

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 Committee on Judiciary

BILL: SB 120

INTRODUCER: Senator Abruzzo and others

SUBJECT: Prohibited Discrimination

DATE: January 25, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	Unfavorable
2.			GO	
3.			AGG	
4.			FP	

I. Summary:

SB 120 amends the Florida Civil Rights Act (FCRA) by expressly prohibiting discrimination based on actual or perceived sexual orientation and gender identity or expression. The FCRA currently prohibits discrimination based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. Discrimination is prohibited in the FCRA under current law in the areas of education, employment, housing, and public accommodations. Individuals protected by the FCRA are commonly known as members of a protected class.

Under current law and the bill, the provisions of FCRA governing employment discrimination do not apply to religious organizations. With respect to public accommodations, employment, and public lodging and food service establishments, the bill further states that it does not “limit the free exercise of religion guaranteed by the United States Constitution and the State Constitution.” What specific individuals or activities are protected by the statement, however, are not specified.

Current law prohibits and penalizes discrimination against a person who actually has a protected status. This bill additionally prohibits and penalizes discrimination based on the *perception* that a person belongs to a class protected under the FCRA. This change may significantly expand the population of persons authorized to bring claims of discrimination under the FCRA. However, a claim based on a perception, rather than an actual status, may be more difficult to prove.

II. Present Situation:

Title VII of the Civil Rights Act of 1964¹ and Federal Action

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, religion, national origin, or sex. Title VII applies to employers having 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.² The status of pregnancy is subsumed as a protected class in the category of sex discrimination. Title VII does not grant sexual orientation or gender identity protected status. Although the Equal Employment Opportunity Commission (EEOC) has produced guidelines stating that Title VII covers sexual orientation, many federal courts decline to interpret sexual orientation as protected under Title VII.³

Employment Non-Discrimination Act (ENDA)

Proposed federal legislation establishing the federal Employment Non-Discrimination Act (ENDA) would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity. The Act would have applied to employers who have at least 15 employees. Although the Act was filed in Congress many times since 1994 (with transgender language added in 2009), the bill never passed both houses of Congress.⁴ The Act passed the U.S. Senate in 2013,⁵ but the Act was defeated in a House committee.⁶ The Act would have exempted religious organizations from its provisions regulating employment.⁷

Case Law on Title VII and Sexual Orientation

Despite the lack of the inclusion of sexual orientation and gender identity under Title VII, some courts have interpreted Title VII to provide some protection on other grounds. Still, this interpretation has been infrequent. In 1998, the United States Supreme Court interpreted Title VII as applying to same-sex sexual harassment. In *Oncale v. Sundowner Offshore Services, Inc.*, the Court determined that Title VII's inclusion of sex as a protected status protects men as well as women.⁸ Where the plaintiff was repeatedly targeted by fellow employees for sex-related, humiliating actions, threatened with rape, and called a name suggesting homosexuality, the Court concluded that the plaintiff was discriminated against based on sex.⁹ The Court then remanded

¹ 42 U.S.C. 2000e et. seq.

² 42 U.S.C. 2000e-2.

³ Katherine McAnallen, NCSL Legisbrief, *Sexual Orientation in Employment Discrimination Laws*, Vol. 23, No. 34 (Sept. 2015).

⁴ Alex Reed, *Redressing LGBT Employment Discrimination Via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 133-135.

⁵ 159 CONG. REC. S10, 129-39 (daily ed. Nov. 7, 2013).

⁶ Section 815 (Nov. 12, 2013).

⁷ Sec. 6.(a) of the Act provided "This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964"

⁸ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1988).

⁹ *Id.* at 81.

the case back to the district court of appeals for further proceedings “[B]ecause we conclude that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII”¹⁰

In 2002, the United States Court of Appeals for the Ninth Circuit heard a case in which a plaintiff alleged that he was sexually harassed and assaulted by fellow colleagues based on his sexual orientation.¹¹ Although the plaintiff sought relief under the theory that Title VII includes sexual orientation, the court ruled instead that his case was actionable based on a sexual harassment claim.¹² The court noted that Title VII prohibits offensive sexual conduct when the conduct is sufficiently severe or pervasive. As such, the court ruled that sexual orientation of the victim was irrelevant.¹³

In 2014, President Barack Obama signed an Executive Order adding sexual orientation and gender identity protections for federal employees. The Executive Order:

- Prohibits a federal contractor from firing or harassing an employee on the basis of sexual orientation or gender identity; and
- Explicitly bans discrimination against transgender employees of the federal government.¹⁴

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 Title VII of the federal Civil Rights Act of 1964, the FCRA includes age, handicap, and marital status as protected classes.¹⁵ The Florida Legislature added pregnancy as a protected status under the FCRA in 2015.¹⁶

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, are considered unlawful employment practices.¹⁷ Courts interpreting the FCRA typically follow federal precedent because the FCRA is generally patterned after Title VII. Still, differences between the 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.¹⁸

Procedure for Filing Claims of Discrimination

A person who believes that he or she has been the target of unlawful discrimination may file a complaint with the Florida Commission on Human Rights (FCHR). The person must file the complaint within 365 days of the alleged violation.¹⁹ After a person files a claim of

¹⁰ *Id.* at 82.

