

**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.)

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Prepared By: The Professional Staff of the Committee on Commerce and Tourism

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BILL: SB 982

INTRODUCER: Senators Thompson and Smith

SUBJECT: Florida Civil Rights Act

DATE: March 20, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	McKay	CM	<b>Pre-meeting</b>
2.			JU	
3.			RC	

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**I. Summary:**

SB 982 amends the Florida Civil Rights Act (FCRA) by expressly prohibiting discrimination because of pregnancy. The FCRA currently prohibits discrimination based on race, creed, color, sex, physical disability, or national origin in the areas of education, employment, housing, and public accommodation. In 2014, the Florida Supreme Court decided that discrimination based on pregnancy is subsumed within the prohibition in the FCRA against sex discrimination in employment practices. This bill codifies that decision.

By specifically permitting a state cause of action for pregnancy discrimination claims, plaintiffs will have more time to file suit than under federal law. After the Equal Employment Opportunity Commission concludes an investigation of a complaint and issues a “right-to-sue” letter, the plaintiff has 90 days to file an action in federal court. Plaintiffs bringing pregnancy discrimination cases in state court would have up to 1 year to file after a determination of reasonable cause by the Florida Commission on Human Relations (FCHR). Also, plaintiffs filing against a small-sized employer may be able to recoup greater punitive damages in state court, due to the difference in caps on punitive damages in state and federal court.

**II. Present Situation:**

**Title VII of the Civil Rights Act of 1964<sup>1</sup>**

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on race, color, religion, national origin, or sex. Title VII applies to employers with 15 or more employees and outlines a number of unlawful employment practices. Title VII makes it unlawful for employers to refuse to hire, discharge, or otherwise discriminate against an individual with respect to

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<sup>1</sup> 42 U.S.C. 2000e et. seq.

compensation, terms, conditions, or privileges of employment, based on race, color, religion, national origin, or sex.<sup>2</sup>

### **Pregnancy Discrimination Act<sup>3</sup>**

In 1976, the United States Supreme Court ruled in *General Electric Co. v. Gilbert* that Title VII did not provide protection based on pregnancy discrimination.<sup>4</sup> In response, in 1978, Congress passed the Pregnancy Discrimination Act (PDA). The PDA amended Title VII to expressly provide that discrimination because of sex includes discrimination against a woman due to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.<sup>5</sup>

### **Americans with Disabilities Act<sup>6</sup>**

The Americans with Disabilities Act (ADA) prohibits discrimination based on disability in employment, public accommodation, and telecommunications. The ADA defines disability as a “physical or mental impairment that substantially limits one or more major life activities...; a record of such an impairment; or... being regarded as having such an impairment.”<sup>7</sup> Although pregnancy is not generally considered a disability, pregnancy-related impairments may be protected under the ADA if they substantially limit one or more major life activities, such as walking or lifting.<sup>8</sup>

### **Family and Medical Leave Act<sup>9</sup>**

The Family and Medical Leave Act (FMLA) provides that employees of certain covered employers are entitled to take up to 12 weeks of unpaid leave a year for a serious illness, injury, or other health condition that involves continuing treatment by a health care provider. The FMLA also guarantees that employees can return to the same or an equivalent position. To apply, the FMLA sets certain threshold requirements regarding a minimum number of employees and time worked in that position.<sup>10</sup> In addition to providing coverage for birth or adoption, the FMLA authorizes leave for prenatal care, incapacity related to pregnancy, and any serious health condition following childbirth.<sup>11</sup>

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<sup>2</sup> 42 U.S.C. 2000e-2.

<sup>3</sup> Pub. L. No. 95-555, 92 Stat. 2076.

<sup>4</sup> 429 U.S. 125, 145-146 (1976).

<sup>5</sup> The PDA provides that individuals qualifying for protection on the basis of pregnancy must be treated the same for employment purposes, including the receipt of benefits, as any other person who does not have that condition but is similarly able or unable to work.

<sup>6</sup> 42 U.S.C. s. 101.

<sup>7</sup> 42 U.S.C. s. 12102.

<sup>8</sup> Equal Employment Opportunity Commission, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014), available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#dissta](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#dissta) (last visited Mar. 17, 2015).

<sup>9</sup> 29 U.S.C. s. 2611 (11)(1993).

<sup>10</sup> The FMLA applies to private employers with at least 50 employees and all public employers. To be eligible for FMLA leave, an individual must have worked for the employer for at least 12 months and must have worked at least 1,250 hours during the 12 months prior to the leave.

