

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 Commerce and Tourism

BILL: SB 294

INTRODUCER: Senator Thompson

SUBJECT: Labor Regulations

DATE: January 22, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Little	McKay	CM	Pre-meeting
2.			ATD	
3.			AP	

I. Summary:

SB 294 creates the “Healthy Working Families Act” (act) under ch. 448, F.S., to provide a policy by which employees are able to earn “sick and safe leave” for time away from work. The bill requires all state or local government agencies and all private employers to provide employees with 1 hour of sick and safe leave per every 30 hours worked. Employers with 10 or more employees are required to provide paid compensation for sick and safe leave that is earned and used by employees. Employers with less than 10 employees are not required to provide paid leave, but employees are still entitled to unpaid sick and safe leave.

Acceptable uses for sick and safe leave include taking time off in order for the employee, or a family member of the employee, to obtain medical care or treatment for illness, injury, or condition. Obtaining medical attention, counseling, legal services, and other related services for victims of domestic violence, sexual assault, or stalking are also acceptable uses for sick and safe leave.

The bill delegates multiple tasks to the Department of Economic Opportunity (DEO) in order to provide oversight and enforcement of the act, including conducting investigations and inspections to determine whether a violation of the act has occurred. The DEO is also required to develop an outreach program and model notices to inform individuals about the availability of sick and safe leave.

The bill sets forth penalties for those found to be in violation of the act. If an employer is found to be in violation of the act, the bill allows the DEO, the Attorney General, or an employee, to bring an action against the employer. If the action is brought by the Attorney General, the bill allows the court to order the employer to pay the state \$1,000 per violation. If an employee is found to have acted in bad faith in filing a complaint, bringing a civil action, or testifying in an action, the employee commits a misdemeanor of the first degree.

II. Present Situation:

The Family Medical Leave Act

The federal Family and Medical Leave Act (FMLA) of 1993, as amended, entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.¹

*Covered Employers*²

The FMLA only applies to employers that meet certain criteria. A covered employer is a:

- Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;
- Public agency, including a local, state, or federal government agency, regardless of the number of employees it employs; or
- Public or private elementary or secondary school, regardless of the number of employees it employs.

*Eligible Employees*³

Only eligible employees are entitled to take FMLA leave. An eligible employee is one who:

- Works for a covered employer;
- Has worked for the employer for at least 12 months;
- Has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave; and
- Works at a location where the employer has at least 50 employees within 75 miles.

*Leave Entitlement*⁴

Eligible employees may take up to 12 workweeks of leave in a 12-month period for one or more of the following reasons:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
- To care for a spouse, son, daughter, or parent who has a serious health condition;
- For a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- For any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status.⁵

¹ 29 U.S.C. § 2601.

² 29 U.S.C. § 2611.

³ *Id.*

⁴ 29 U.S.C. § 2611-2612.

⁵ An eligible employee may also take up to 26 workweeks of leave during a “single 12-month period” to care for a covered servicemember with a serious injury or illness, when the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

Notice⁶

Employees must comply with their employer's usual and customary requirements for requesting leave and provide enough information for their employer to reasonably determine whether the FMLA may apply to the leave request. Employees generally must request leave 30 days in advance when the need for leave is foreseeable. When the need for leave is foreseeable less than 30 days in advance or is unforeseeable, employees must provide notice as soon as possible and practicable under the circumstances.

Enforcement⁷

The Wage and Hour Division of the United States Department of Labor administers and enforces the FMLA for all private, state and local government employees, and some federal employees. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. An employee may also be able to bring a private civil action against an employer for violations. In general, any allegation must be raised within 2 years after the date of violation.

Expansion of FMLA in other States

The FMLA allows states and local governments to set standards that are more expansive than the federal law, and many states and local entities have chosen to do so.⁸ Currently, only three states offer paid, or partially paid, family and medical leave.⁹ California, New Jersey, and Rhode Island provide funding for paid leave through a payroll tax on employees. The state of Washington passed a paid family leave law in 2007 that was to take effect in October 2009. However, due to state budget concerns, subsequent legislation delayed implementation of the paid leave law.¹⁰

Leave Provisions in Florida

In Florida, there is no specific government agency responsible for administering and enforcing worker protection laws. Hour and wage laws, including those under the FMLA, are overseen by the federal Wage and Hour Division through local offices across the state. Complaints of discrimination or harassment in the workplace are typically handled by the Florida Commission on Human Regulations and the Equal Employment Opportunity Commission. The Florida Department of Financial Services regulates issues arising under workers' compensation claims, while the DEO handles issues pertaining to unemployment insurance.¹¹

⁶ 29 U.S.C. § 2612(e).

