

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 Commerce and Tourism

BILL: SB 1828

INTRODUCER: Senator Rodriguez

SUBJECT: Employment Discrimination

DATE: February 5, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Little	McKay	CM	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 1828 prohibits an employer from taking any retaliatory personnel action against an employee who leaves his or her place of employment due to a mandatory evacuation order issued by the President of the United States, the Governor, or a political subdivision of the state.

Employers are prohibited from discharging, suspending, demoting, or taking other adverse action against an employee who:

- Left the employee's place of employment to evacuate under a mandatory evacuation order.
- Evacuated because the employee's residence or place of employment was included in the mandatory evacuation zone.
- Returns to work within 14 days after the mandatory evacuation order is lifted, or another time agreed upon between the employee and employer.

Under the bill, an employee who is the object of a prohibited retaliatory personnel action may pursue a civil cause of action against the employer. A court is authorized to order relief and reasonable attorneys fees and costs to the prevailing party.

The bill does not apply to specified emergency personnel, individuals necessary to provide for the safety and well-being of the general public, and individuals employed at a nursing home facility, hospice, an assisted living facility, or a hospital.

The bill takes effect on July 1, 2018.

II. Present Situation:

Mandatory Evacuation Orders

Chapter 252, Florida Statutes (F.S.), confers certain emergency powers upon the Governor, the Division of Emergency Management, and the governing bodies of each political subdivision of the state with respect to emergencies that occur within the state.¹

With respect to the Governor, s. 252.36(2), F.S., provides for declaration of a state of emergency by executive order or proclamation if the Governor finds an emergency or the threat of an emergency has occurred or is about to occur. The law provides that the state of emergency continues until the Governor finds the emergency conditions no longer exist and terminates the state of emergency. However, a state of emergency may not exist for more than 60 days unless the Governor renews it.²

The Governor may also compel evacuation from any stricken or threatened area in the state if he or she determines it necessary to preserve life or facilitate emergency mitigation, response and recovery; and may prescribe routes, modes of transportation, and destinations in connection with evacuation.³ Counties may also order evacuations of their jurisdictional areas pursuant to authority delegated by the Governor and through each county's emergency management director.⁴

Hurricane Irma

During the 2017 hurricane season, Florida experienced one of the most powerful storms ever recorded in the Atlantic Ocean. In early September, Floridians watched news coverage of Hurricane Irma as it quickly developed into a Category 5 hurricane and trajectories began to show the powerful storm heading on a northward path, directly through the middle of the state.⁵

In preparation for the storm, on September 4, 2017, Governor Rick Scott declared a state of emergency in all 67 counties in Florida.⁶ The following day, the President of the United States approved a pre-landfall emergency declaration for the State of Florida.⁷ As the storm

¹ Section 252.32(1)(b), F.S.

² The Legislature may terminate a state of emergency at any time by concurrent resolution.

³ Section 252.36(5)(e) and (f), F.S.

⁴ See s. 252.36(8) and s. 252.38(1), F.S. See also Florida Attorney General Advisory Legal Opinion, AGO 95-24, dated April 3, 1995, explaining that counties may issue emergency evacuation orders in the absence of a directive from the Governor, where there is a Declaration of Emergency that expressly does not preclude such issuance.

⁵ *Maps: Tracking Hurricane Irma's Path Over Florida*, N.Y. TIMES, Sept. 11, 2018, available at <https://www.nytimes.com/interactive/2017/09/05/us/hurricane-irma-map.html>

⁶ See Office of Governor Rick Scott, *Executive Order No. 17-235*, available at <https://www.flgov.com/wp-content/uploads/2017/09/SLG-BIZHUB17090402490.pdf> (last visited Feb. 5, 2018).

