

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government →

- This bill requires law enforcement agencies to provide victim statements and active criminal investigative information to domestic violence centers.
- This bill authorizes judges to issue emergency protection orders in certain domestic violence-related instances.
- This bill requires certain employers to grant leave to employees who are victims of domestic violence for certain reasons.

Maintain Public Security → This bill authorizes judges to issue emergency protection orders in certain domestic violence-related instances.

B. EFFECT OF PROPOSED CHANGES:

Nationally, more than 1.5 million adults are victims of domestic violence each year.¹ In Florida, 120,697 crimes of domestic violence were reported to the police in 2003.² In fiscal year 2003-2004, Florida's domestic violence centers responded to 132,629 crisis calls, provided counseling services to 197,787 individuals, and provided emergency shelter to 14,467 individuals, primarily women and children.³

Domestic Violence - Public Records

Police reports are public records except as otherwise made exempt or confidential.⁴ If a police report contains confidential information, it must be redacted prior to being made public.⁵ In contrast, the following information is exempt from Florida's public records laws:

- Any document that reveals the identity, home or employment telephone number, home or employment address, or personal assets of the victim of a crime and identifies that person as the victim of a crime, which document is received by any agency that regularly receives information from or concerning the victims of crime, is exempt from Florida's public records laws;⁶
- Active criminal intelligence information and active criminal investigative information are exempt from Florida's public records laws.⁷

There is a difference between records the legislature has determined to be exempt and those which the legislature has determined to be confidential and exempt. If information is made confidential and exempt, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute. If records are not confidential but are only exempt, the exemption does not prohibit the showing of such information.⁸ Because the above-listed information is *exempt* rather than confidential and exempt, a law enforcement agency has discretion to release it.

¹ Legal Momentum, an advocacy and research organization based in New York City, as quoted in *When Home Comes to Work*, ABA Journal (Sept 2005), at 42.

² <http://www.fcadv.org/statistics.html>

³ *Id.*

⁴ s. 119.105, F.S.

⁵ Section 119.07, F.S., provides that a person who has custody of a public record who asserts that an exemption applies to a part of such record shall redact that portion of the record to which an exemption has been asserted and validly applies, and such person shall produce the remainder of such record for inspection and copying.

⁶ s. 119.071(2)(c), F.S.

⁷ s. 119.071(2)(c), F.S.

⁸ *WFTV, Inc., v. School Bd. Of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

When a law enforcement officer investigates an allegation of alleged domestic violence, the officer must, regardless of whether an arrest was made, make a written report that clearly indicates the alleged offense was an incident of domestic violence.⁹ Additionally, whenever possible, the officer must obtain a written statement from the victim and witnesses concerning the alleged domestic violence.¹⁰ Currently, law enforcement agencies are required to send a copy of the report, *excluding any victim/witness statements or other materials that are part of an active criminal investigation and are exempt from disclosure under chapter 119, F.S.*, to the nearest certified domestic violence center.¹¹

Victim statements could be considered "active criminal investigative information." However, because such information is only exempt from Florida's public records laws (rather than confidential and exempt), a law enforcement agency would have discretion to release it. Currently, most law enforcement agencies allow victims and defendants/respondents to obtain such information by going to the involved law enforcement agency and making a request.

Effect of the Bill

This bill would require that the entire report, *including victim and witness statements or other materials that are part of an active criminal investigation and are exempt from disclosure under Florida's public records laws* to be furnished to the domestic violence center. The bill specifies that the exempt statements and materials retain their exempt status when held by the certified domestic violence center and must not be accessed by any person other than the victim.

Domestic Violence – Injunctions / Protective Orders

Any person who is either the victim of domestic violence¹² or has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of domestic violence may file a sworn petition for an injunction for protection against domestic violence.¹³ Upon filing a petition for an injunction, an ex parte¹⁴ hearing will be held in which a judge, pending a full hearing, may either grant or deny a temporary injunction.¹⁵ A court may grant a temporary injunction when it appears that an immediate and present danger of domestic violence exists.¹⁶ Temporary injunctions may include the following relief:

- Restraining the respondent from committing any acts of domestic violence;
- Awarding the petitioner temporary exclusive use of a dwelling; and
- Granting the petitioner temporary custody of a minor child.¹⁷

The respondent to a temporary injunction must be served with the injunction before the injunction can be enforced.¹⁸ Temporary injunctions are only effective for up to 15 days, during which time a full hearing is scheduled and held.¹⁹

In practice, when an incident of domestic violence occurs, the victim may go to the courthouse and complete a petition for an injunction against domestic violence. Because temporary injunction hearings are held ex parte, the victim is usually informed that same day whether the judge granted the petition.

