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 Governmental Oversight and Accountability

BILL:	CS/SB 440
INTRODUCER:	Governmental Oversight and Accountability Committee and Senator McClain
SUBJECT:	Gender Identity Employment Practices
DATE:	March 26, 2025 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McVaney	GO	**Fav/CS**
2.			JU	
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 440 creates the Freedom of Conscience in the Workplace Act, which prohibits specific behaviors that accommodate the use of preferred pronouns that do not correspond to a person's sex within the context of employment by the state, a county, municipality, special district, or any subdivision or agency thereof.

Additionally, the bill makes it an unlawful employment practice for an employer to require, as a condition of employment, any training, instruction, or other activity on gender identity or gender expression.

The bill grants the Department of Management Services authority to adopt rules to implement portions of the bill.

The bill may result in increased costs to the state and local governments.

The bill takes effect July 1, 2025.

II. Present Situation:

Unlawful Discrimination in Florida

Florida has long guaranteed civil rights protections in the State Constitution, which prohibits, in relevant part, forms of discrimination on the basis of gender, race, religion, national origin, and physical disability, and guarantees equality under the laws to all peoples.[1]

In 2019, Governor DeSantis reaffirmed the policy of non-discrimination in government employment and declared it the policy of his administration to prohibit discrimination in employment based on age, sex, race, color, religion, national origin, marital status, or disability.[2]

Florida Civil Rights Act (Part I, Chapter 760, F.S.)

The Florida Civil Rights Act (FCRA) protects persons from discrimination based on race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. The FCRA establishes the Florida Commission on Human Relations (the Commission) within the Department of Management Services. The Commission is empowered to receive, initiate, investigate, conciliate, hold hearings on, and act upon complaints alleging discriminatory practices.[3] Additionally, the Attorney General may initiate a civil action for damages, injunctive relief, civil penalties of up to $10,000 per violation, and other appropriate relief.[4] The Governor appoints, and the Senate confirms, the 12 members of the Commission.[5]

Unlawful Employment Practices

Employers, employment agencies, labor organizations, and joint labor-management committees are prohibited from engaging in employment practices that discriminate against individuals based on race, color, religion, sex, pregnancy, national origin, age, disability, or marital status.[6]

Administrative and Civil Remedies

Following a potential violation of the FCRA, an aggrieved person, the Commission, a commissioner, or the Attorney General has 365 days to file a complaint with the Commission naming the person responsible for the violation and describing the violation.[7] Within 180 days of the filing, the Commission must make a determination of whether reasonable cause exists to believe that discriminatory practice has occurred.[8]

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[1] FLA. CONST. art. I *passim*.
[2] Office of the Governor, *Executive Order Number 19-10*, Jan. 8, 2019 (Reaffirming Commitment to Diversity in Government).
[3] Section 760.06(5), F.S.
[4] Section 760.021(1), F.S.
[5] Section 760.03(1), F.S.
[6] *See* s. 760.10, F.S. Limited exceptions apply in bona-fide scenarios where authorized by law or necessary for the performance of the particular employment. *See* s. 760.10(8), F.S.
[7] Section 760.11(1), F.S.
[8] Section 760.11(3), F.S.

If the Commission issues a finding of reasonable cause, the aggrieved person may request an administrative hearing or bring a civil action.[9] A civil action must be brought within 1 year after the determination of reasonable cause.[10] The FCRA expressly requires a plaintiff to exhaust his or her administrative remedy as a prerequisite to filing a civil action alleging unlawful discrimination, including housing discrimination.[11] The remedies available through an administrative hearing are affirmative relief from the effects of the practice, including back pay and attorney's fees; while remedies available through a civil action include affirmative relief such as back pay, injunctive relief, compensatory damages, punitive damages up to $100,000, and attorney's fees.[12]

Alternatively, under s. 760.11(7), F.S., if the Commission makes a determination that there is not reasonable cause, the claimant may request an administrative hearing but must do so within 35 days of the date of the "no cause" determination. If the claim is not made within 35 days, the claim is barred.[13]

III. Effect of Proposed Changes:

Section 1 provides the title "Freedom of Conscience in the Workplace Act," for the bill. This Act, in part, declares as the state's policy that a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex.

