# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 795 Pregnant Employees
**SPONSOR(S):** Joseph
**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Business & Professions Subcommittee | 12 Y, 0 N | Wright | Anstead |
| 2) Appropriations Committee | | | |
| 3) Commerce Committee | | | |

## SUMMARY ANALYSIS

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, pregnancy, national origin, age, handicap, or marital status in employment. The FCRA applies to certain employers that employ 15 or more employees.

Under federal and Florida law, employers are not specifically required to provide “reasonable accommodations” for pregnancy, childbirth or other pregnancy-related medical needs for female employees. Currently, employers only have to accommodate pregnant employees if the employer has already provided accommodations to other workers temporarily disabled for reasons unrelated to pregnancy, and if the female employee has a pregnancy related disability. General pregnancy issues, childbirth issues, and other pregnancy-related medical needs are not covered.

The bill ensures that employers “reasonably accommodate” female employees with needs related to pregnancy, childbirth, and related conditions, unless it would cause an “undue hardship” for the employer.

The bill defines "undue hardship" to mean “an accommodation requiring significant difficulty or expense when considered in light of the following factors:

- The nature, cost, and duration of the accommodation.
- The overall financial resources of the employer.
- The overall size of the business of the employer with respect to the number of employees and the number, type, and location of the employer's facilities.
- The effect on expenses and resources or any other impacts of such accommodation on the employer's operation.”

The bill defines “reasonable accommodation” as making reasonable changes in the workplace, including, but not limited to, providing assistance with manual labor; temporary modification in work schedules, seating, or equipment; temporary relief from lifting requirements; reasonable time off to recover from childbirth; and reasonable private space for lactation.

The bill includes an action for a claim of unlawful employment practices under the FCRA for failure to provide reasonable accommodations and for denying employment opportunities based on the employer's need to make reasonable accommodations because of a medical need related to pregnancy. The bill also requires an employer to provide written notice of the right to be free from discrimination in relation to pregnancy.

There is no fiscal impact on local governments and an indeterminate fiscal impact on state government.

The bill has an effective date of July 1, 2020.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED 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]

**Americans with Disabilities Act[8]**

Employers with 15 or more employees are covered by the Americans with Disabilities Act (ADA). Under the ADA, employees who suffer from pregnancy-related disabilities, such as preeclampsia or diabetes, are entitled to reasonable accommodation from their employers. A disability is a mental or physical impairment that substantially limits a major life activity, such as standing, lifting, walking, sleeping, or breathing. Pregnancy itself is not considered a disability under the ADA.[9]

Generally, "reasonable accommodation" means changes or modifications to the employee's schedule, duties, or workspace to help an employee perform the essential functions of the job. Examples of reasonable accommodations may include modification of work hours, restriction on lifting, leaves of absence, and transfer to a less demanding position. An employer is not required to take measures that

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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] 42 U.S.C. § 12101 *et seq*.
[9] Deborah England, Your Right to Accommodation During Pregnancy, Nolo.com, https://www.nolo.com/legal-encyclopedia/your-right-accommodation-during-pregnancy.html (last visited Jan. 31, 2020).

would create an "undue burden," or changes that are too costly or difficult to make when considering the employer's size and resources.[10]

**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…"[11] in employment and public accommodations.[12]

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, pregnancy,[13] national origin, age, handicap, or marital status, are considered unlawful employment practices, including:[14]

- 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.[15]

An employer under the FCRA is any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.[16]

**Accommodations for Pregnant Employees**

Under federal and Florida law, employers are not specifically required to accommodate pregnant employees, but they are required to treat pregnant employees the same as non-pregnant employees who are temporarily disabled for other reasons.[17]

The law is less clear when it comes to an employer that provides an accommodation to some, but not all, employees who are temporarily disabled for other reasons.[18] In *Young v. UPS*,[19] a pregnant employee sued UPS after she was denied light-duty work. UPS provided light-duty work to some employees, including those who were injured on the job. But it didn't provide light duty to other

