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 Community Affairs

BILL:	CS/SB 566
INTRODUCER:	Community Affairs Committee and Senator Bracy
SUBJECT:	Prohibited Discrimination
DATE:	January 14, 2020
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Paglialonga	Ryon	CA	**Fav/CS**
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 566 amends the Florida Civil Rights Act of 1992 to define "race" as "inclusive of traits historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles." Under the bill, a "protective hairstyle" includes, but is not limited to, hairstyles such as braids, locks, or twists. Currently, an individual's hair texture, such as curly or straight hair, is considered an immutable characteristic of one's identity and is protected from discrimination. However, this protection does not extend to an individual's hairstyle because it is considered a mutable characteristic, which is a product of personal choice.

This bill's definition of "race" and "protective hairstyle" is also incorporated in other sections of state law. The bill prohibits employers, landlords, real estate sellers, real estate financiers, Florida K-20 public education institutions, and certain parties receiving funds from the Florida Housing Finance Corporation from discriminating against an individual for racial traits and protective hairstyles.

The bill provides individuals a legal cause of action to allege that a party unlawfully discriminated against them based on any trait historically associated with race, including a protective hairstyle. An individual will be able to receive administrative remedies, equitable relief, and civil damages for claims of race discrimination, as well as discrimination of any trait historically associated with race, including, but not limited to, a protective hairstyle.

II. Present Situation:

Title VII of the Federal Civil Rights Act

Federal law protects certain classes of people from prejudice and discrimination as a job candidate and employee. Title VII of the Civil Rights Act of 1964 (Title VII) provides in relevant part that it is unlawful for an employer:

(1) 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; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin[1]

Title VII applies to employers with 15 or more employees, including federal, state, and local governments. Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations.

Under Section 1981 of Title VII, an individual may bring a legal claim for discrimination in making and enforcing contracts.[2] In 1991, Congress amended Section 1981 of the Civil Rights Act to specify that prohibited contract discrimination also applied to employment contracts. This section provides in part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[3]

Title VII does not provide a precise definition of race or race discrimination. This omission requires the judicial branch to utilize canons of statutory interpretation to better define what characteristics of an individual Title VII protects as components of race, color, religion, sex, or national origin.[4]

Title VII Federal Jurisprudence for Hairstyle

The established view of courts is that Title VII only prohibits employment discrimination based on immutable characteristics.[5] An immutable characteristic is an individual trait that cannot be readily changed, such as race, color, sex, or national origin.[6] Alternatively, a mutable characteristic is a trait that involves personal choice. One may alter a mutable characteristic with

[1] 42 U.S.C. §2000e-2(a)(1)-(2) (2019)
[2] *Id.* §1981(a).
[3] *Id.*
[4] *See* EEOC v. Catastrophe Management Solution, 852 F.3d 1018 (11th Cir. 2016)
[5] *Id.*
[6] *Id.*

relative ease or personal choice. Examples of mutable characteristics are hair length,[7] grooming standards,[8] and language used on the job.[9]

In their 2016 Equal Employment Opportunity Commission v. Catastrophe Management Solutions decision, the Eleventh Circuit upheld an employer's right to condition employment on the alteration of a dreadlocks[10] hairstyle.[11] Although the employer did not specifically ban dreadlocks in the company's employment policies, the company required personnel to groom in a manner that projects a professional and businesslike image.[12] The Eleventh Circuit ultimately decided that the hairstyle was not a personal trait protected by Title VII. The court concluded that conditioning employment on the alteration of a particular hairstyle was not a form of race discrimination.[13]

In its decision, the Eleventh Circuit reasoned that the dreadlock hairstyle was a mutable characteristic that, although associable with race, involved a personal decision on behalf of the individual. Unlike race, the potential employee decided to have a particular hairstyle and also could alter the hairstyle to obtain employment.[14]

When distinguishing the concepts of hairstyle and race, the court stated:

> "We recognize that the distinction between immutable and mutable characteristics of race can sometimes be a fine (and difficult) one, but it is a line that courts have drawn. So, for example, discrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not. Compare, e.g., Jenkins v. Blue Cross Mut. Hosp. Ins., Inc., 538 F.2d 164, 168 (7th Cir. 1976) (en banc) (recognizing a claim for racial discrimination based on the plaintiff's allegation that she was denied a promotion because she wore her hair in a natural Afro), with, e.g., Rogers v. Am. Airlines, Inc., 527 F.Supp. 229, 232 (S.D.N.Y. 1981) (holding that a grooming policy prohibiting an all-braided hairstyle did not constitute racial discrimination, and distinguishing policies that prohibit Afros, because braids are not an immutable characteristic but rather "the product of ... artifice")"[15]