⁹ s. 741.29, F.S.

¹⁰ *Id.*

¹¹ *Id.*

¹² "Domestic violence" is defined as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member. s. 741.28, F.S.

¹³ s. 741.30, F.S.

¹⁴ An ex parte hearing involves only one party to a legal matter and is conducted in the absence of and usually without notice to the other party. <http://dictionary.reference.com/search?q=ex%20parte>

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

As noted above, the respondent to the petition must be served with the injunction before the injunction can be enforced. Although it is possible that a victim might receive a temporary injunction the same day as the domestic violence incident, the process sometimes takes up to a day.

Effect of the Bill

This bill provides that in emergency situations immediately following incidents of domestic violence, a court may issue an emergency protection order if a law enforcement officer states under oath to the court (in person, by telephone, in writing, or by fax) the facts that show an emergency protection order is needed and the court finds reasonable grounds to believe that the victim or the victim's child is in immediate danger of domestic violence. The court may grant the same relief as provided for temporary injunctions (use of the dwelling, custody, etc...). The emergency protection order expires 72 hours after issuance or at the end of the next judicial day, whichever time is later, or at the request of the victim. The bill specifies that once the emergency protection order is issued, the law enforcement officer must:

- If the judge's order was verbal, put the order in writing on an approved form provided by the court, outline the grounds justifying the issuance of the order, and sign and date the order.
- If possible, serve a signed copy of the order on the offender and victim at the scene of the domestic violence incident.
- Complete the appropriate affidavit of service and file the affidavit with the issuing court by the close of business on the next judicial day.
- If the order was reduced to writing and signed by the officer, file the original, signed order with the issuing court by the close of business on the next judicial day.

Domestic Violence – Employment Issues

It is estimated that U.S. employers lose between \$3 billion and \$13 billion each year as a result of domestic violence due to lost productivity of victims and the cost of training replacement employees.²⁰ The federal Family and Medical Leave Act of 1993 (FMLA),²¹ while not specifically directed to domestic violence, requires employers to grant up to 12 weeks of unpaid leave during any 12-month period for specified family and medical needs. The U.S. Office of Personnel Management has suggested that the FMLA, which affects any employer with more than 50 employees which is engaged in commerce or any activity affecting commerce, is available to employees who suffer from the effects of physical or emotional abuse, either of themselves or their children, which require medical attention.²² To date, only six states (California, Colorado, Hawaii, Illinois, Maine, and North Carolina) have enacted legislation giving domestic violence victims specific job protections.²³

In 1996, the Governor and Cabinet of Florida developed a model policy on Domestic Violence in the Workplace. It was described as "a standard to which agencies may look for guidance and policy development," but left to each agency the flexibility to address individual agency needs.²⁴ The policy included a provision that directed that:

The agency shall grant leave with or without pay, adjust schedules or work assignments, as appropriate, for employees who are victims of domestic violence to include time off for medical and legal assistance, court appearances, counseling, relocation, or to make other necessary arrangements to provide for victim safety.²⁵

²⁰ *Id.* at 44.

²¹ Public Law 103-3.

²² *Responding to Domestic Violence: Where Federal Employees Can Find Help*, U.S. Office of Personnel Management, <http://www.opm.gov/ehs/workplac/html/domestic.html>, (accessed December 27, 2005).

²³ *When Home Comes to Work*, ABA Journal (Sept 2005), at 44.

²⁴ *State of Florida Model Policy on Domestic Violence in the Workplace*, The Third Report of the Governor's Task Force on Domestic and Sexual Violence (1997), p. 1.

²⁵ *Id.*, paragraph (5)(E), at 177.

