) prohibits discrimination based on disability in employment, public accommodation, and telecommunications. The ADA defines disability as a "physical or mental impairment that substantially limits one or more major life activities ... ; a record of such an impairment; or ... being regarded as having such an impairment."<sup>7</sup> Although pregnancy is not generally considered a disability, complications arising out of pregnancy may afford an individual protections provided under the ADA.<sup>8</sup>

### **Family and Medical Leave Act<sup>9</sup>**

The Family and Medical Leave Act (FMLA) provides that employees of certain covered employers are entitled to take up to 12 weeks of unpaid leave a year for a serious illness, injury, or other health condition that involves continuing treatment by a health care provider. The FMLA also guarantees that employees can return to the same or an equivalent position. To apply, the FMLA sets certain threshold requirements regarding a minimum number of employees

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

<sup>2</sup> 42 U.S.C. 2000e-2.

<sup>3</sup> Pub. L. No. 95-555, 92 Stat. 2076.

<sup>4</sup> 429 U.S. 125, 145-146 (1976).

<sup>5</sup> The PDA provides that individuals qualifying for protection on the basis of pregnancy must be treated the same for employment purposes, including the receipt of benefits, as any other person who does not have that condition but is similarly able or unable to work.

<sup>6</sup> 42 U.S.C. s. 101.

<sup>7</sup> 42 U.S.C. s. 12102.

<sup>8</sup> Michael E. Barnsback, *Complying with Employment Regulations*, 2013 WL 418827, p. 9 (2013).

<sup>9</sup> 29 U.S.C. s. 2611 (11)(1993).

and time worked in that position.<sup>10</sup> In addition to providing coverage for birth or adoption, the FMLA authorizes leave for prenatal care, incapacity related to pregnancy, and any serious health condition following childbirth.<sup>11</sup>

### **Florida Civil Rights Act**

The 1992 Florida Legislature enacted the Florida Civil Rights Act (FCRA) to protect persons from discrimination in education, employment, housing, and public accommodations. In addition to the classes of race, color, religion, sex, and national origin protected in federal law, the FCRA includes as a protected class age, handicap, or marital status.<sup>12</sup>

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, are considered unlawful employment practices.<sup>13</sup> Unlike Title VII, the FCRA has not been amended to expressly prohibit pregnancy discrimination.

Courts interpreting the FCRA typically follow federal precedent because the FCRA is generally patterned after Title VII. Still, differences between state and federal law persist. As noted above, the FCRA includes age, handicap, and marital status as protected categories. Although Title VII does not include these statuses, other federal laws address age and disability, albeit in a different manner.<sup>14</sup>

### **Pregnancy Discrimination in Florida**

Although Title VII expressly includes pregnancy status as a form of sex discrimination, the FCRA does not. The fact that the FCRA is modeled after Title VII but failed to include this provision has caused division among both federal and state courts as to whether the Legislature intended to provide protection on the basis of pregnancy status. Without guidance from the Florida Supreme Court, the ability to bring a claim based on pregnancy discrimination varies among jurisdictions.

The case of *O'Loughlin v. Pinchback* represents the first time that a Florida district court of appeal reviewed a claim of pregnancy discrimination in the context of the FCRA (then known as the Florida Human Rights Act).<sup>15</sup> In this case, the plaintiff alleged that her employer unlawfully terminated her from her position as a correctional officer based on her pregnancy. The First District Court of Appeal indicated as an initial matter that Florida styled its anti-discrimination law on the federal model.<sup>16</sup> Although the Legislature did not amend Florida law to conform to Title VII as amended by the Pregnancy Discrimination Act (PDA), the court held that both

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<sup>10</sup> The FMLA applies to private employers with at least 50 employees and all public employers. To be eligible for FMLA leave, an individual must have worked for the employer for at least 12 months and must have worked at least 1,250 hours during the 12 months prior to the leave.

<sup>11</sup> For more information, see U.S. Dept. of Labor, *FMLA Frequently Asked Questions*, <http://www.dol.gov/whd/fmla/fmla-faqs.htm> (last visited January 7, 2014).

<sup>12</sup> Section 760.10(1)(a), F.S.

<sup>13</sup> Section 760.10(2) through (8), F.S.

