

II. Present Situation:

The Family Medical Leave Act

The 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

*Notice*⁶

¹See Public Law 103-3, Enacted February 5, 1993, available at http://www.dol.gov/whd/fmla/fmlaAmended.htm#SEC_107_ENFORCEMENT (last visited Feb. 25, 2013).

² *Id.* See section 101. Definitions.

³ *Id.* See section 101. Definitions.

⁴ *Id.* See section 102. Leave Requirement.

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.

⁶See supra note 4.

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. The Wage and Hour Division investigates complaints. 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 two years from the date of violation.

Expansion of FMLA in other States and Local Governments

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 two states, California and New Jersey, offer paid, or partially paid, family and medical leave.⁹ In California, paid leave is funded by a payroll tax on employees and allows employees to participate in the temporary disability program. New Jersey extended its existing temporary disability insurance system to administer paid leave, and also funds the program through an employee payroll tax.

Washington passed a paid family leave law in 2007 that was to take effect in October 2009. However, due to state budget concerns, subsequent bills have delayed the implementation of the paid leave law until 2015.¹⁰

Wisconsin recently provided for the preemption of local sick leave ordinances in the state.¹¹ The 2011 Wisconsin Act 16 prohibits a city, village, town, or county from enacting or administering an ordinance that requires employers to provide paid or unpaid leave for four reasons:

⁷ United States Department of Labor, Wage and Hour Division, *Fact Sheet # 77B: Protection for Individuals under the FMLA*, available at <http://www.dol.gov/whd/regs/compliance/whdfs77b.htm> (last visited Feb. 25, 2013).

⁸ See 29 C.F.R. s. 825.701, available at <http://law.justia.com/cfr/title29/29-3.1.1.3.52.7.466.2.html> (last visited Feb. 25, 2013). 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> (last visited Feb. 25, 2013). San Francisco, Philadelphia, and Seattle have also passed expanded leave ordinances. Miami-Dade County ordinances on family leave and domestic violence include unpaid leave for the care of a grandparent and for circumstances related to a medical or dental problem resulting from domestic or repeat violence. See Miami-Dade County Regulations, *Chapter 11A Discrimination: Article V. - Family Leave, Article VIII - Domestic Leave*, available at http://miamidade.fl.regulations.us/code/reglist/ord_ptiii_ch11a?selectdate=3/1/2013 (last visited Mar. 1, 2013).

⁹ National Conference of State Legislatures, *State Family Medical Leave Laws*, available at <http://www.ncsl.org/issues-research/labor/state-family-and-medical-leave-laws.aspx> (last visited Feb. 25, 2013).

¹⁰ *Id.*

¹¹ See Wisconsin Legislative Council, *Act Memo for 2011 Wisconsin Act 16: Preemption of Local Sick Leave Ordinances* (May 10, 2011), available at <http://docs.legis.wisconsin.gov/2011/related/lcactmemo/sb23.pdf>.

- for the employee’s own health condition or preventive medical care.
- for a family member of the employee’s health condition or preventive medical care.
- for the employee’s medical care or assistance relating to domestic violence.
- for the employee’s other family, medical, or health issues, for himself or herself or a family member.¹²

Leave Provisions in Florida Law

Some leave of absence and medical leave provisions exist in Florida Statutes. Section 741.313, F.S., provides that an employer 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. These provisions only apply to an employer who employs 50 or more employees and to an employee who has been employed for three months or longer.¹³

Section 110.221, F.S., prevents the termination of state career service employees for reasons related to pregnancy or adoption. The section also allows up to six months of unpaid leave for these employees.¹⁴ In addition, s. 121.121, F.S., governs authorized leaves of absences for members of the Florida Retirement System.