Section 2 addresses the use of pronouns in the context of the public workplace where those pronouns do not correspond with an individual's sex. Specifically, the bill provides that:

- An employer cannot require an applicant, employee, or contractor, within the context of their state or county employment, to use a person's preferred pronouns if they do not correspond to that person's sex;
- An applicant, employee, or contractor cannot require a public employer to use his or her preferred pronouns if they do not correspond to his or her sex; and
- An application or other employment form that asks about sex may *only* offer male or female as answers and cannot provide a nonbinary or other option.

An employer, for purposes of this section, is the state or any county, municipality, or special district or any subdivision or agency thereof. A "political subdivision" is further defined by s. 1.01(8) as cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in Florida.

The bill grants the Department of Management Services rulemaking authority to adopt rules implementing section 2.

[9] Section 760.11(4), F.S.
[10] Section 760.11(5), F.S. If, however, the commission fails to make a determination of reasonable cause, the four-year statute of limitations for cause of action based on statutory liability applies. *Joshua v. City of Gainesville*, 768 So.2d 432 at 439 (Fla. 2000).
[11] Section 760.07, F.S.
[12] Section 760.11(5), (6), and (7), F.S.
[13] Section 760.11(7), F.S.

Section 3 amends s. 760.10, F.S., to classify as an unlawful employment practice under the Florida Civil Rights Act the requirement that one must, as a condition of employment, complete any training, instruction, or other activity on sexual orientation, gender identity, or gender expression.

Section 4 reenacts s. 760.11, F.S., for the purpose of incorporating by reference the changes made to s. 760.10, F.S., by this act.

Section 5 provides that the bill takes effect July 1, 2025.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, section 18(a) of the Florida Constitution provides in part that county or municipality may not be bound by a general law requiring a county or municipality to spend funds or take an action that requires the expenditure of funds unless certain specified exemptions or exceptions are met. Local governments may be subjected to litigation as a result of the implementation of employment practices required by the bill. If the bill does qualify as a mandate, in order to be binding upon cities and counties, the bill must contain a finding of important state interest and be approved by a two-thirds vote of the membership of each house.

The bill may be excepted from the mandates provision if the bill applies equally to all persons similarly situated, including state and local governments. However, the bill applies only to public employers, and excludes private employers. This is therefore unlikely to be found to affect all persons similarly situated. If it were, such exception would require a finding of important state interest on behalf of the legislature.

The mandate requirements do not apply to laws that have an insignificant fiscal impact, which for Fiscal Year 2025-2026 is forecast at approximately $2.4 million.[14, 15, 16] The estimated costs for the bill are unknown at this time. If costs imposed by the bill exceed $2.4 million, the mandates provisions may apply. If the bill does qualify as a mandate, in order to be binding upon cities and counties, the bill must contain a finding of important state interest and be approved by a two-thirds vote of the membership of each house.

B. Public Records/Open Meetings Issues:

None identified.

[14] FLA. CONST. art. VII, s. 18(d).
[15] An insignificant fiscal impact is the amount not greater than the average statewide population for the applicable fiscal year times $0.10. *See* Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Impact*, (Sept. 2011), http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf (last visited Mar. 16, 2025).
[16] Based on the Florida Demographic Estimating Conference's February 4, 2025 population forecast for 2025 of 23,332,606. https://edr.state.fl.us/content/conferences/population/ConferenceResults_Tables.pdf (last visited Mar. 16, 2025).

C. Trust Funds Restrictions:

None identified.

D. State Tax or Fee Increases:

None identified.