[10] *Id*.
[11] s. 760.01, F.S.
[12] "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.
[13] "Pregnancy" was added in 2015 as a result of a discrepancy in case law as to whether it was already included in "sex." Ch. 2015-68, L.O.F.
[14] 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.
[15] s. 760.10, F.S.
[16] S. 760.02(7), F.S.
[17] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (1987); England, *supra* note 9.
[18] England, *supra* note 9.
[19] *Young v. United Parcel Service*, 575 U.S. 206 (2015).

employees, including pregnant employees and employees injured off the job. The Supreme Court held that employers are not required to accommodate pregnant employees any time they accommodate a subset of non-pregnant employees. However, employers must be able to show a legitimate, nondiscriminatory reason for the different treatment. If the employer doesn't have a sufficiently strong reason for treating pregnant employees differently, that may be evidence of pretext for discrimination.[20]

Florida does not have a specific law requiring employers to accommodate pregnancy-related needs, regardless of other accommodations made for other employees, but instead requires that pregnant employees be treated the same as non-pregnant employees who are similar in their ability or inability to work.[21]

Twenty-eight states have a law requiring some sort of accommodation based on pregnancy status.[22]

**Claims and Remedies under Title VII and the FCRA**

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

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).[23] The EEOC must investigate and make a reasonable cause determination within 120 days after the date of the filing.[24] 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.[25] 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.[26]

A person who wishes to file a complaint with the FCHR must do so within 365 days of a violation.[27] The FCHR must make a reasonable cause determination within 180 days after the filing of the complaint.[28] If the FCHR finds reasonable cause, the plaintiff may bring either a civil action or request an administrative hearing.[29] A plaintiff is required to bring a civil action under the FCRA within one year of the determination of reasonable cause by the FCHR.[30]

An employee may demonstrate her case through direct evidence of discrimination, but if she instead relies on circumstantial evidence, courts must utilize the *McDonnell Douglas*[31] burden-shifting framework.[32] Such framework requires that the party bringing the claim must first show that "(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated employees [not belonging to the class] more favorably; and (4) she was qualified to do the job."[33] Once she establishes her case, the burden shifts to the employer who then

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[20] *Id*.; England, *supra* note 9.
[21] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (1987).
[22] A Better Balance, *State Pregnant Workers Fairness Laws*, https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes/ (last visited Jan. 31, 2020).
[23] 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.
[24] 42 U.S.C. §. 2000e-5(b).
[25] *Id*.
[26] 42 U.S.C. § 2000e-5(f)(1).
[27] S. 760.11(1), F.S.
[28] S. 760.11(3), F.S.
[29] S. 760.11(4), F.S.
[30] S. 760.11(5), F.S.
[31] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[32] *Diaz v. Florida*, 219 F.Supp.3d 1215 (S.D. Florida 2016)(citing *Young v. United Parcel Service*, 575 U.S. 206 (2015)).
[33] *Young v. United Parcel Service*, 575 U.S. 206; *Diaz v. Florida*, 219 F.Supp.3d 1215 (citing *McCann v. Tilman,* 526 F.3d at 1373 (11th Cir. 2008)(citing *EEOC v. Joe's Stone Crab, Inc*., 220 F.3d 1263, 1286 (11th Cir. 2000))).

must articulate a legitimate, non-discriminatory reason for the employment action.[34] If the employer is able to satisfy this burden of production, the presumption of discrimination is refuted, and the burden then falls on the employee to demonstrate that the alleged reason is actually a cause for discrimination.[35]

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.[36] 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.[37]

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."[38] Punitive damages under the FCRA may not exceed $100,000.[39] 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.[40]

FCHR is required to make a notice which outlines information on the rights under the FCRA. Each employer, employment agency, and labor organization must keep such notice posted in conspicuous places upon its premises.[41]

**Effect of the Bill**

The bill provides additional requirements of employers related to preventing pregnancy-related discrimination in employment.

