HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #: HB 625

FINAL HOUSE FLOOR ACTION:

SPONSOR(S): Cortes, B.; Berman; and others

115 **Y's** 2 **N's**

COMPANION BILLS: SB 982

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

HB 625 passed the House on April 24, 2015, as SB 982. The bill amends the Florida Civil Rights Act to prohibit discrimination on the basis of pregnancy in employment and places of public accommodation.

The Florida Civil Rights Act of 1992 (FCRA), patterned after Title II and Title VII of the federal Civil Rights Act of 1964, prohibits discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status in places of public accommodation and employment.

Although Title VII has been amended to expressly include pregnancy status as a component of sex discrimination, the FCRA does not contain a similar provision. As a result, state and federal courts have historically been divided on whether discrimination based on pregnancy is an unlawful practice under the FCRA. In 2014, the Florida Supreme Court held in *Delva v. Continental Group, Inc.,* that discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in employment practices, consistent with the express provisions of Title VII.

The bill amends the FCRA to codify the *Delva* decision. It expressly provides that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FCRA to prohibit discrimination on the basis of pregnancy in places of public accommodation.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill was approved by the Governor on May 21, 2015, ch. 2015-68, L.O.F., and will become effective on July 1, 2015.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Title II and VII of the Civil Rights Act of 1964[1]

Title II of the federal Civil Rights Act of 1964 (Title II) prohibits discrimination on the basis of race, color, religion, or national origin in certain places of public accommodation, such as hotels, restaurants, and places of entertainment. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex. Title VII applies to employers with 15 or more employees[2] and outlines a number of unlawful employment practices. For example, Title VII makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment based on race, color, religion, national origin, or sex.[3]

Pregnancy Discrimination Act[4]

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert*[5] that Title VII did not include pregnancy discrimination as a form of sex discrimination under its prohibition against unlawful employment practices. In response to the decision, Congress passed the Pregnancy Discrimination Act (PDA) in 1978. The PDA amended Title VII to expressly define the terms "because of sex" and "on the basis of sex," to prohibit discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.[6] Under the PDA, an employer cannot discriminate against a woman on the basis of pregnancy in hiring, fringe benefits (such as health insurance), pregnancy and maternity leave, harassment, or any other term or condition of employment.[7]

Florida Civil Rights Act of 1992

Patterned after Title II and Title VII, but providing broader protections, the Florida Civil Rights Act of 1992 (FCRA) was enacted to "secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status…"[8] in employment and public accommodations.[9] Similar to Title VII, the FCRA provides a number of actions that, if undertaken because of or on the basis of an individual's race, color, religion, sex, national origin, age, handicap, or marital status, are considered unlawful employment practices, including:[10]

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[1] 42 U.S.C. § 2000a *et seq.;* 42 U.S.C. § 2000e *et seq*.
[2] 42 U.S.C. § 2000e(b).
[3] 42 U.S.C. § 2000e-2(a).
[4] Pub. L. No. 95-555, 95th Cong. (Oct. 31, 1978), codified as 42 U.S.C. § 2000e(k).
[5] 429 U.S. 125, 145 (1976).
[6] The PDA defines the terms "because of sex" or "on the basis of sex" to include pregnancy, childbirth, or related conditions and women who are affected by pregnancy, childbirth, or related conditions. It further states that these individuals must be treated the same for employment purposes, including the receipt of benefits, as any other person who is not so affected but has similar ability or inability to work.
[7] For more information, see U.S. Equal Employment Opportunity Commission, Facts about Pregnancy Discrimination, http://www.eeoc.gov/facts/fs-preg.html (last visited May 6, 2015).
[8] s. 760.01, F.S.
[9] "Public accommodations" means places of public accommodation, lodgings, facilities principally engaged in selling food for consumption on the premises, gasoline stations, places of exhibition or entertainment, and other covered establishments. s. 760.02(11), F.S.
[10] s. 760.10, F.S. Note that this section does not apply to a religious corporation, association, educational institution, or society which conditions employment opportunities to members of that religious corporation, association, educational institution, or society.

- Failing to hire an individual, or otherwise discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment;
- Limiting, segregating, or classifying employees or applicants for employment in ways that would deprive such individuals of employment opportunities or adversely affect an individual's status as an employee;
- Failing or refusing to refer an individual for employment;
- Excluding or expelling an individual from membership in a labor organization or limiting, segregating, or classifying the membership of a labor organization;
- Discriminating in admission to, or employment in, any program established to provide apprenticeship or other training for a profession, occupation, or trade;
- Discriminating in licensing, certification, credentials, examinations, or an organizational membership required to engage in a profession, occupation, or trade; and
- Printing or publishing ads related to membership in certain labor organizations or employment that indicate a preference, limitation, specification, or discrimination.[11]

Unlike Title VII, the FCRA has not been amended to specifically include discrimination based on the pregnancy status of an individual as an unlawful employment practice. The FCRA also does not prohibit pregnancy discrimination in places of public accommodation.