“At-Will” Employment

Florida is an “at-will” employment state.¹⁵ In essence, this means that, absent an employment contract, either party, employer or employee, may terminate the employment relationship at any time, for any reason, so long as the reason is not prohibited by law.¹⁶

Actions for wrongful termination of employment, under the constitutional theory of a violation of “basic rights” as set forth in Article I, Section 2 of the Florida Constitution, must be based upon a state action, and not the action of one citizen (employer) against another (employee).¹⁷ One citizen’s rights “shall not be construed to deny or impair others retained by the people.”¹⁸ The application of the right to equal protection in Article I, Section 2 of the Florida Constitution, is activated when the government intrudes into a citizen’s most basic, personal freedom from

¹² *Id.* The Act does not affect local ordinances that require leave for employees of a local governmental unit. If the terms of a collective bargaining agreement are inconsistent with the provisions of the Act, the provisions apply when the collective bargaining agreement expires, or is extended, modified, or renewed, whichever occurs first.

¹³ See s. 741.313, F.S.

¹⁴ See s. 110.221, F.S. Additional provisions relate to annual leave credits and accrued sick leave.

¹⁵ This section of the analysis is drawn from Florida Senate Judiciary Committee, *CS/SB 1130 Analysis: Firearms in Motor Vehicles* (Mar. 26, 2008) available at <http://archive.flsenate.gov/data/session/2008/Senate/bills/analysis/pdf/2008s1130.ju.pdf>.

¹⁶ See *Smith v. Piezo Technology and Prof'l Adm'rs*, 427 So. 2d 182, 184 (Fla. 1983) (“[t]he established rule in Florida relating to employment termination is that ‘[W]here the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained for breach of the employment contract.’”) (quoting *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1254 (Fla. 1980)); *Leonardi v. City of Hollywood*, 715 So. 2d 1007, 1008 fn. 1 (Fla. 4th DCA 1998) (“[t]he general rule of at-will employment is that an employee can be discharged at any time, as long as he is not terminated for a reason prohibited by law, such as retaliation or unlawful discrimination”).

¹⁷ *Schreiner v. McKenzie Tank Lines*, 432 So. 2d 567, 569-70 (Fla. 1983).

¹⁸ FLA. CONST., art. 1, s. 1.

such intrusion. Consequently, there is no constitutional right to employment in Florida in the private sector.

The Legislature has enacted statutes addressing discrimination based upon race, color, religion, sex, national origin, age, handicap, or marital status.¹⁹ These statutes provide causes of action for employment discrimination, and the methods by which they are to be pursued, against employers who employ 15 or more employees for each working day in each of 20 or more calendar weeks.²⁰

The statutory protections set forth protect employees from discrimination based upon who they are, not matters that are necessarily matters of choice or preference. These statutory protections could be viewed as an expansion, or at least a clarification from a public policy standpoint, of the constitutional basic rights enumerated in Article I, Section 2 of the Florida Constitution.

Reasons not inherently “identity-related,” for employing or not employing, retaining, or terminating an employee are matters within the discretion of the employer and are neither constitutionally nor statutorily governed.

Orange County Earned Sick Time Ordinance Petition

In 2012, registered voters petitioned to place an Orange County ordinance entitled *Earned Sick Time for Employees of Businesses in Orange County* on the November ballot.²¹ The ordinance would require employers with 15 or more employees to give employees within Orange County paid sick time when they are sick or caring for a sick family member. Employees would accrue one hour of sick time for every 37 hours worked, capped at 56 hours in a calendar year. Employers with fewer than 15 employees would not have to offer paid sick time, but could not retaliate against workers who take unpaid time off when they are sick.

Local Government Powers and Legislative Preemption

The Florida Constitution grants counties or municipalities broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.²² Those counties operating under a county charter have all powers of self-government not inconsistent with general law, or special law approved by the vote of the electors.²³ Likewise, municipalities have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.²⁴ Section 125.01, F.S., enumerates the powers and duties of all county governments, unless preempted on a particular subject by general or special law.

¹⁹ Florida Civil Rights Act, ss. 760.1-760.11, F.S.; s. 509.092, F.S.

²⁰ Section 760.02(7), F.S.

²¹ Petition language is available at

http://blogs.orlandosentinel.com/news_politics/files/2012/08/Earned_Sick_Time_Petition_Form.pdf. The ordinance was not on the November 2012 ballot but is now scheduled for the August 2014 ballot.

²² FLA. CONST. art. VIII, s. 1(f).

²³ FLA. CONST. art. VIII, s. 1(g).