⁷ Information under this subheading obtained from: United States Department of Labor, Wage and Hour Division, *Fact Sheet # 77B: Protection for Individuals under the FMLA*, <http://www.dol.gov/whd/regs/compliance/whdfs77b.htm> (last visited Jan. 20, 2016).

⁸ 29 C.F.R. § 825.701. Connecticut and Minnesota allow leave for an organ or bone marrow donor. Oregon's definition of "family member" includes the employee's grandparent, grandchild, or parent-in-law. North Carolina allows leave to participate in children's educational activities. See National Conference of State Legislatures, *State Family and Medical Leave Laws that Differ from the Federal FMLA* (Sept. 2008), available at <http://www.ncsl.org/Portals/1/Documents/employ/StateFamilyandMedicalLeaveLaws.pdf>.

⁹ National Conference of State Legislatures, *State Family Medical Leave Laws*, <http://www.ncsl.org/issues-research/labor/state-family-and-medical-leave-laws.aspx> (last visited Jan. 20, 2016).

¹⁰ *Id.*

¹¹ The roles of Florida's agencies are specified under ch. 20, F.S.

However, certain leave of absence and medical leave provisions exist in Florida Statutes. Chapter 110 governs public officials, employees, and records, in order to provide a uniform policy for personnel management.¹² The policy of the state is to “support employees in balancing their personal needs and work responsibilities” in such a way that allows employees “to blend the competing demands of work and personal life.”¹³

The Department of Management Services (DMS) has been delegated rulemaking authority for the creation of a policy for leave granted by agencies to employees.¹⁴ Types of leave addressed by DMS include sick leave, annual leave, and parental leave. Attendance and leave rules promulgated by DMS are found in Chapter 60L of the Florida Administrative Code.

General Requirements

The DMS requires leave of absences granted to employees to be approved in writing and prohibits authorization and use of paid leave before it has been accrued.¹⁵ Each type of leave is accrued based on the position held by an employee, the pay schedule of the employee, and the actual number of hours worked by the employee. Approved leave may be taken in increments of fifteen minutes or more and agencies are responsible for keeping a record of all authorized leaves of absences.¹⁶

Sick Leave

The DMS provides that sick leave may be authorized for personal illness, personal appointments with a doctor or dentist, and illness to certain family members or individuals for whom the employee has caretaker responsibility.¹⁷ After 3 workdays of absence within a 30-day period, agencies may require medical verification before granting additional sick leave.¹⁸ After 10 consecutive days of absence, an agency must obtain medical verification before authorizing any additional sick leave or leave without pay.¹⁹

There is no limit on the number of hours of unused sick leave an employee may accrue.²⁰ Employees in senior management service and select exempt service positions earn 104 sick hours of leave.²¹ Full-time employees, paid monthly, earn 8 hours and 40 minutes for each full

¹² For the purposes of ch. 110, F.S., the term agency refers to “any official, officer, commission, board, authority, council, committee, or department of the executive branch or the judicial branch of state government as defined in chapter 216.” Section 110.107(4), F.S.

¹³ Section 110.105(2)(b), F.S.

¹⁴ Section 110.1055, F.S.

¹⁵ Rule 60L-34.004(1) and (5), F.A.C.

¹⁶ Rule 60L-34.004(4) and (10), F.A.C.

¹⁷ Rule 60L-34.0042(3), F.A.C.

¹⁸ Rule 60L-34.0042(4)(b), F.A.C.

¹⁹ Rule 60L-34.0042(4)(c), F.A.C.

²⁰ Rule 60L-34.0042(2)(c), F.A.C.