---

[7] *See* Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975)
[8] *Id.*
[9] *See* Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (Upholding an employer's right to require employees to speak English while on the job.)
[10] Dreadlocks or locks are a hairstyle created when hair strands attach or lock onto one another, forming bunched strands. They are also known as "locs," or simply "dreads," though the latter two terms have disturbing historical derivations and are therefore sometimes considered offensive. Locks can occur naturally, or can be induced through manipulation, depending on the individual's hair. *See* California Senate Judiciary Committee Analysis: Senate Bill 188, 2019-2020 Regular Session at page 3, *available at:* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB188 (last visited Jan. 15, 2020).
[11] EEOC v. Catastrophe Management Solution, 852 F.3d at 1033 ("Ms. Jones told CMS that she would not cut her dreadlocks in order to secure a job, and we respect that intensely personal decision and all it entails. But, for the reasons we have set out, the EEOC's original and proposed amended complaint did not state a plausible claim that CMS intentionally discriminated against Ms. Jones because of her race.")
[12] *Id.* at 1020
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1030

Through analyzing the difference between hair texture and hairstyles, the Eleventh Circuit makes it clear that the natural state of hair is an immutable characteristic protected by Title VII, but once an individual decides to style his or her hair in a particular way, employers are allowed the right to be critical of that decision without the presumption of a discriminatory intent.

Although the U.S. Supreme Court has not directly ruled on the issue of hairstyle under Title VII, the Court has ruled that a county's hair grooming regulations for the male members of its police force were constitutional and valid under the Civil Rights Act of 1871.[16]

The reluctance of the U.S. Supreme Court to hear Title VII hairstyle cases may be due to the settled judicial distinction between immutable and mutable characteristics or may be due to the view that the issue of ethnic hairstyles should be resolved through the legislative process.[17] In EEOC v. Catastrophe Management Solutions, the Eleventh Circuit suggested that "given the role and complexity of race in our society, and the many different voices in the discussion, it may not be a bad idea to try to resolve through the democratic process what "race" means (or should mean) in Title VII."[18]

Florida Civil Rights Act

The 1992 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, the FCRA includes age, handicap, and marital status as protected classes.[19] The Legislature added pregnancy as a protected status under the FCRA in 2015.[20]

Similar to Title VII, the FCRA specifically provides several actions that, if undertaken by an employer, are considered unlawful employment practices.[21] 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,

[16] *See* Kelley v. Johnson, 425 U.S. 238 (1976) Policeman brought suit under the Civil Rights Act of 1871 challenging validity of county's hair grooming regulation for the male members of its police force. The Supreme Court, Mr. Justice Rehnquist, held that the county's determination that a hair grooming regulation should be enacted was not so irrational that it could be branded "arbitrary" and therefore a deprivation of respondent's "liberty" interest in freedom to choose his own hair style; whether a state or local government choice to have its uniformed police exhibit a similarity of appearance reflects a desire to make police officers readily recognizable to the public or to foster the "esprit de corps" that similarity of garb and appearance may inculcate within the police force itself, that justification for a hair style regulation is sufficiently rational to defeat a claim based on the liberty guarantee of the Fourteenth Amendment.

[17] "What we take away from Willingham and Garcia is that, as a general matter, Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices. *See* Willingham, 507 F.2d at 1092; Garcia, 618 F.2d at 269. And although these two decisions have been criticized by some, *see*, e.g., Camille Gear Rich, Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII, 79 N.Y.U. L. Rev. 1134, 1213–21 (2004), we are not free, as a later panel, to discard the immutable/mutable distinction they set out. *See* Cohen v. Office Depot, Inc., 204 F.3d 1069, 1076 (11th Cir. 2000)" EEOC v. Catastrophe Management Solution, 852 F.3d at 1030

[18] *Id.* at 1033

[19] Section 760.10(1)(a), F.S.

[20] SB 982 (Ch. 2015-68, L.O.F.)

[21] Section 760.10(2) through (8), F.S.