E. Other Constitutional Issues:

Freedom of Speech

The state and federal constitutions protect freedom of speech. The First Amendment to the U.S. Constitution guarantees that "Congress shall make no law ... abridging the freedom of speech;"[17] and the State Constitution's free speech protections "is the same as is required under the First Amendment."[18] If the government is able to meet the applicable level of judicial scrutiny, the law is constitutional, even if it restricts free speech.

Governments can typically restrict speech that is a part of an employee's official duties without encroaching on the freedom of speech, but the restrictions must be on employee speech that has potential to affect the employer's operations.[19] Courts apply a two-part inquiry to determine the constitutional protection afforded a public employee's speech (the "Garcetti test").[20]

- First, was the employee speaking as a citizen on a matter of public concern? If not, then there is no first amendment protection based on the employer's reaction to the speech.
- If yes, then a more in-depth inquiry about the speech is required. Mainly, the second question to be addressed is whether the government entity has an adequate justification for treating the employee differently from any other member of the general public?[21] In particular, this question addresses whether the speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[22]

Section 1000.071(1), F.S., provides that "[a]n employee or contractor of a public K-12 educational institution may not provide to a student his or her preferred personal title or pronouns if [it does] not correspond to his or her sex." The U.S. Northern District Federal

[17] U.S. CONST. amend. I.
[18] *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982); *Scott v. State*, 368 So. 3d 8, 10 (Fla. 4th DCA 2023), *review denied*, No. SC2023-1188 (Fla. Nov. 22, 2023), and *cert. denied sub nom.* Scott v. Fla., No. 23-7786 (U.S. Oct. 7, 2024).
[19] *Connick v. Myers*, 461 U.S. 138, 143 (1983).
[20] *Garcetti v. Ceballos,* 547 U.S. 410 (2006).
[21] *Garcetti v. Ceballos,* 547 U.S. 410 (majority); 16A AM. JUR. 2D *Constitutional Law* s. 491 (2024); Legal Almanac: *The First Amendment: Freedom of Speech* s. 8:4; *Connick v. Myers*, 461 U.S. 138, 142-148 (1983); 63C AM. JUR. 2D *Public Officers and Employees* s. 195 (2024) (citing *Smith v. Gilchrist*, 749 F.3d 302, 309 (4th Cir. 2014)).
[22] *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Court found that this is a viewpoint discriminatory prohibition that chills subject employees' First Amendment right to speak freely.[23] In its application of the Garcetti test, the court found that: (1)(a) An individual's use of his or her preferred pronouns is not a government message, but a personal one, and therefore is made in the speaker's capacity as a citizen—not an employee. (1)(b) That such usage is a matter of public concern,[24] invariably—at least—because it is the subject of state policy. (2) The usage did not impair the normal operations of the workplace or impede the speaker's employment duties. This matter is on appeal.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None identified.

B. Private Sector Impact:

Those companies that provide human resource training may be required to tailor their offerings to conform to the bill's requirement that no training be offered on sexual orientation, gender identity, or gender expression.

C. Government Sector Impact:

State agencies and local governments will be required to examine their employment requirements to remove prohibited trainings, amend employment forms, and adopt policies to conform to the law.

The DMS may be required to adopt rules to implement section 2 of the bill. The DMS should be able to absorb such duties into its current workload.

The Commission on Human Relations, EEOC, and similar agencies that can hear allegations of unfair labor practices may see an increase in workload as a result of the creation of new unfair labor practices.

VI. Technical Deficiencies:

None identified.

VII. Related Issues:

A statute, policy, or program that distributes benefits or burdens based on sex may invite equal-protection or other distinction-based challenges. Public debate, legal questions, and concerns exist regarding whether discrimination on the basis of transgender identity or sexual orientation constitutes discrimination "on the basis of sex." Interpretations of the protections are varied.

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[23] *Wood v. Fl. Dep't of Educ.*, 729 F. Supp. 3d 1255 (N.D. Fla. 2024).