²¹ Rule 60L-34.0042(1), F.A.C.

calendar month of employment while full-time employees, paid biweekly, earn 4 hours for each full biweekly period of employment.²² Part-time employees earn sick leave as follows:²³

Biweekly Pay Period		Monthly Pay Period	
Number of Hours Actually Worked	Hours of Sick Leave Credit	Number of Hours Actually Worked	Hours of Sick Leave Credit
Less than 17	0	Less than 36	0
17 through 32.99	1	36 through 70.99	2.167
33 through 47.99	2	71 through 103.99	4.333
48 through 63.99	3	104 through 138.99	6.500
64 or more	4	139 or more	8.667

Family Supportive Work Program

The DMS was also delegated the task of developing a model rule for the Family Supportive Work Program (FSWP) to be implemented by all executive branch agencies, excluding the State University System.²⁴ The FSWP establishes personnel policies that enable employees to balance work and family through flexible work schedules, compressed time, job sharing, part-time employment, parental leave, and both paid and unpaid family or administrative leave for family responsibilities.²⁵

FSWP leave must be approved in writing,²⁶ and may be granted for the following reasons up to the specified periods of time:²⁷

Reason for leave	Amount of leave allowed
Birth or adoption of child (within 12 months)	Up to 6 months for the parent
Family member’s serious health condition	Up to 6 months
Non-medical family responsibilities	Up to 30 days
Administrative leave for child’s school activities	Up to 1 hour per month
Leave of absence without pay	Up to 12 months ²⁸

Notably, FSWP provides employees medical leave to care for family members, and not for an employee’s personal illness. Non-medical family responsibilities include caring for aging

²² Rule 60L-34.0042(2)(a), F.A.C.

²³ Rule 60L-34.0042(2)(b), F.A.C.

²⁴ Section 110.1522, F.S.

²⁵ *Id.*

²⁶ Section 110.219(3), F.S.

²⁷ Rule 60L-34.0051(4)-(7), F.A.C.

²⁸ Leave of absence without pay covers any absence from work so long as the agency deems the leave to be justified and not detrimental to the agency. Rule 60L-34.0052, F.A.C.

parents, involvement in settling parents' estates upon death, relocating dependent children into schools, and visiting family members in places that require extensive travel time.²⁹

Private Sector

Currently, only one Florida law regulates when a private employer must allow leave for an employee. Section 741.313, F.S., provides that an employer must permit an employee to take up to 3 working days of leave from work in any 12-month period if the employee or a family or household member of an employee is the victim of domestic violence or sexual violence. This leave may be paid or unpaid, at the discretion of the employer.³⁰

An employee is eligible to request leave if the employee has been employed for 3 months or longer.³¹ Employers are required to keep domestic violence information confidential and that information is exempt from disclosure under public record laws.³² These provisions apply to government agencies and any employer who employs 50 or more employees.

Employer-Sponsored Benefits Study Task Force

In 2013, the Legislature created an Employer-Sponsored Benefits Study Task Force to analyze, among other things, whether the state should set minimum mandatory standards for employer-sponsored benefits.³³ Sponsored benefits were defined as “anything of value that an employee may receive from an employer in addition to wages and salary” and included “paid or unpaid days off for holidays, sick leave, vacation and personal necessity.”³⁴ Ultimately, a majority of the task force recommended not to set minimum mandatory standards, reasoning that employee benefits are an area to be determined through negotiations within the employer/employee relationship and that allowing the free market to dictate competitive employee benefits is a sound business platform that provides opportunities for economic growth.³⁵

III. Effect of Proposed Changes:

The Healthy Working Families Act

The bill creates the “Healthy Working Families Act” (act) under chapter 448, F.S., to provide a policy by which employees are able to earn “sick and safe leave” for time away from work. Earned sick and safe leave can be approved by an employer so that an employee may take a temporary leave from work in order to care for themselves or their family members.

²⁹ Leave for non-medical family responsibilities may be contingent upon causing only minimal impact to the employee's work unit. Rule 60L-34.0051(5), F.A.C.

³⁰ Section 741.313(2)(a), F.S.

³¹ *Id.*

³² Sections 741.313(4) and (7), F.S.

³³ Chapter 2013-200, L.O.F., Section 1.

³⁴ See Employer-Sponsored Benefits Study Task Force Final Report, January 15, 2014, available at <http://careersourceflorida.com/wp-content/uploads/2014/01/TaskForceBenefitsStudyFinalReport.pdf> (last accessed January 20, 2016).

³⁵ *Id.*

Covered Employers

The bill subjects all state or local government agencies and all private employers to the accrual formula for sick and safe leave. Employers with less than 10 employees are not required to provide paid compensation for the sick and safe leave used by employees, but their employees are still entitled to earn unpaid leave. Employers with 10 or more employees are required to provide paid time off when an employee uses earned sick and safe leave.

By subjecting all private employers to the sick and safe leave requirements, this bill greatly expands Florida law regulating private employer/employee benefits. Because most government agencies already implement leave policies, the impact of this bill on government agencies may not be as significant as the impact on private employers.