⁷ Federal Emergency Management Agency, *President Donald J. Trump Signs Emergency Declaration for Florida*, available at <https://www.fema.gov/news-release/2017/09/05/president-donald-j-trump-signs-emergency-declaration-florida> (last visited Feb. 5, 2018).

approached, mandatory evacuation orders were issued throughout the state and a record number of 6.5 million people evacuated.⁸

Worker Protections in Florida

In Florida, there is no specific government agency responsible for administering and enforcing worker protection laws. Hour and wage laws are overseen by the federal Wage and Hour Division through local offices across the state. Complaints of discrimination or harassment in the workplace are typically handled by the Florida Commission on Human Regulations and the Equal Employment Opportunity Commission. The Florida Department of Financial Services regulates issues arising under workers' compensation claims, while the Department of Economic Opportunity (DEO) handles issues pertaining to unemployment insurance.⁹

Although current law does not directly prohibit an employer from firing or punishing an employee who does not show up to work due to a mandatory evacuation order, existing provisions may offer a remedy to an employee under such circumstances.

Reemployment Assistance Program

Florida's "Reemployment Assistance Program"¹⁰ provides reemployment benefits to individuals who become unemployed through no fault of their own. To receive benefits, such individuals must apply to the DEO, which is responsible for determining claimant eligibility, and the calculation and payment of reemployment assistance benefits.¹¹ Key eligibility requirements for reemployment benefits involve a claimant's earnings during a certain period of time, the manner in which the claimant became unemployed, and the claimant's efforts to find new employment.¹²

Reemployment assistance benefits are funded through a tax imposed on employers as a cost of doing business in the state of Florida. The rate at which employers pay reemployment assistance taxes is based on the employer's annual experience rating. One factor that can negatively affect an employer's tax rate is the number of employees that qualify for reemployment assistance benefits during the previous year. An employer with a high number of employees eligible for reemployment assistance benefits will likely be required to pay a higher tax rate.¹³

⁸ Mandatory evacuations were ordered for Monroe County and portions of Brevard, Broward, Citrus, Collier, Dixie, Duval, Flagler, Glades, Hendry, Hernando, Indian River, Lee, Martin, Miami-Dade, Orange, Palm Beach, Pasco, Pinellas, Sarasota, Seminole, St. Lucie, Sumter, and Volusia counties. Additionally, voluntary evacuation notices were issued for Alachua, Baker, Bay, Bradford, Charlotte, Columbia, Desoto, Hardee, Highlands, Hillsborough, Lake, Manatee, Okeechobee, Osceola, and Polk counties. See Office of Governor Rick Scott, *Gov. Scott Issues Updates on Hurricane Irma Preparedness*, September 7, 2017, available at <https://www.flgov.com/2017/09/07/gov-scott-issues-updates-on-hurricane-irma-preparedness-5/> (last visited Feb. 5, 2018).

⁹ The roles of Florida's agencies are specified under ch. 20, F.S.

¹⁰ The state's unemployment compensation program was rebranded in 2012. See Chapter 2012-30, Laws of Fla.

¹¹ Section 20.60(5)(c), F.S. and s. 443.171, F.S.

¹² Section 443.151(3) (a), F.S.

¹³ Florida Department of Revenue, *Employer Guide to Reemployment Tax*, available at http://floridarevenue.com/Forms_library/current/rt800002.pdf (last visited Feb. 5, 2018).

Disaster Unemployment Assistance

Upon an official declaration by the President of the United States of a major disaster, Disaster Unemployment Assistance (DUA) is made available to individuals who have become unemployed as a result of the major disaster and would not ordinarily be eligible under Florida's Reemployment Assistance Program. After Hurricane Irma, DUA benefits were made available to Floridians in 48 affected counties.¹⁴ Eligible individuals were authorized to receive DUA benefits for up to 26 weeks.¹⁵

Florida Whistleblower's Act

Florida's Whistleblower's Act (FWA) protects employees from certain retaliatory personnel actions taken by an employer. Sections 448.101-448.105, F.S., prohibit employers from taking any retaliatory personnel action against an employee who has "objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation." The FWA applies to private employers with 10 or more employees and provide an employee with a civil cause of action as a remedy for relief.¹⁶

An employee who is the object of retaliatory personnel action for not coming to work due to a mandatory evacuation order may be able to bring a civil action against the employer under the FWA. To prevail, a court would need to find:

- The employer's request to attend work under a mandatory evacuation order was a violation of a law, rule, or regulation;
- The employee refused to violate such law, rule, or regulation; and
- The employer took retaliatory personnel action against the employee.¹⁷