<sup>14</sup> Kendra D. Presswood, *Interpreting the Florida Civil Rights Act of 1992*, 87 FLA. B.J. 36, 36 (December 2013).

<sup>15</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>16</sup> *Id.* at 791.

federal and state law should be read in concert to provide the maximum protection against discrimination. Therefore, Title VII as amended by the PDA preempts Florida law “to the extent that Florida’s law offers less protection to its citizens than does the corresponding federal law.”<sup>17</sup> Therefore, the *O’Loughlin* court found that pregnancy discrimination is prohibited by state law.

Other courts have interpreted the issue of pregnancy discrimination in state law differently. In *Carsillo v. City of Lake Worth*, the Fourth District Court of Appeal opined that the FCRA includes pregnancy because Congress originally intended Title VII to include pregnancy, and the PDA merely clarified that intent.<sup>18</sup> The court concluded it unnecessary for Florida to amend its statute in light of this interpretation. The Florida Supreme Court declined to hear the appeal.<sup>19</sup>

However, the Third District Court of Appeal court reached an opposite finding. In *Delva v. Continental Group, Inc.*, the court did not look beyond the plain language of the FCRA, and found that no remedy exists for a pregnancy claim in state court under Florida law.<sup>20</sup> The court certified the conflict with the *Carsillo* case to the Florida Supreme Court. The Court held oral arguments November 7, 2013.<sup>21</sup> To date, the Court has not released a decision.

Federal courts interpreting the FCRA have similarly wrestled with whether pregnancy status is prohibited by its provisions.<sup>22</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 did so primarily because the Legislature has not amended the FCRA to expressly include pregnancy as a protected class.

### **Procedure for Filing Claims of Discrimination**

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

For a charge filed with the EEOC, the EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.<sup>23</sup> If the EEOC finds an absence of reasonable cause, the EEOC will dismiss the charge. If the EEOC finds reasonable cause, the

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<sup>17</sup> *Id.* at 792.

<sup>18</sup> *Carsillo v. City of Lake Worth*, 995 So.2d 1118, 1121 (Fla. 4th DCA 2008).

<sup>19</sup> 20 So.3d 848 (Fla. 2009).

<sup>20</sup> *Delva v. Continental Group, Inc.*, 96 So.3d 956, 958 (Fla. 3d DCA 2012), *reh’g denied*.

<sup>21</sup> Appellants filed *Delva v. Continental Group, Inc.* with the Florida Supreme Court on October 16, 2012. The Court assigned *Delva* case number SC12-2315.

<sup>22</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, 1187 (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323, 1327 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325, 1336 (S.D. Fla. 2011). Federal courts finding FCRA protects against pregnancy discrimination include *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202, p. 6 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476, p. 2 (M.D. Fla. 2009), *Constable v. Agilysys, Inc.*, 2011 WL 2446605, p. 6 (M.D. Fla. 2011), and *Glass v. Captain Katanna’s, Inc.*, 2013 WL 3017010, p. 8 (M.D. Fla. 2013).

<sup>23</sup> 42 U.S.C. s. 2000e-5(b).

EEOC must engage in informal conferencing, conciliation, and persuasion to remedy the unlawful employment practice.<sup>24</sup>

For a charge filed with the FCHR, the FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.<sup>25</sup> If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.<sup>26</sup>

After the EEOC concludes its investigation and issues a “right-to-sue” letter to the plaintiff, the plaintiff must file a claim in federal court under Title VII within 90 days of receipt of the letter.<sup>27</sup>

A plaintiff is required to file a state claim in civil court under the Florida Civil Rights Act within 1 year of the determination of reasonable cause by the FCHR.<sup>28</sup>

### **Remedies**

Both state and federal law authorize awards of back pay, compensatory damages, and punitive damages.<sup>29</sup>

In federal court, punitive damages vary depending on the size of the employer. In cases that qualify for punitive damages, the sum of both compensatory and punitive damages is capped at:

- \$50,000 for an employer that has 15 to 100 employees in at least 20 calendar weeks in the current or preceding calendar year;
- \$100,000 for an employer that has between 101 and 200 employees;
- \$200,000 for an employer that has between 201 and 500 employees; and
- \$300,000 for an employer that has more than 500 employees.