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.[22]

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.[23] After a person files a claim of discrimination with the FCHR, the FCHR investigates the complaint.[24] The FCHR then must make a reasonable cause determination within 180 days after the filing of the complaint.[25] If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.[26] A plaintiff is required to file a state claim in a civil court under the Florida Civil Rights Act within 1 year of the determination of reasonable cause by the FCHR.[27]

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.[28] DOAH will issue a recommended order, which the FCHR may reject, adopt, or modify by issuing a final order.[29]

Remedies

Administrative Remedies If the Commission Pursues Administrative Action

Affirmative relief includes the prohibition of the discriminatory practice and back pay. The FCHR may also award reasonable attorney's fees to the prevailing party.[30]

Civil Remedies If the Person Pursues a Legal Action

State law authorizes awards of back pay, compensatory damages, and punitive damages.[31] Compensatory damages include damages for mental anguish, loss of dignity, and any other intangible injuries.[32] Punitive damages are capped at $100,000 regardless of the size of the employer.[33] The state and its agencies and subdivisions of the state are not liable for punitive damages[34] or recovery amounts more than the limited waiver of sovereign immunity.[35]

---

[22] Kendra D. Presswood, *Interpreting the Florida Civil Rights Act of 1992*, 87 FLA. B.J. 36, 36 (Dec. 2013)
[23] Section 760.11(1), F.S.
[24] Section 760.11(3), F.S.
[25] Section 760.11(3), F.S.
[26] Section 760.11(4), F.S.
[27] Section 760.11(5), F.S.
[28] Section 760.11(7), F.S.
[29] *Id*.
[30] Section 760.11(6), F.S.
[31] Section 760.11(5), F.S
[32] *Id*.
[33] *Id*.
[34] Section 760.11(5), F.S.
[35] *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.

Florida Fair Housing Act

The Florida Fair Housing Act (FFHA),[36] modeled after the Federal Fair Housing Act, prohibits a person from refusing to sell or rent, or otherwise make unavailable, a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.[37] Also, the FFHA affords protection to persons who are pregnant or in the process of becoming legal custodians of children of 18 years of age or younger, or to persons who are handicapped or associated with a disabled person.[38]

Courts interpreting the FFHA also follow federal precedent because the FFHA similarly covers the topics of Title VII.

Procedure for Filing Claims of Housing Discrimination

A person who believes that he or she has been the target of unlawful housing discrimination may file a complaint with the Florida Commission on Human Rights (FCHR). Under the FFHA, the FCHR has the authority to investigate housing complaints and issue necessary subpoenas to the parties involved.[39] The FCHR may choose to resolve a housing complaint and try to eliminate or correct the alleged discriminatory housing practice on behalf of an aggrieved party.[40] The FCHR may find reasonable cause for the plaintiff to bring either a civil action or an administrative hearing.[41] The FCHR is also allowed to institute a civil action if a respondent doesn't voluntarily alter discriminatory housing practices.[42]

Remedies for Housing Discrimination

<u>FCHR Civil Fines for Housing Discrimination</u>

If the FCHR initiates a civil action under s. 760.34(7), F.S., a court may find discriminatory housing practices and fine the respondent:

- Up to $10,000, if the respondent has not previously been found guilty of a violation;
- Up to $25,000, if the respondent has been found guilty of one prior violation; and
- Up to $50,000, if the respondent has been found guilty of two or more violations.

<u>Civil and Administrative Remedies If the Person Pursues a Legal Action</u>

Courts may provide civil complainants affirmative relief from the effects of the discriminatory housing practice, including injunctive and other equitable relief, actual and punitive damages, and reasonable attorney's fees and costs.[43] State law also allows aggrieved persons to request administrative relief under chapter 120, F.S. within 30 days after receiving notice that the commission has concluded its investigation under s. 760.34, F.S.[44]

[36] Part II of ch. 760, F.S.
[37] Section 760.23(1), F.S.
[38] Sections 760.23(6)-(9), F.S.
[39] Section 760.32, F.S.
[40] Section 760.34(1), F.S.
[41] Section 760.34, F.S.
[42] *Id.* at (7)(a)
[43] Section 760.35, F.S.
[44] Section 760.11(5), F.S

Florida Housing Finance Corporation – Prohibited Discrimination

The Florida Housing Finance Corporation (FHFC) [45] is the state entity primarily responsible for encouraging the investment of private capital in residential housing and stimulating the construction and rehabilitation of affordable housing in Florida.[46] The FHFC administers several multifamily and single-family housing programs, such as the State Apartment Incentive Loan Program (SAIL), the State Housing Initiatives Partnership Program (SHIP), the Affordable Housing Catalyst Program, and the First Time Homebuyer Program, that assist Floridians in obtaining safe, decent, affordable housing.