²⁴ FLA. CONST. art. VIII, s. 2(b); *see also* s. 166.021, F.S.

Under its broad home rule powers, a municipality or a charter county may legislate concurrently with the Legislature on any subject which has not been expressly preempted to the State.²⁵ Express preemption of a municipality's power to legislate requires a specific statement; preemption cannot be made by implication or by inference.²⁶ A county or municipality cannot forbid what the Legislature has expressly licensed, authorized or required, nor may it authorize what the Legislature has expressly forbidden.²⁷ The Legislature can preempt a county's broad authority to enact ordinances and may do so either expressly or by implication.²⁸

III. Effect of Proposed Changes:

Section 1 creates an undesignated section of Florida Statutes on ordinances relating to family or medical leave benefits for employees. Definitions provided for “employee” and “employer” are those as established in the federal Fair Labor Standards Act of 1938.²⁹ “Family or medical leave” is defined to mean a paid or unpaid absence from employment to deal with a health condition or seek medical attention for oneself or to assist another person engaged in the same two activities. This type of leave is also defined to include the birth or adoption of a child. “Family or medical leave” does *not* include leave related to and arising directly from domestic violence. “Political subdivision” is also defined and includes a county, municipality, department, commission, special district board or other public body.

This section provides that a political subdivision may not require an employer to provide family or medical leave benefits to an employee and may not otherwise regulate such leave. With the exception of family or medical leave benefits regulated under federal law or regulations, the regulation of family and medical leave benefits is expressly preempted to the state.

This section also creates the Employer-Sponsored Benefits Study Task Force to analyze employer-sponsored family and medical leave benefits and the impact of state preemption of the regulation of such benefits. The task force shall submit a report of its findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The task force is composed of nine members and includes the Director of the Workforce Florida, Inc., who will serve as chair of the group. The President and Speaker shall each make four appointments to the task force and will include members of the Legislature, owners of various sized businesses, and representatives of organizations representing non-

²⁵ See, e.g., *City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).

²⁶ *Id.*

²⁷ *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).

²⁸ *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).

²⁹ See U.S. Department of Labor Wage and Hour Division, *The Fair Labor Standards Act of 1938, As Amended*, available at <http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf> (last visited Feb. 25, 2013). Section 203 of the Act defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.” The term “employee” means “any individual employed by an employer” subject to certain federal government employee definitions and excluding certain employees deemed as volunteers.

management employees of businesses. The task force shall organize by September 1, 2013, and complete its work by January 15, 2014.

This section does not limit the authority of a political subdivision to establish family or medical leave benefits for its employees. In addition, the section does not prohibit a federally authorized and recognized tribal government from requiring family or medical leave benefits for a person employed within a territory over which the tribe has jurisdiction.

Section 2 provides an effective date upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

It is unknown how many local governments may have established family or medical leave benefits that apply to non-government employees which are more expansive than federal law.³⁰ Under the bill, any such benefits would be preempted to the state.

There will be indeterminate costs associated with the meetings and the work-product of the Employer-Sponsored Benefits Study Task Force.

³⁰ Miami-Dade County ordinances on family leave and domestic violence include unpaid leave for the care of a grandparent and for circumstances related to a medical or dental problem resulting from domestic or repeat violence. See Miami-Dade County Regulations, *Chapter 11A Discrimination: Article V. - Family Leave, Article VIII - Domestic Leave*, available at http://miamidade.fl.eregulations.us/code/reglist/ord_ptiii_ch11a?selectdate=3/1/2013 (last visited Mar. 1, 2013).

VI. Technical Deficiencies:

None.

VII. Related Issues:

The sponsor may wish to clarify who will manage the administrative responsibilities of the task force or if member per diem or travel expenses may be reimbursed.

VIII. 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 March 14, 2013:

- Establishes an exception to the preemption provision for leave related to and arising directly from domestic violence.
- Removes the bill's provision of an employee's right to absence from work for illness or a medical emergency and the process for work schedule adjustments for doctor or dental appointments.
- Creates the Employer-Sponsored Benefits Study Task Force.

- B. **Amendments:**

None.