The bill defines the following terms for the FCRA:

- **"Pregnancy"** means pregnancy, childbirth, or related conditions, including, but not limited to, lactation or the expression of breast milk.
- **"Reasonable accommodation"** means making reasonable changes in the workplace, including, but not limited to, providing more frequent or longer breaks; assistance with manual labor; temporary job restructuring; temporary modification in work schedules, seating, or equipment; temporary relief from lifting requirements; temporary transfer to less strenuous or less hazardous work; reasonable time off to recover from childbirth; and reasonable private, nonrestroom space for lactation or the expression of breast milk.
- **"Undue hardship"** means an accommodation requiring significant difficulty or expense when considered in light of the following factors:
    - The nature, cost, and duration of the accommodation;
    - The overall financial resources of the employer;
    - The overall size of the business of the employer with respect to the number of employees and the number, type, and location of the employer's facilities; and
    - The effect on expenses and resources or any other impacts of such accommodation on the employer's operation.

The bill provides additional actions which constitute a claim of unlawful employment practices under the FCRA for:

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[34] *Diaz v. Florida*, 219 F.Supp.3d 1215 (citing Burke–Fowler v. Orange Cty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006)).
[35] *Diaz v. Florida*, 219 F.Supp.3d 1215 (citing Wilson v. B/E Aerospace, Inc, 376 F.3d 1079 (11th Cir, 2004)).
[36] *Id*.; 42 U.S.C. § 2000e-5(g).
[37] 42 U.S.C. §1981a(b)(3)
[38] S. 760.11(5), F.S.
[39] *Id.*
[40] S. 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.
[41] S. 760.10(10), F.S.

- failure to make reasonable accommodations, upon request, for an employee with a medical need related to pregnancy, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer's business. If an employer's policy requires similar accommodations to be made, or if similar accommodations have been made in the past or are currently being made for other employees for any reason, there is a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.
- denying employment opportunities to an otherwise qualified job applicant or employee, if such denial is based on the employer's need to make reasonable accommodations for the applicant or employee because of a medical need related to pregnancy.
- requiring an employee to take leave if another reasonable accommodation can be provided.
- taking adverse action against an employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation. For purposes of this subparagraph, the term "adverse action" includes, but is not limited to, failing to reinstate an employee to her original position, or an equivalent position, with equivalent pay, seniority, and benefits after the need for such accommodation ceases or counting an employee's absences from work due to a medical need related to pregnancy against the employee under the employer's no-fault attendance policy.

An employer will not be required to create additional employment opportunities that the employer would not otherwise have created or to discharge an employee, transfer an employee who has more seniority, or promote an employee who is not qualified for the position unless the employer has a policy for doing so for other classes of employees who have a right to accommodations.

An employer must provide written notice of the right to be free from discrimination in relation to pregnancy, including the right to reasonable accommodations, to:

- New employees at the commencement of employment.
- Existing employees beginning on July 1, 2020, but no later than November 1, 2020.
- Any employee who notifies an employer of her pregnancy no later than 10 days after such notification.

An employer must post a written notice in conspicuous places on its premises of the right to be free from discrimination in relation to a medical need related to pregnancy, including the right to reasonable accommodations.

FCHR must develop education and outreach programs as necessary to inform employers, employees, and job applicants about their rights and responsibilities under the bill.

The bill may not be construed to preempt, limit, diminish, or otherwise affect any employer policy or provision or other provision of law relating to sex or pregnancy discrimination or in any way diminish the coverage for pregnancy under the FCRA or any other provision of ch. 760, F.S.

The effective date of the bill is July 1, 2020.

B. SECTION DIRECTORY:

Section 1 Amends s. 760.02, F.S., providing definitions for “reasonable accommodation” and “undue hardship.”

Section 2 Amends s. 760.10, F.S., providing requirements for certain employers to take certain actions related to an employee’s needs related to pregnancy.

Section 3 Provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   There may be indeterminate expenditures due to additional signage required and determining appropriate spaces for breastfeeding mothers. In addition, the Commission on Human Relations is required to provide education and outreach for the acts within this legislation with no additional appropriation.[42]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may provide more job stability for employees with pregnancy-related job needs. The bill may be more costly for businesses who need to provide more job accommodations than currently required.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

FCHR will need to adopt rules related to developing programs and outreach materials related to pregnancy discriminations. There is sufficient rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[42] Florida Department of Management Services, Agency Analysis of 2020 House Bill 795, p. 4 (Jan. 14, 2020).