The SAIL program provides gap financing to developers through non-amortizing, low-interest loans to leverage mortgage revenue bonds or federal Low Income Housing Tax Credit resources and obtain the full financing needed to construct affordable rental units for very low-income families. The SHIP program provides funds to all 67 counties and Florida's larger cities on a population-based formula to finance and preserve affordable housing for very low, low, and moderate-income families based on locally adopted housing plans. Florida law grants the FHFC specific powers necessary to carry out activities or implement programs to provide affordable housing.[47]

Under s. 420.516, F.S., it is unlawful for any sponsor[48] involved in an FHFC program to discriminate against any person or family because of race, color, sex, national origin, or marital status while FHFC financing or funding bonds are outstanding.[49]

Educational Equality

The Florida Educational Equity Act[50] (FEEA) governs students' and employees' civil rights in Florida's public educational systems. The FEEA mirrors civil rights protections under Title VI of the federal Civil Rights Act. The FEEA requires equal access for all people to the Florida K-20 public education system and prohibits discrimination against any student or employee in the system. The FEEA prohibits discrimination based on race, ethnicity, gender, national origin, disability, or marital status.[51]

Additionally, discrimination protections are also applied to extracurricular school programs and activities under s. 1002.20, F.S. This section provides that all K-20 education programs, activities, and opportunities offered by public educational institutions must be made available

[45] The Florida Housing Finance Corporation (FHFC) was created as a public corporation within the Department of Economic Opportunity (DEO). However, the FHFC is a separate budget entity and is not subject to the control, supervision, or direction of DEO. Section 420.504, F.S.
[46] Section 420.502(7), F.S.
[47] *See* ss. 159.608 and 420.507, F.S.
[48] "Sponsor means any individual, association, corporation, joint venture, partnership, trust, local government, or other legal entity or any combination thereof which: (a) Has been approved by the corporation as qualified to own, construct, acquire, rehabilitate, reconstruct, operate, lease, manage, or maintain a project; and (b) Except for a local government, has agreed to subject itself to the regulatory powers of the corporation." Section 420.502(39), F.S.
[49] Section 420.516, F.S.
[50] Section 1000.05, F.S.
[51] Id.

without discrimination based on race, ethnicity, gender, national origin, disability, or marital status.[52]

Freedom of Speech and Expression in Public School

The First Amendment to the U.S. Constitution protects an individual's freedom of speech and expression from undue interference or restriction by the government or a state actor, such as a public school.[53] These rights are applied to the states through the Fourteenth Amendment.[54] In the public school setting, courts interpret constitutional freedoms to provide school students a right to express themselves through hairstyle as long as it does not objectively disrupt the academic atmosphere of the school.[55]

To preserve the structure and learning environment of a public school, school administrators may only restrict speech and expression that poses an objective disruption to other students or school activities.[56] Under Section 1983 of the Civil Rights Act of 1871, students may claim that a school's restriction on a hairstyle is a violation of their First and Fourteenth Amendment constitutional rights to freedom of speech and expression.[57]

When evaluating student First Amendment claims against public school officials, a court will consider the reasons why a school official suppresses a student's freedom of expression.[58] In some instances, a court will conclude that a school is justified in suppressing student expression because schools have a legitimate state interest in controlling student behavior to preserve a structured environment conducive to learning and good moral character.[59]

In other instances, the court may rule that a school's reasons for curtailing a student's freedom of expression do not justify the sacrifice of liberty. The Supreme Court has stated, "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint [or expression]."[60]

Federal Jurisprudence for Hairstyle in Public Schools

The Eleventh Circuit has ruled that a public school acted unconstitutionally by requiring a student to cut his hair for being too long.[61] In the case, the school supported this requirement by claiming that the length of hair disrupted school activities because the student was the target of violence repeatedly due to his hair length.[62] The school's attempt to avoid violence by requiring

[53] *See* Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503 (1969)
[53] *See* Tinker v. Des Moines Ind. Comm. Sch. Dist., 393 U.S. 503 (1969)
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *See* Holloman ex rel. Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) at 1275, rejecting Ferrell v. Dallas Ind. Sch. Dist., 392 F.2d 697 (5th Cir. 1968)
[58] *Id.*
[59] *Id.*
[60] Tinker, 393 U.S. at 509
[61] *See* Holloman, 370 F.3d at 1275
[62] *Id.*

the student to cut his hair was deemed an impermissible reason for suppressing the student's freedom to express himself through hairstyle.[63]