[24] Factors used to determine this include "whether the speech communicates 'a subject of legitimate news interest, a subject of general interest and of value and concern to the public at the time." *Mitchell v. Hillsborough Cnty.*, 468 F.3d 1276 (11th Cir 2006), *quoting Connick v. Myers*, 461 U.S. 138, at 147-48, (1983).

However, at least within in the context of the Federal Civil Rights Act, the Supreme Court of the United States held in *Bostock* that discrimination on the basis of sexual orientation or transgender status constitutes discrimination on the basis of sex.[25] Title VII of the Civil Rights Act of 1964 (Title VII) is a federal law that protects employees in both the private and public sectors against discrimination in the workplace based on certain specified characteristics, including sex, race, color, and national origin.[26] The *Bostock* opinion was based on the court's interpretation of the phrase "based on sex" within Title VII. The Court explicitly limited its opinion to the context of firing an employee, side-stepping issues such as "bathrooms, locker rooms… or anything else of the kind."[27]

The extent to which the *Bostock* holding will influence constitutional equal protection litigation is unclear. In particular, it is uncertain whether a requirement to use different pronouns in the workplace constitutes a "serious and material change in the terms, conditions, or privileges of employment." Adverse employment actions are generally those which affect continued employment or pay, such as a termination, demotion, suspension without pay, and pay raises or cuts.[28] Alternatively, a plaintiff may argue that the policy creates a hostile work environment that creates mistreatment of the plaintiff based on his or her sex, and that the mistreatment is sufficiently severe or pervasive that it can be said to alter the terms, conditions, or privileges of employment.[29]

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[30] Florida's Equal Protection Clause guarantees that "all natural persons, female and male alike, are equal before the law."[31] Equal protection claims against government actors allege unconstitutionally unequal treatment between groups, and states "do not escape the strictures of the Equal Protection Clause in their role as employers." Groups can be based on any form of classification, but discrimination based on certain classes—such as sex—are inherently suspect and therefore afforded a higher level of judicial scrutiny.[32] To withstand a constitutional challenge, classifications by sex must serve important governmental objectives and must be substantially related to the achievement of those objectives.[33] If classifications based on an

[25] *Bostock v. Clay County*, 590 U.S. 644 (2020) (Title VII covers discrimination based on sexual orientation and reaches bias against transsexuals; Justice Gorsuch in writing for six Justices stated that by discriminating against homosexuals, the employer intentionally penalizes men for being attracted to men and women for being attracted to women; by discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today; the employer intentionally refuses to hire applicants in part because of the affected individuals' sex, even if it never learns any applicant's sex; the ruling rejected the argument put forward by dissenting Justice Kavanaugh that because homosexuality and transgender status can't be found on that the Title VII list and because they are conceptually distinct from sex, the employers reason, they are implicitly excluded from Title VII's reach).
[26] 42 U.S.C. §§ 2000e - 2000e17 (as amended).
[27] *Id.* at 681.
[28] *Wood v. Fl. Dep't of Educ.*, 729 F. Supp. 3d 1255 (N.D. Fla. 2024), *citing Crawford v. Carroll*, 529 F.3d 961, 970-71 (11th Cir. 2008).
[29] *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 861 (11th Cir. 2020).
[30] U.S. CONST. amend. XIV, s. 1.
[31] FLA. CONST. art. I, s. 2.
[32] *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 597-8 (2008).

individual's sexual orientation or transgender status trigger a sex based constitutional analysis, the bill may not be able to survive a constitutional challenge.

VIII. Statutes Affected:

This bill creates section 110.1051, amends section 760.10, and reenacts s. 760.11 of the Florida Statutes.

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 Governmental Oversight and Accountability on March 25, 2025:
Deletes an unlawful employment practice created by the bill and deletes from a second unlawful employment practice the reference to training, instruction, or other activity regarding sexual orientation.

B. Amendments:

None.