¹¹ *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (2002).

¹² *Id.* at 1066.

¹³ *Id.* at 1065-1067.

¹⁴ Executive Order 13672 (July 21, 2014).

¹⁵ Section 760.10(1)(a), F.S.

¹⁶ SB 982 (Ch. 2015-68, L.O.F.)

¹⁷ Section 760.10(2) through (8), F.S.

¹⁸ Kendra D. Presswood, *Interpreting the Florida Civil Rights Act of 1992*, 87 FLA. B.J. 36, 36 (Dec. 2013).

¹⁹ Section 760.11(1), F.S.

discrimination with the FCHR, the FCHR investigates the complaint.²⁰ The FCHR then must make a reasonable cause determination within 180 days after the filing of the complaint.²¹ If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.²² 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.²³

If the FCHR returns a finding of no reasonable cause, the complainant may request an administrative hearing with the Division of Administrative Hearings (DOAH) within 35 days of the finding.²⁴ DOAH will issue a recommended order, which the FCHR may reject, adopt, or modify by issuing a final order.²⁵

Remedies

Administrative Remedies If the Commission Pursues Administrative Action

Affirmative relief includes prohibition of the practice and back pay. The FCHR may also award reasonable attorney's fees to the prevailing party.²⁶

Civil Remedies If the Person Pursues a Legal Action

State law authorizes awards of back pay, compensatory damages, and punitive damages.²⁷ Compensatory damages include damages for mental anguish, loss of dignity, and any other intangible injuries.²⁸ Punitive damages are capped at \$100,000 regardless of the size of the employer.²⁹ The state and its agencies and subdivisions of the state are not liable for punitive damages³⁰ or recovery amounts in excess of the limited waiver of sovereign immunity.³¹

Religious Exemption for an Unlawful Employment Practice

An employer commits an unlawful employment practice if, based on a person's protected status, he or she:

- Discharges or refuses to hire a person or discriminates in the area of terms or conditions of employment; or
- Limits, segregates, or classifies an employee or applicant in such a way as to deprive him or her of an opportunity.³²

²⁰ Section 760.11(3), F.S.

²¹ Section 760.11(3), F.S.

²² Section 760.11(4), F.S.

²³ Section 760.11(5), F.S.

²⁴ Section 760.11(7), F.S.

²⁵ *Id.*

²⁶ Section 760.11(6), F.S.

²⁷ Section 760.11(5), F.S.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Section 760.11(5), F.S.

³¹ *Id.* Section 768.28(5), F.S., provides that damages against a state, its agencies, or subdivisions are capped at \$200,000 per claim or \$300,000 per incident. A plaintiff may pursue a claim bill to recover in excess of these caps, but claim bills are subject to the prerogative of the Legislature.

³² Section 760.10(1), F.S.

Entities prohibited from engaging in unlawful employment practices include labor organizations and employment agencies.³³

Certain entities are exempt from the provisions on unlawful employment practices. These are religious corporations, associations, educational institutions, and societies which condition opportunities to members who subscribe to their tenets or beliefs.³⁴

Anti-Discrimination Provisions in Local Government or Other States Based on Gender Identity or Sexual Orientation

Ordinances in Local Government in the State

A number of counties in Florida prohibit discrimination based on gender identity or sexual orientation. These counties include Alachua, Broward, Hillsborough, Leon, Miami-Dade, Monroe, Orange, Palm Beach, Pinellas, and Volusia Counties. Numerous municipalities also prohibit discrimination on this basis.³⁵

Anti-Discrimination Laws in Other States

Nineteen other states, the District of Columbia, and Puerto Rico provide protections against discrimination in employment and housing in state law based on sexual orientation and gender identity.³⁶ In addition to having a state law prohibiting discrimination based on sexual orientation, New York prohibits gender identity discrimination by public employers through executive order.³⁷

III. Effect of Proposed Changes:

SB 120 amends the Florida Civil Rights Act (FCRA) by expressly prohibiting discrimination based on sexual orientation and gender identity or expression. The FCRA currently prohibits discrimination based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status in the areas of education, employment, housing, and public accommodations.

The bill defines the term “gender identity or expression” as gender-related identity, appearance, or behavior, regardless of whether it is different from that traditionally associated with the person’s physiology or assigned sex at birth, and which can be shown by:

- Medical history, care, or treatment of the gender identity;
- Consistent and uniform assertion of the gender-related identity; or
- Evidence that the gender-related identity is a sincerely held part of a person’s core identity and is not being asserted for an improper purpose.