Eligible Employees

The bill's definition of employee appears to apply to individuals who are regularly scheduled to work more than 8 hours a week for an employer.

An employee who regularly works less than eight hours a week for an employer is not subject to this bill's provisions. Under the bill, an employee is defined as *not* being a person who meets all of the following criteria:

- Has an irregular work schedule with the employer;
- Contacts the employer for work assignments and is scheduled to work the assignments within 4 hours after contacting the employer;
- Has no obligation to work for the employer if the individual does not contact the employer for work assignments; and
- Is not employed by a temporary placement agency.

Accrual Formula

The bill sets forth an accrual formula for sick and safe leave that amounts to 1 hour of leave per 30 hours worked by an employee. The bill requires the accrual formula to be implemented by October 1, 2016.

The bill allows an employer to award an employee, at the beginning of the fiscal or calendar year, the full amount of sick and safe leave the employee would accrue within the year. For employees that are rehired by an employer within 12 months, the employer is also required to reinstate any unused sick and safe leave that the employee had earned before ending employment with the employer.

However, an employer is not required to allow an employee to take earned sick and safe leave during the first 3 months of employment, to carry forward more than 56 hours of earned sick and safe leave per year, or to allow an employee to use more than 80 hours of earned sick and safe leave per year.

Implementing this formula may complicate existing regulations for government employees. The bill does not distinguish different accrual methods for part-time and full-time employees, and the

amount of leave that can be accrued and carried over under this policy is significantly less than the current standards set forth by the DMS. Additionally, the DMS does not allow an employer to grant paid leave prior to it having been earned by the employee.

Uses of Sick and Safe Leave

The bill states that in order for an employee to use earned sick and safe leave, an employee must request approval of leave and notify the employer of the anticipated duration of the leave.

Acceptable uses for sick and safe leave include:

- Obtaining care or treatment for the employee for any mental or physical illness, condition or injury;
- Obtaining preventative medical care for the employee or a family member;
- If the employer's place of business, or a school or child care center of the employee's family member, has been closed by order of public official;
- To care for a family member if a public official or health care provider has determined the family member's presence in the community would jeopardize the health of others because of the family member's exposure to a communicable disease; or
- If necessary for the employee or an employee's family member to obtain medical attention, counseling, legal services, and other related services for victims of domestic violence, sexual assault, or stalking.

The definition of family member is more expansive than the definition of family member under the FMLA.³⁶ In the bill, family member is defined as any one of the following:

- A biological, adopted, foster, or stepchild of the employee;
- A minor for whom the employee has legal or physical custody or guardianship;
- A biological, adoptive, foster, or stepparent of the employee or employee's spouse;
- The legal guardian of the employee;
- A person who served as the primary caregiver of the employee when the employee was a minor;
- The spouse of a grandparent of the employee;
- A grandchild of the employee;
- A biological, adopted, or foster sibling of the employee; or
- The spouse of a biological, adopted, or foster sibling of the employee.

Verification for Leave

The bill allows an employer to request reasonable documentation to verify that leave was granted for an acceptable use if an employee uses sick and safe leave for more than two consecutive, scheduled shifts. The bill sets forth ways an employee can provide reasonable documentation to an employer and prohibits an employer from inquiring into unnecessary details of the nature of an illness, domestic violence, sexual assault, or stalking.

³⁶ The FMLA defines "family member" as the spouse, son, daughter, or parent of the employee.

Recordkeeping

The bill requires employers to keep documentation regarding sick and safe leave in a confidential file that is separate from the employee's personnel file. Employers are required to keep, for at least 3 years, a record of all accrued and used sick leave for each employee. If paid sick and safe leave is used, the employer is also required to provide the employee with a written statement of the amount of leave earned and the remaining balance available for use.

Department of Economic Opportunity (DEO)

The bill delegates multiple tasks to the DEO for the oversight and enforcement of the sick and safe leave policy. The DEO is required to:

- Develop and implement an outreach program to inform individuals about the availability of sick and safe leave. As part of the program, the DEO must distribute notices and other written materials, in both English and Spanish, to child care centers, elder care providers, community health centers, domestic violence shelters, health care providers, hospitals, and schools.
- Create and make available a poster and model notice that may be used by an employer to inform employees of their rights to sick and safe leave. The bill provides that notices developed by the DEO are required to include the following information:
 - a statement as to how sick and safe leave is accrued;
 - a description of when an employer is required to allow an employee to use leave;
 - a statement regarding the prohibition against an employer taking adverse action against an employee; and
 - information of the employee's right to file a complaint for any alleged violation of the requirements under the bill.
- Upon receipt of a written complaint, the DEO must conduct an investigation and inspect the records of an employer to determine whether a violation of the sick and safe leave policy has occurred. If a violation is determined to have occurred the DEO is authorized to:
 - attempt to resolve informally, by mediation, any issue involved in the violation;
 - request the Attorney General bring an action on behalf of the employee; or
 - bring an action on behalf of the employee in the county of which the violation allegedly occurred.