In state court, punitive damages are capped at \$100,000 regardless of the size of the employer.<sup>30</sup>

### **EEOC and FCHR Workshare Agreement**

The EEOC and the FCHR are working together pursuant to a worksharing agreement (Agreement), the purpose of which is to effectuate Title VII, in addition to other specified federal laws.<sup>31</sup> The Agreement requires the FCHR to “take all charges alleging a violation of Title VII ...” where both the EEOC and the FCHR have mutual jurisdiction, or where only the EEOC has jurisdiction ....<sup>32</sup> To continue the agreement, the FCHR is required to annually represent in writing that “there have been no substantive changes in the processes, procedures, statutes,

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<sup>24</sup> *Id.*

<sup>25</sup> Section 760.11(3), F.S.

<sup>26</sup> Section 760.11(4), F.S.

<sup>27</sup> 42 U.S.C. s. 2000e-5(f)(1).

<sup>28</sup> Section 760.11(5), F.S.; 42 U.S.C. s. 2000e-5(g)(1) and s. 1981a.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Florida Commission on Human Relations and Equal Employment Opportunity Commission, *FY 2011 EEOC/FEPA Model Worksharing Agreement*, as extended through FY 2013 (on file with the Senate Judiciary Committee).

<sup>32</sup> *Id.* at 2.

policies or regulations that would adversely affect or substantially alter the work sharing arrangement ...”

### III. Effect of Proposed Changes:

This bill adds the condition of pregnancy as a protected class under the Florida Civil Rights Act of 1992 (FCRA). The definition of the term “pregnancy” is the substance of the definition under the federal Pregnancy Discrimination Act. Pregnancy means a woman affected by pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

Pregnancy is afforded the same protection as other statuses or classes identified in the FCRA. A woman affected by pregnancy may not be discriminated against:

- By public lodging and food service establishments;
- With respect to education, housing, or public accommodation; or
- With respect to employment, provided that any discriminatory act constitutes an unlawful employment practice.<sup>33</sup>

In addition to compensation, terms, conditions, or privileges of employment, the bill adds discrimination with respect to “benefits” to the list of “unlawful employment practices” specified in existing law. The extent to which the bill prohibits conduct not already prohibited under existing law is not clear.

By ensuring a state cause of action for pregnancy discrimination claims, plaintiffs will have more time to file suit. As described in the Present Situation, after receiving a “right-to-sue” letter from the federal Equal Employment Opportunity Commission, a plaintiff must file a case in federal court within 90 days. A plaintiff has up to 1 year to file a civil action in state court after the FCHR issues its reasonable cause determination.

Additionally, a state cause of action in some cases will allow for greater remedies than the remedies authorized by federal law. Under federal law, the sum of compensatory and punitive damages against an employer having between 15 and 100 employees may not exceed \$50,000. Under a state claim, punitive damages may reach \$100,000, regardless of the size of the employer. However, federal law authorizes the sum of compensatory and punitive damages of up to \$300,000 for discrimination by larger employers.

The bill takes effect July 1, 2014.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

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<sup>33</sup> Unlawful employment practices include discharging or failing to or refusing to hire a person, or discriminating in compensation, benefits, terms, conditions, or privileges of employment; and limiting or classifying an employee or applicant in such a way as to deprive the person of employment opportunities (ss. 760.10(1) and (2), F.S.) The prohibition on unlawful employment practices applies also to employment agencies and labor organizations. (ss. 760.10 (3) and (4), F.S.)

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

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

This bill will ensure plaintiffs have access to state court to pursue pregnancy discrimination claims.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

If the Florida Supreme court upholds the *Delva v. Continental Group, Inc.*<sup>34</sup> case and this bill does not become law, plaintiffs in pregnancy discrimination cases will be limited to redress in federal court. Any prohibition on the ability of the Florida Commission on Human Relations (FCHR) to continue to process pregnancy discrimination claims may take the FCHR out of conformity with the worksharing agreement. If so, federal funding for the FCHR may potentially be jeopardized.

**VIII. Statutes Affected:**

This bill substantially amends ss. 509.092, 760.01, 760.02, 760.05, 760.07, 760.08, and 760.10, F.S. This bill reenacts s. 760.11(1), F.S., for the purpose of incorporating the amendments made to s. 760.10, F.S.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

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

None.

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<sup>34</sup> 96 So.3d 956 (Fla. 3d DCA 2012).

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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