Other Worker Protections

The federal Fair Labor Standards Act (FLSA) requires covered employees to comply with minimum wage, overtime pay, recordkeeping, and child labor standards. Employers that do not comply with the FLSA or take prohibited adverse action against an employee who reports information pertaining to a violation of the FLSA may be subject to a suit for relief. Remedies for an employee under the FLSA include reinstatement, payment of lost wages, and damages.¹⁸

¹⁴ DUA benefits were available to residents of Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, DeSoto, Dixie, Duval, Flagler, Gilchrist, Glades, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Lafayette, Levy, Lake, Lee, Manatee, Marion, Martin, Miami-Dade, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, St. Johns, St. Lucie, Sarasota, Seminole, Sumter, Suwannee, Union and Volusia Counties. DEO, *Disaster Unemployment Assistance*, available at <http://www.floridajobs.org/job-seekers-community-services/reemployment-assistance-center/claimants/disaster-unemployment-assistance> (last visited Feb 5, 2018).

¹⁵ FEMA, *Federal Aid Programs for the State of Florida*, available at <https://www.fema.gov/news-release/2017/09/10/federal-aid-programs-state-florida> (last visited Feb. 5, 2018).

¹⁶ Similarly, provisions under s. 112.3187, F.S., protect public employees from adverse personnel action if the employee discloses information pertaining to an employer's alleged violation of law.

¹⁷ However, a nursing home employee that sought a FWA civil action under similar circumstances was unsuccessful in her attempt to establish that a mandatory evacuation order was a law, rule, or regulation. *See Gillyard v. Delta Health Group, Inc.*, 757 So.2d 601, (Fla. 5th DCA 2000) (holding that it would be absurd to interpret s. 448.102(3), F.S., as prohibiting employees from attending work at a nursing home during a mandatory evacuation order).

¹⁸ USDOL Wage and Hour Division, *Handy Reference Guide to the FLSA*, available at <https://www.dol.gov/whd/regs/compliance/hrg.htm> (last visited Feb. 5, 2018).

The federal Family and Medical Leave Act (FMLA) entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.¹⁹ If a declared emergency or mandatory evacuation order causes an employee's absence from work for the purpose of caring for a family member, an employer subject to the FMLA may be required to allow the employee's absence. In addition to penalties being imposed by the United States Department of Labor (USDOL), an employer that violates the FMLA may be subject to a civil action brought by the employee.²⁰

The Occupational Safety and Health Administration (OSHA) is an agency under the USDOL, and is responsible for establishing health and safety standards in the workplace.²¹ Employers that fail to meet these standards may be subject to inspection and penalties. Employees who report unsafe workplace issues to the OSHA are protected from retaliatory action taken by employers under whistleblower provisions. Generally, a mandatory evacuation order is issued when there are hazardous circumstances that constitute an emergency. The OSHA may pursue an investigation or action against an employer who required an employee to attend work despite a mandatory evacuation order and unsafe circumstances. Additionally, an employee may be protected from retaliatory action against the employer if the employee requests the involvement of the OSHA at the workplace.

III. Effect of Proposed Changes:

The bill prohibits an employer from taking any retaliatory personnel action against an employee²² who leaves a place of employment due to a mandatory evacuation order.²³ The term "retaliatory personnel action" includes "the discharge, suspension, or other demotion by an employer of an employee or any other adverse employment action taken by an employer against an employee in the terms and conditions of employment."

Specifically, the employer may not take retaliatory personnel action against an employee who:

- Left the employee's place of employment to evacuate under a mandatory evacuation order.
- Evacuated because the employee's residence or place of employment was included in the mandatory evacuation zone.
- Returns to work within 14 days after the mandatory evacuation order is lifted, or another time agreed upon between the employee and employer.

An employee who has been the object of a prohibited retaliatory personnel action may bring a civil action against the employer in the county in which the alleged retaliatory personnel action occurred, in which the complainant resides, or in which the employer has its principal place of

¹⁹ 29 U.S.C. § 2601.

²⁰ Information under this subheading obtained from: United States Department of Labor, Wage and Hour Division, *Fact Sheet # 77B: Protection for Individuals under the FMLA*, <http://www.dol.gov/whd/regs/compliance/whdfs77b.htm> (last visited Feb. 5, 2018).