Violations of Sick and Safe Leave Policy

In addition to the actions the DEO is authorized to take for a violation of the sick and safe leave policy, an employee is also able to bring a civil action against the employer. The bill creates a rebuttable presumption that an employer has violated the sick and safe leave policy if an allegation is received and the employer is found to have failed to provide notice to employees, failed to keep proper records, or failed to allow the DEO to investigate the employer's records.

The bill prohibits an employer from taking adverse action or discriminating against an employee who, in good faith, files a complaint with the DEO regarding alleged violations of the sick and safe leave policy. Another rebuttable presumption is created by the bill with regards to when an employer takes adverse action against an employee. An employer's action is considered adverse if it amounts to a discharge or demotion of employee, or a threat of such action, or any other

retaliatory action, that results in a change to the terms or conditions of employment which would dissuade a reasonable employee from exercising a right under this policy.

The bill provides that if a court finds that an employer violated the sick and safe leave policy, the court may award the employee:

- the full monetary value of any unpaid earned sick and safe leave;
- actual economic damages suffered by the employee as a result of the employer's violation of this section;
- an additional amount not to exceed three-times the amount of economic damages awarded;
- reasonable attorneys fees and costs; or
- any other relief the court deems appropriate, including backpay, reinstatement of employment, and injunctive relief.

The bill also provides that if an action is brought by the Attorney General on behalf of an employee, the court may order the employer to pay the state the amount of \$1,000 per violation.

However, if an employee files a complaint, brings a civil action, or testifies in an action, in bad faith, the bill subjects the employee to a criminal penalty. The bill states that an employee found to be in violation of the sick and safe leave policy commits a misdemeanor of the first degree, punishable under s. 775.082 or s. 775.083, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The employment records of public employees, unless specifically exempted, are public records. These records include requests for leave and time sheets. The bill requires all employers to keep confidential all information related to an employee's leave granted under this bill. A public records exemption may be needed to keep sick and safe leave information confidential.

The Legislature may, by a two-thirds vote of the House and the Senate,³⁷ create an exemption to public records or open meetings requirements.³⁸ An exemption must explicitly state the public necessity of the exemption,³⁹ must be tailored to accomplish the

³⁷ FLA. CONST., art. I, s. 24(c).

³⁸ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

³⁹ FLA. CONST., art. I, s. 24(c).

stated purpose of the law,⁴⁰ and must relate to one subject containing only exemptions or provisions governing enforcement.⁴¹

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Imposing sick and safe leave requirements upon all employers will likely cause a significant fiscal impact on the private sector. Employers who employ 10 or more employees will be required to grant paid leave to employees who earn and use sick and safe leave. Employers would be subject to lawsuits from the DEO, the Attorney General's office, and employees for violations of the sick and safe leave policy.

C. Government Sector Impact:

Many agencies already provide similar leave for their employees in their personnel policies. As a result, state agencies may be less affected than private employers when it comes to implementing the sick and safe leave policy. However, government agencies would also be subject to lawsuits from the DEO, the Attorney General's office, and employees for violations of the sick and safe leave policy.

Additionally, the DEO is required by the bill to create an outreach program, notices for employers and employees in multiple languages, and to oversee and investigate complaints under the sick and safe leave policy. The DEO estimates a need of 25 FTE staff with a total budgetary cost of \$2,500,000 annually.⁴² As the volume of complaints and enforcement activities is determined, OPS staff may also be needed to supplement the primary staff.⁴³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

⁴⁰ FLA. CONST., art. I, s. 24(c).

⁴¹ *State v. Knight*, 661 So. 2d 344 (Fla. 4th DCA 1995).

⁴² Department of Economic Opportunity, *Senate Bill 294 Analysis* (Sept. 24, 2015) (on file with the Senate Commerce and Tourism Committee).

⁴³ *Id.*

VIII. Statutes Affected:

This bill creates section 448.111 of the Florida Statutes.

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.