³³ Section 760.10(2) through (8), F.S.

³⁴ Section 760.10(9), F.S.

³⁵ Municipalities include Atlantic Beach, Dunedin, Gainesville, Gulfport, Juno Beach, Key West, Lake Worth, Largo, Miami, Miami Beach, Oakland Park, Orlando, Tampa, Venice, West Palm Beach and Wilton Manors. Equality Florida, <http://www.eqfl.org/Discrimination> (last visited Jan. 23, 2016).

³⁶ These states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Vermont, and Washington. McAnallen, *supra* note 3. Human Rights Campaign, *Statewide Housing Laws & Policies*, http://www.hrc.org/state_maps (last viewed Jan. 23, 2016).

³⁷ McAnallen, *supra* note 3.

The term “sexual orientation” is defined as a person’s actual or perceived heterosexuality, homosexuality, or bisexuality. The person asserting this status does not appear to have to provide an indicia of proof of sexual orientation. The way in which gender identity or expression is defined appears to require some indicia of proof on the part of the person asserting this status. How a person could provide proof under a claim that he or she was discriminated against based on a perception of that status is unknown.

The bills states with respect to public accommodations, employment, and public lodging and food service establishment that the bill does not “limit the free exercise of religion guaranteed by the United States Constitution and the State Constitution.” What specific individuals or activities are protected by the statement, however, are not specified.

Under the bill, sexual orientation and gender identity or expression are afforded the same protection as other statuses or classes identified in the FCRA. Based on the status of sexual orientation and gender identity or expression, a person 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.³⁸

Current law prohibits and penalizes discrimination against a person who actually has a protected status. This bill additionally prohibits and penalizes discrimination based on the *perception* that a person belongs to any of the protected classes included in the FCRA. This change may significantly expand the population of persons authorized to bring claims based on discrimination under the FCRA. Still, proving discrimination based on a perception, rather than an actual protected status, may be more difficult for a plaintiff to demonstrate.

The bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

³⁸ 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. The prohibition on unlawful employment practices applies also to employment agencies and labor organizations. *See* s. 760.10, F.S.

D. Other Constitutional Issues:

Current law provides an exemption from the prohibition on unlawful employment practices. The exemption is afforded to religious organizations or other entities which provide opportunities to members who subscribe to the same tenets or beliefs. In addition to the current exemption afforded to organizations, this bill appears to provide another exemption. This exemption is provided to persons who are exercising their constitutional free exercise of religion in the areas of employment and public accommodations. Whether this bill better enables a person to assert the free exercise of religion as a defense to an action based on a civil rights discrimination is unknown.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Current law prohibits and penalizes discrimination against a person who actually has a protected status. This bill additionally prohibits and penalizes discrimination based on the perception that a person belongs to a protected class. This change may significantly expand the population of persons authorized to bring claims based on discrimination under the FCRA, which could increase costs in litigation for employers and owners of public accommodations. Still, proving discrimination based on a perception, rather than an actual protected status, would be more difficult to prove.

C. Government Sector Impact:

Florida Commission on Human Relations (FCHR)

This bill expands the types of classes receiving protected status under the FCRA. The Florida Commission on Human Relations anticipates that this expansion would result in an increased caseload of about 100 to 110 cases. The FCHR requests an additional 3 FTE positions (1 attorney, 1 investigator, and 1 support staff) to support the increase in workload. The total amount requested on a recurring basis is as follows:

Job Title	Amount/FTE	Expenses
Senior Attorney	\$72, 278	\$10,367
Investigation Specialist	\$56, 776	\$10,367
Secretary Specialist	\$29, 029	\$9,042
	Total: \$158,083	\$29,776

The total amount requested for FTE and Expenses on a recurring basis is \$187,859. The total amount requested on non-recurring basis is \$17,434. The FCRA indicates that these

amounts would need to be funded through General Revenue funds because the federal government will not fund these types of cases.³⁹

State Agencies

Some of the expected increase in cases brought to the FCRA is due to the addition of gender identity or expression and sexual orientation as a protected class. Expanding claims beyond discrimination based on an actual protected status to one that is perceived may also significantly expand the population of claimants. This change could increase costs in litigation for state agency employers. Still, proving discrimination based on a perception, rather than an actual protected status, would be more difficult to prove.

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill prohibits discrimination for all types of protected classes in the areas of employment and public accommodation based on a perception of a person belonging to a protected class. This represents a significant expansion from current law, which prohibits discrimination based on actual status only. How perception would be demonstrated is unknown.

VIII. Statutes Affected:

This bill amends the following sections of the Florida Statutes: 419.001, 509.092, 760.01, 760.02, 760.05, 760.07, 760.08, 760.10, 509.092, 760.22, 760.23, 760.24, 760.25, 760.26, 760.29, and 760.60.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

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

³⁹ Florida Commission on Human Relations, *Fiscal Impact Analysis on SB 120*.