<sup>11</sup> For more information, see U.S. Dept. of Labor, Wage and Hour Division, *Family and Medical Leave Act*, <http://www.dol.gov/whd/fmla/> (last visited Mar. 17, 2015).

## Florida Civil Rights Act

The 1992 Florida Legislature enacted the Florida Civil Rights Act 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 federal law, the FCRA includes age, handicap, and marital status as protected classes.<sup>12</sup>

Similar to Title VII, the FCRA specifically provides a number of actions that, if undertaken by an employer, are considered unlawful employment practices.<sup>13</sup> Unlike Title VII, the FCRA has not been amended to expressly prohibit pregnancy discrimination.

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, 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.<sup>14</sup>

## Pregnancy Discrimination in Florida

Although Title VII expressly includes pregnancy status as a form of sex discrimination, the FCRA does not. The fact that the FCRA is modeled after Title VII but failed to include this provision has caused division among both federal and state courts as to whether the Legislature intended to provide protection on the basis of pregnancy status. Thus, the ability to bring a claim based on pregnancy discrimination varies among jurisdictions.

The case of *O'Loughlin v. Pinchback* was the first time that a Florida district court of appeal reviewed a claim of pregnancy discrimination in the context of the FCRA (then known as the Florida Human Rights Act).<sup>15</sup> In this case, the plaintiff alleged that her employer unlawfully terminated her from her position as a correctional officer based on her pregnancy. The First District Court of Appeal indicated as an initial matter that Florida styled its anti-discrimination law on the federal model.<sup>16</sup> Although the Legislature did not amend Florida law to conform to Title VII as amended by the Pregnancy Discrimination Act, 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 by the PDA preempts Florida law “to the extent that Florida’s law offers less protection to its citizens than does the corresponding federal law.”<sup>17</sup> Therefore, the *O'Loughlin* court found that pregnancy discrimination is prohibited by state law.

Other courts interpreted the issue of pregnancy discrimination in state law differently. In *Carsillo v. City of Lake Worth*, the Fourth District Court of Appeal opined that the FCRA includes pregnancy because Congress originally intended Title VII to include pregnancy, and the PDA

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<sup>12</sup> Section 760.10(1)(a), F.S.

<sup>13</sup> Section 760.10(2) through (8), F.S.

<sup>14</sup> Kendra D. Presswood, *Interpreting the Florida Civil Rights Act of 1992*, 87 FLA. B.J. 36, 36 (December 2013).

<sup>15</sup> 579 So.2d 788 (Fla. 1st DCA 1991). This case was brought under the Florida Human Rights Act of 1977, which was the predecessor to the Florida Civil Rights Act of 1992, and was also patterned after Title VII.

<sup>16</sup> *Id.* at 791.

<sup>17</sup> *Id.* at 792.

merely clarified that intent.<sup>18</sup> The court concluded it was unnecessary for Florida to amend its statute in light of this interpretation. The Florida Supreme Court declined to hear the appeal.<sup>19</sup>

However, the Third District Court of Appeal court reached an opposite finding. In *Delva v. Continental Group, Inc.*, the court did not look beyond the plain language of the FCRA, and found that no remedy exists for a pregnancy claim in state court under Florida law.<sup>20</sup> The court certified the conflict with *Carsillo* to the Florida Supreme Court.

In 2014, the Florida Supreme Court reviewed the *Delva* case and quashed that decision.<sup>21</sup> The Court concluded that “discrimination based on pregnancy is subsumed within the prohibition in the FCRA against discrimination based on an individual’s sex.”<sup>22</sup> The Court opined that this interpretation was consistent with legislative intent, as provided in the FCRA itself, that the FCRA be liberally construed to further its purpose of securing all individuals within the state freedom from discrimination based on sex.<sup>23</sup>

The decision only addressed pregnancy discrimination claims under the FCRA, but did not speak to s. 509.092, F.S., which addresses discrimination in public lodging and public food establishments.

### **Procedure for Filing Claims of Discrimination**

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

For a charge filed with the EEOC, the EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

For a charge filed with the FCHR, the FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.<sup>27</sup> If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.<sup>28</sup>

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<sup>18</sup>*Carsillo v. City of Lake Worth*, 995 So.2d 1118, 1121 (Fla. 4th DCA 2008).

<sup>19</sup> 20 So.3d 848 (Fla. 2009).