Pregnancy Discrimination in Florida

The fact that the FCRA is patterned after Title VII but has not been amended to expressly include pregnancy status as a component of sex discrimination in employment has caused division among both federal and state courts as to whether the Florida Legislature intended to provide protection from discrimination on the basis of pregnancy under state law. Thus, the ability to bring a claim based on pregnancy discrimination varied among the jurisdictions.

The earliest case to address the issue of pregnancy discrimination under Florida law was *O'Laughlin v. Pinchback*.[12] In this case, the plaintiff alleged that she was terminated from her position as a correctional officer based on pregnancy. The First District Court of Appeal held that the Florida Human Rights Act[13] (predecessor to the FCRA) stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by not recognizing that discrimination against pregnant employees is sex based discrimination."[14] The court held that both federal and state law should be read in concert to provide the maximum protection against discrimination. Therefore, Title VII, as amended, preempted Florida law "to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law."[15] By finding the Florida Human Rights Act to be preempted by federal law, the court did not reach the question of whether the Florida law on its own prohibits pregnancy discrimination. However, the court did note that Florida law had not been amended to include a prohibition against pregnancy-based discrimination.[16]

The Fourth District Court of Appeal in *Carsillo v. City of Lake Worth*[17] found that since the FCRA is patterned after Title VII, which considers pregnancy discrimination to be sex discrimination, the FCRA also bars such discrimination.[18] The court recognized that the Florida statute had never been amended, but concluded that since the original intent of Congress, as expressed by the PDA, was to prohibit this

[11] s. 760.10, F.S.
[12] 579 So. 2d 788 (Fla. 1st DCA 1991).
[13] This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, Chs. 69-287, 72-48, and 77-341, Laws of Fla., and which was also patterned after Title VII.
[14] *O'Laughlin,* 579 So. 2d at 792.
[15] *Id.*
[16] *Id.* at 791.
[17] 995 So. 2d 1118 (Fla. 4th DCA 2008), *rev. denied*, 20 So. 3d 848 (Fla. 2009).
[18] *Id.* at 1119.

type of discrimination, it was unnecessary for Florida to amend its statute to import the intent of the law after which it was patterned.[19]

In contrast, the Third District Court of Appeal in *Delva v. Continental Group, Inc.* (*Delva I*)[20] held that the FCRA does not prohibit pregnancy discrimination based on the *O'Laughlin* court's analysis that the FCRA had not been amended to include pregnancy status.[21] The issue before the court was narrowly defined to whether the FCRA prohibited discrimination in employment on the basis of pregnancy; therefore, it did not address the preemption holding in *O'Laughlin.* The court certified the conflict[22] with the *Carsillo* case to the Florida Supreme Court.[23]

In 2014, the Florida Supreme Court reviewed the *Delva I* decision in *Delva v. Continental Group, Inc.* (*Delva II*)[24] and quashed the decision, holding that:

> The statutory phrase making it an "unlawful employment practice for an employer… to discriminate…because of…sex," as used in the FCRA, includes discrimination based on pregnancy, which is a natural condition and primary characteristic unique to the female sex."[25]

The court reasoned that such a construction of the FCRA was consistent with legislative intent, as expressed in the FCRA itself, that the FCRA be liberally construed to further its purpose to secure for all individuals within the state freedom from discrimination because of sex.[26] Indeed, the court found that to conclude that the FCRA does not protect women from discrimination based on pregnancy—a primary characteristic of the female sex—would undermine the very protection provided in the FCRA to prevent an employer from discriminating against women because of their sex.[27] The court ascribed no legal significance to the Legislature's failure to amend the FCRA to include pregnancy discrimination after the *Gilbert* decision and rejected the argument that the failure to do so was an indication of the Legislature's intent not to include pregnancy within the meaning of sex discrimination.[28]

The decision did not address whether discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in places of public accommodation.

Claims and Remedies under Title VII and the FCRA

A Florida employee may now file a charge of an unlawful employment practice based upon pregnancy discrimination with either the federal Equal Employment Opportunity Commission (EEOC) or the Florida Commission on Human Relations (FCHR).