The CROWN Act in California

California became the first state to enact discrimination protections for hairstyles in state civil rights law. The California CROWN[64] Act was passed unanimously by California's Assembly and Senate. The bill[65] was signed into law by Governor Newsom on July 3, 2019, and took effect on January 1, 2020.[66]

The California law prohibits employers and public schools from restricting certain hairstyles. No employer or public school may ban or restrict individuals from wearing their hair in styles historically associated with race, including, but not limited to, afros, braids, twists, cornrows, and dreadlocks. Restricting protected hairstyles explicitly or under generic terms is considered a prohibited form of discrimination under California's Civil Rights Act, and violators will be subject to civil liabilities.[67]

III. Effect of Proposed Changes:

CS/SB 566 is the "Creating a Respectful and Open World for Natural Hair Act," or "CROWN Act," and amends various provisions of the Florida Statutes to provide civil protections against discrimination based on any trait historically associated with race, including, but not limited to, hair texture, hair type, and protective hairstyles in the areas of employment, housing, and education. The bill defines "protective hairstyle" as including, but not limited to, hairstyles such as braids, locks, or twists.

The bill's preamble includes a series of recitals that declare hairstyle restrictions, a rampant source of racial discrimination imposed by European culture. The preamble states that prohibitions against certain hairstyles have a disparate impact on black individuals and are more likely to burden or punish black employees and students.

Florida Civil Rights Act and Fair Housing Act

The bill amends the definitions in the Florida Civil Rights Act (FCRA) in s. 760.02, F.S., to define "race" as any trait historically associated with race, including but not limited to, hair texture, hair type, and protective hairstyles. The term "protective hairstyle" includes, but is not limited to, hairstyles such as braids, locks, or twists.

---

[63] *Id.*
[64] "Creating a Respectful and Open World for Natural Hair Act" *See* California Senate Judiciary Committee Analysis: Senate Bill 188, 2019-2020 Regular Session
[65] California SB 188 (2019), *available at*: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188 (last visited Jan. 15, 2020).
[66] Office of Governor Gavin Newsom, *Governor Newsom Signs Legislation to Protect Employees from Racial Discrimination Based on Hairstyle*, *available at*: https://www.gov.ca.gov/2019/07/03/governor-newsom-signs-legislation-to-protect-employees-from-racial-discrimination-based-on-hairstyle/ (last visited Dec. 30, 2019).
[67] *Id.*

Under the bill, discrimination based on traits historically associated with race, including protective hairstyles, is a prohibited form of race discrimination. The definition of "race" in the bill applies to the FCRA, the Florida Fair Housing Act, and s. 509.092, F.S., which prohibits public lodging and food service establishments from refusing to serve individuals based upon a protected status. Thus, based on a protected racial trait or protective hairstyle, a person may not be discriminated against:

- By public lodging and food service establishments;
- With respect to education, housing, or public accommodation;
- With respect to employment, provided that any discriminatory act constitutes an unlawful employment practice;[68] or
- With respect to the sale, rental, or financing of residential real estate.

The bill provides individuals the ability to seek administrative remedies, equitable relief, and damages for legal claims based on discrimination of a racial trait and protective hairstyle. The bill also directs the Florida Commission on Human Relations to receive, initiate, investigate, conciliate, hear, and act upon complaints alleging discrimination of racial traits and protective hairstyles.

Florida Housing Finance Corporation

The bill amends s. 420.516, F.S, to specify that it is unlawful for any sponsor[69] involved a Florida Housing Finance Corporation program to discriminate against any individual based on race, as defined in s. 760.02, F.S., while bonds are outstanding for funding or financing the sponsor's project.

Public K-20 Education System

The bill amends s. 1000.21, F.S., to define "race" and "protective hairstyle" as used in the Florida K-20 Education Code, making it unlawful for any Florida K-20 public education system to discriminate against a student or employee based a racial trait or protective hairstyle. This protection extends to education programs, activities, and opportunities offered by the Florida K-20 public education system.

The bill reenacts s. 420.5087(6)(i), F.S., to incorporate the amendments made by the bill.

The bill will take effect on July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[68] 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.