<sup>20</sup> *Delva v. Continental Group, Inc.*, 96 So.3d 956, 958 (Fla. 3d DCA 2012), *reh’g denied*.

<sup>21</sup> *Delva v. Continental Group, Inc.*, 137 So.3d 371 (Fla. 2014).

<sup>22</sup> *Id.* at 375.

<sup>23</sup> *Id.* at 375.

<sup>24</sup> 42 U.S.C. s. 2000e-5(b).

<sup>25</sup> *Id.*

<sup>26</sup> 42 U.S.C. s. 2000e-5(f)(1).

<sup>27</sup> Section 760.11(3), F.S.

<sup>28</sup> Section 760.11(4), F.S.

A plaintiff is required to file a state claim in civil court under the Florida Civil Rights Act within 1 year of the determination of reasonable cause by the FCHR.<sup>29</sup>

### Remedies

Both state and federal law authorize awards of back pay, compensatory damages, and punitive damages.<sup>30</sup>

In federal court, punitive damages vary depending on the size of the employer. In cases that qualify for punitive damages, the sum of both compensatory and punitive damages is capped at:

- \$50,000 for an employer that has 15 to 100 employees for at least 20 calendar weeks in the current or preceding calendar year;
- \$100,000 for an employer that has between 101 and 200 employees;
- \$200,000 for an employer that has between 201 and 500 employees; and
- \$300,000 for an employer that has more than 500 employees.<sup>31</sup>

In state court, punitive damages are capped at \$100,000 regardless of the size of the employer.<sup>32</sup>

### III. Effect of Proposed Changes:

SB 982 adds the condition of pregnancy as a protected class under the Florida Civil Rights Act of 1992 (FCRA). (**Sections 2 and 3**, amending ss. 760.01 and 760.05, F.S., respectively.)

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 public lodging and food service establishments (**Section 1**, amending s. 509.092, F.S.);
- with respect to education, housing, or public accommodation (**Sections 4 and 5**, amending ss. 760.07 and 760.08, F.S., respectively.); or
- with respect to employment, provided that any discriminatory act constitutes an unlawful employment practice (**Section 6**, amending s. 760.10, F.S.).<sup>33</sup>

By specifically permitting a state cause of action for pregnancy discrimination claims, plaintiffs will have more time to file suit. As described in the Present Situation, after receiving a “right-to-sue” letter from the EEOC, a plaintiff must file a case in federal court within 90 days. A plaintiff has up to 1 year to file a civil action in state court after the FCHR issues its reasonable cause determination.

<sup>29</sup> Section 760.11(5), F.S.

<sup>30</sup> 42 U.S.C. s. 2000e-5(g)(1) and s. 1981a.

<sup>31</sup> 42 U.S.C. s. 1981a(b)(3).

<sup>32</sup> Section 760.11(5), F.S.

<sup>33</sup> 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.

Additionally, a state cause of action in some cases will allow for greater remedies than the remedies authorized by federal law. Under federal law, the sum of compensatory and punitive damages against an employer having between 15 and 100 employees may not exceed \$50,000. Under a state claim, punitive damages may reach \$100,000, regardless of the size of the employer. However, federal law authorizes the sum of compensatory and punitive damages of up to \$300,000 for discrimination by larger employers.

**Section 7** reenacts s. 760.11, F.S., for the purpose of incorporating changes made by the provisions of this bill.

**Section 8** provides that the bill takes effect July 1, 2015.

#### **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:

This bill will ensure plaintiffs have access to state courts to pursue pregnancy discrimination claims, and such plaintiffs may receive greater remedies than available under federal law.

C. Government Sector Impact:

State and local governments are currently required to comply with Title VII as amended by the Pregnancy Discrimination Act of 1978 (PDA). The PDA has been interpreted by the state and local governments as prohibiting discrimination on the basis of pregnancy, childbirth, or related medical conditions. Therefore, complying with this bill will not create any additional burdens for state or local governments.

The FCHR manages complaints of discrimination brought under Title VII in Florida. According to the analysis conducted by the FCHR, passage of this bill will not result in any additional fiscal or workload burden on the agency.<sup>34</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 509.092, 760.01, 760.05, 760.07, 760.08, and 760.10.

This bill reenacts section 760.11(1), Florida Statutes, for the purpose of incorporating the changes made by the provisions of this bill.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>34</sup> Florida Commission on Human Relations, *SB 982 by Senator Thompson* (Feb. 19, 2015) (on file with the Senate Commerce and Tourism Committee).