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[19] *Id.* at 1120.
[20] 96 So. 3d 956 (Fla. 3d DCA 2012).
[21] *Id.* at 958.
[22] *Id.*
[23] Federal courts interpreting the FCRA similarly wrestled with whether pregnancy status is covered by its provisions. Like the state courts, the federal courts that found that the FCRA does provide a cause of action based on pregnancy discrimination did so because the FCRA is patterned after Title VII, which bars pregnancy discrimination. *See Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, 1996 WL 529202 (M.D. Fla. 1996), *Terry v. Real Talent, Inc.*, 2009 WL 3494476 (M.D. Fla. 2009), *Constable v. Agilysys, Inc.*, 2011 WL 2446605 (M.D. Fla. 2011), and *Glass v. Captain Katanna's, Inc*., 950 F.Supp.2d 1235 (M.D. Fla. 2013). The courts that found that the FCRA does not prohibit pregnancy discrimination primarily did so because the Legislature has not amended the FCRA to specifically protect pregnancy status. *See Frazier v. T- Mobile USA, Inc.*, 495 F.Supp.2d 1185 (M.D. Fla. 2003), *Boone v. Total Renal Laboratories, Inc.*, 565 F.Supp.2d 1323 (M.D. Fla. 2008), and *DuChateau v. Camp Dresser & McKee, Inc.*, 822 F.Supp.2d 1325 (S.D. Fla. 2011).
[24] 137 So. 3d 371 (Fla. 2014)
[25] *Id.* at *372.*
[26] *Id*.
[27] *Id.* at 375.
[28] *Id.*

A person who wishes to file a complaint with the EEOC must do so within 300 days of a violation in a jurisdiction with a fair employment practices agency (such as Florida, which has the FCHR).[29] The EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.[30] If the EEOC finds an absence of reasonable cause, the EEOC will dismiss the charge. If the EEOC finds reasonable cause, the EEOC must engage in informal conferencing, conciliation, and persuasion to remedy the unlawful employment practice.[31] After the EEOC concludes its investigation and issues a "right-to-sue" letter to the plaintiff, the plaintiff must file a claim in federal court under Title VII within 90 days of receipt of the letter.[32]

A person who wishes to file a complaint with the FCHR must do so within 365 days of a violation.[33] The FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.[34] If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.[35] A plaintiff is required to bring a civil action under the FCRA within one year of the determination of reasonable cause by the FCHR.[36]

Remedies available to persons who bring claims based upon pregnancy discrimination differ depending upon whether the claim is brought under Title VII or under the FCRA. If a plaintiff prevails under Title VII or the FCRA, the plaintiff might be entitled to an order prohibiting the discriminatory practice, as well as reinstatement or hiring, with or without back pay.[37] Depending upon the number of persons employed by the defendant employer, a Title VII claimant may also recover from $50,000 to $300,000 in aggregated compensatory and punitive damages.[38] In contrast, there is no limit on compensatory damages under the FCRA, which include "damages for mental anguish, loss of dignity, and any other intangible injuries."[39] Punitive damages under the FCRA may not exceed $100,000.[40] However, the total recovery, including back pay, for a claimant who brings a discrimination claim against the state or its subdivisions is limited under the FCRA to $300,000.[41]

Effect of the Bill

The bill codifies the Florida Supreme Court decision in *Delva II* by amending the FCRA to expressly provide that discrimination on the basis of pregnancy is a prohibited employment practice. The bill also amends the FCRA to prohibit discrimination on the basis of pregnancy in places of public accommodation. Accordingly, pregnancy is afforded the same protection as other statuses or classes identified in the FCRA. A woman affected by pregnancy may not be discriminated against:

- By places of public accommodation; or
- With respect to employment, provided that the discriminatory act constitutes an unlawful employment practice.

Persons injured by a violation of the FCRA due to pregnancy discrimination are entitled to all rights and remedies under the FCRA.

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[29] 42 U.S.C. § 2000e-5(e)(1). The enforcement procedures referenced in this paper do not apply to individuals affected by federal agencies, who have a separate process. 29 C.F.R. part 1614.
[30] 42 U.S.C. §. 2000e-5(b).
[31] *Id*.
[32] 42 U.S.C. § 2000e-5(f)(1).
[33] s. 760.11(1), F.S.
[34] s. 760.11(3), F.S.
[35] s. 760.11(4), F.S.
[36] s. 760.11(5), F.S.
[37] *Id*.; 42 U.S.C. § 2000e-5(g).
[38] 42 U.S.C. §1981a(b)(3)
[39] s. 760.11(5), F.S.
[40] *Id.*
[41] Section 760.11(5), F.S., referring to the limited waiver of sovereign immunity in s. 768.28, F.S. Unlike the FCRA, there apparently is no limitation on total recovery, including back pay, for a claimant who brings suit against the state or its subdivisions under Title VII, though the caps on compensatory and punitive damages would apply.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.