²¹ For more information on the Occupational Safety and Health Administration, see <https://www.osha.gov/about.html> (last visited Feb. 5, 2018)

²² The bill defines "employee" and "employer" as having the same meanings as described in the federal FLSA and its implementing regulations.

²³ The bill defines "mandatory evacuation order" as "an official statement issued by the President of the United States, the Governor, or a political subdivision of this state to mandate the evacuation of all or part of the population of an area stricken or threatened by an emergency."

business. The civil action for relief must be brought within 2 years after discovering that such action was taken or within 4 years after the action was taken, whichever is earlier. However, the bill provides that an employee may not recover if he or she failed to notify the employer about the applicable evacuation order or if the retaliatory personnel action was predicated upon another ground.

In addition to an award of reasonable attorneys fees, costs, and expenses, the bill authorizes the court to order the following forms of relief:

- An injunction restraining continued retaliatory personnel actions prohibited by the bill;
- Reinstatement of the employee to the same position held before the retaliatory personnel action, or to an equivalent position;
- Reinstatement of full fringe benefits and seniority rights;
- Compensation for lost wages, benefits, and other remuneration; and
- Any other compensatory damages allowable by law.

The bill does not apply to individuals who are:

- Employed as emergency personnel²⁴ if the employer provides adequate emergency shelter for those individuals;
- Necessary to provide for the safety and well-being of the general public, including a person necessary for the restoration of vital services;²⁵ and
- Employed at a nursing home facility, hospice, assisted living facility, or hospital.

The bill takes effect on July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The State Constitution prohibits the state from passing any law impairing the obligation of contracts.²⁶ Article I, Section 6 of the State Constitution also creates a constitutional

²⁴ Emergency personnel includes law enforcement officers, firefighters, emergency medical technicians or paramedics, and other individuals who are required, in the course and scope of their employment, to provide services for the benefit of the general public during an emergency.

²⁵ The bill limits the term “vital services” to include only the utility and roadway services necessary immediately after an emergency.

²⁶ Article I, s. 10, FLA. CONST.

right to collectively bargain for public sector employees. The Florida Supreme Court has held that public employees maintain the same rights to collectively bargain as do private employees.²⁷

Typically, collective bargaining agreements still allow an employer the right to exercise control and discretion over its employees, including the right to take disciplinary actions for proper cause.²⁸ Some collective bargaining agreements contain a “force majeure” clause, setting forth the employer’s rights and duties in emergency situations. For instance, an agreement may contain a provision affording the employer the right to cease operations and go out of business completely if a natural disaster forces the business to close. To the extent that the bill interferes with the terms and conditions of employment in existing employment contracts or collective bargaining agreements, the bill may implicate an employer’s right to contract under the State Constitution.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact dependent on the number of mandatory evacuation orders issued, the number of counties affected by such an order, and the duration of the order. The fiscal impact is therefore indeterminate.

C. Government Sector Impact:

The fiscal impact dependent on the number of mandatory evacuation orders issued, the number of counties affected by such an order, and the duration of the order. The fiscal impact is therefore indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Lines 43-52 prohibit an employer from discriminating against an employee whose actions meet specified criteria. The bill does not clearly identify whether an employee must meet all of the listed criteria or only one of the listed criteria in order to be protected from retaliatory personnel action. Additionally, the bill provides that an employee cannot recover in a civil action if the employee does not give notice to the employer. However, the notice requirement is not listed in lines 43-52.

²⁷ See *Hillsborough Cnty. Gov’tl Emps. Ass’n, Inc. v. Hillsborough Cnty. Aviation Auth.*, 522 So.2d 358 (Fla. 1988); *City of Tallahassee v. Public Employees Relations Comm’n*, 410 So.2d 487 (Fla. 1981); *Dade Cnty. Classroom Teachers Ass’n v. Legislature of Fla.*, 269 So.2d 684 (Fla. 1972).

²⁸ See generally Chapter 447, F.S.

The bill does not provide definitions for the following terms: “full fringe benefits,” “seniority rights,” and “a person who is necessary to provide for the safety and well-being of the general public.”

VIII. Statutes Affected:

This bill creates section 448.077 of the Florida Statutes.

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.

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