[69] See Section 420.503(39), F.S.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill potentially violates the Equal Protection Clause of the United States Constitution.[70] The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[71] As seemingly expressed in the recitals of the preamble, the bill's statutory definition of "race" and "protective hairstyle" may run afoul of the Equal Protection Clause by providing discrimination protections to individuals unequally, and based on racial classifications.[72,73] For example, the bill, in theory, may provide discrimination protections for a mohawk-like hairstyle if worn by an American Indian from the Pawnee Nation of Oklahoma[74] but may deny similar protections to other racial groups that lack a historical association with the hairstyle. Notwithstanding, courts are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever reasonably possible.[75]

[70] U.S. Constitution amend. XIV, s. 1.
[71] *Id.*; *See also* Romer v. Evans, 517 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (Under the Equal Protection clause, persons who are similarly situated may not be classified and treated differently because "the Constitution 'neither knows nor tolerates classes among citizens.'")
[72] *See* Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733 (1978) at 307 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." (Justice Powell)). *See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct 2097, 132 L.Ed.2d 158 (1995) at 237 ("To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American." (Justice Scalia))
[73] "[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This " 'standard of review ... is not dependent on the race of those burdened or benefited by a particular classification.' " *Ibid.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)).
[74] *See* Wikipedia, *Mohawk hairstyle*, *available at:* https://en.wikipedia.org/wiki/Mohawk_hairstyle (last visited Jan. 15, 2020); *See also* Pawnee Nation of Oklahoma, *Pawnee History*, *available at:* https://www.pawneenation.org/page/home/pawnee-history (last visited Jan. 15, 2020) ("Pawnees dressed similar to other plains tribes; however, the Pawnees had a special way of preparing the scalp lock by dressing it with buffalo fat until it stood erect and curved backward like a horn.")
[75] *See* Franklin v. State, 887 So.2d 1063, 1080 (Fla.2004); *See also* Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc., 978 So.2d 134, 139 (Fla.2008); *See also* Fla. Dep't of Revenue v. Howard, 916 So.2d 640, 642 (Fla.2005).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may produce an indeterminate negative fiscal impact on private sector businesses. Businesses may face an increase in litigation expenses to defend discrimination claims, monies paid to settle discrimination claims, and civil damages (including punitive damages)[76] owed for meritorious discrimination claims. General business liability insurance policies may not cover these increased costs and liabilities. Businesses and insurance companies may sustain nominal costs in updating insurance policies for employment practices liability coverage to incorporate racial trait and hairstyle discrimination. Businesses may also incur nominal expenses in updating employee grooming and other policies.

Private sector housing companies affected by the bill may sustain similar indeterminate negative fiscal impacts.

This bill may produce an indeterminate positive fiscal impact for individuals that are able to reduce costs associated with hair-care and grooming.[77] However, individuals that are more likely to wear protected hairstyles may see a reduction of their statistical representation in the permanent workforce.[78]

C. Government Sector Impact:

This bill may produce an indeterminate negative fiscal impact for Florida K-20 public education institutions. Florida K-20 public education institutions may face increases in litigation expenses and civil liabilities for racial trait and hairstyle discrimination claims from both students and employees.

The Florida Commission on Human Relations (FCHR) estimates that the bill may require the addition of three full-time employees, consisting of a Specialist II, a Regulatory Specialist, and a Senior Attorney.[79]

VI. Technical Deficiencies:

None.

---

[76] Section 760.07, F.S.
[77] *See* California Senate Judiciary Committee Analysis SB 188, 2019-2020 Regular Session at page 6, *available at:* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB188 (last visited Jan. 15, 2020).
[78] Increasing the costs associated with firing an employee, also increases the "selectivity" of employers, which statistically results in a reduction of minority representation in the workplace. *See* Morgan, John and Vardy, Felix, *Diversity in the Workplace*, International Monetary Fund Working Paper, JEL Classification Numbers: D21, D63, D83, J71, J78. (2006)
[79] Per e-mail correspondence with the Florida Commission on Human Relation dated Jan. 10, 2020 (on file with the Senate Committee on Community Affairs).

VII. Related Issues:

The bill may create a much broader right for discrimination protections than contemplated by the bill's preamble. The bill does not define "traits" or "historically associated." These omissions may cause ambiguity in what characteristics of a person are protected from discrimination.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 420.516, 760.02, 1000.21, and 420.5087.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on January 13, 2020:
The committee substitute amends the definition of "race" to include traits historically associated with race, including "protective hairstyles." This change makes discrimination of a racial trait or protective hairstyle a form of discrimination based on race, as opposed to establishing a new protected status or class. Additionally, the CS uses the term "protective hairstyle" instead of "protected hairstyle."

B. Amendments:

None.