The Florida Department of Management Services has provided by rule that executive agencies must approve parental or family medical leave to assist employees in meeting family needs, specifically allowing leave to be granted for up to six months for a family member's serious health condition²⁶ as defined in the FMLA.²⁷ Additionally, agencies are required to approve up to 30 days family leave for "non-medical family responsibilities," which would appear to be broad enough to include domestic violence-related issues.²⁸ If the employee is granted such leave, the employee may request to use accrued leave credits.²⁹ If the employee does not so request, the agency may place the employee on leave without pay.²⁹

At least one executive agency, the Department of Children and Families (DCF), has in place an operating policy which addresses employees who are victims of domestic violence. In regard to the use of leave time, this policy provides:

The department shall grant the use of accrued leave time or adjust an employee's work schedule or work assignment, as appropriate, for an employee who is a victim of domestic violence. This may include approved time off for medical and legal assistance, court appearances, counseling, relocation, or to make other necessary arrangements to provide for the victim's safety and the safety of any of the victim's children, if necessary.³⁰

Policies have also been adopted at the county level to address these concerns. For example, the Miami-Dade County Code entitles domestic violence victims to up to 30 days of unpaid leave for medical or dental care, legal assistance, court appearances, counselor or supportive services, or any other arrangements needed because of domestic violence. The ordinance applies to leave to obtain orders of protection and for divorce, child custody, and child support hearings. The employee is required to exhaust all paid vacation and personal leave prior to taking leave under this provision. The employer may request certification from a health care provider, attorney of record, counselor, law enforcement agency, clergy, or domestic violence service provider that the employee is being subjected to domestic or repeat violence and is in need of time off for one of the permitted reasons.³¹ Miami-Dade County officials report that since the ordinance was enacted in 1999, only six employees have availed themselves of the ordinance's protection, for a total of 461.25 hours of unpaid leave.³²

Florida law currently prohibits dismissing from employment any person who testifies in a judicial proceeding in response to a subpoena³³ but provides none of the other protections enumerated in the bill to victims of domestic violence.

Florida courts have considered at least three cases in which victims sought unemployment compensation after being dismissed from their jobs for excessive absenteeism related to domestic violence or after leaving their employment as a result of domestic violence concerns. In the earliest of the three cases, the court held that the claimant's concerns for her personal safety provided good cause for leaving her employment, particularly due to robberies which occurred at the workplace while she was there.³⁴ In another case, the court found that an employee whose excessive absenteeism was

²⁶ The FMLA defines a serious health condition as an illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice or residential medical care facility or (2) continuing treatment by a health care provider. See 29 CFR 825.114, http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.114.htm. (accessed February 22, 2006).

²⁷ 60L-34.0051, FAC.

²⁸ *Id.*

²⁹ *Id.*

³⁰ CFOP 60-11 (July 1, 2001), subparagraph 1-7(b)(3), at 1-6.

³¹ County Ordinance 99.5.

³² Two employees used 16 hours each; two used between 50-100 hours each, and two used 100-200 hours each. One employee used the leave in 2001, two in 2002, one in 2003, and two in 2004.

³³ s. 92.57, F.S.

³⁴ *Wall v. Unemployment Claims Commission*, 682 So.2d 1187 (2nd DCA 1996).

caused by domestic problems and by injuries received from her husband was not guilty of misconduct related to work and was thus eligible for unemployment compensation.³⁵ In the final case, the court decided that a claimant who resigned her job and moved to another state was not entitled to compensation since she had voluntarily left her employment without good cause attributable to her employer.³⁶ While these three cases are not precisely on point, since they deal with unemployment compensation rather than entitlement to leave, they are illustrative of the lack of clarity in the judicial decision making regarding employees who are victims of domestic violence.

The personnel records of public employees are currently public record, unless specifically excluded from the requirements of Florida's public records law, s. 119.01, F.S.

Effect of the Bill

The bill requires employers to allow employees to request or take up to three working days of leave with or without pay in any 90-day period if the employee is the victim of domestic violence and the leave is sought to:

- Seek an injunction for protection against domestic violence or an injunction for protection in cases of repeat violence, dating violence, or sexual violence;
- Obtain medical care or mental health counseling, or both, for the employee or a family or household member to address physical or psychological injuries resulting from the act of domestic violence;
- Obtain services from a victim-services organization, including, but not limited to, a domestic violence shelter, program, or a rape crisis center as a result of the act of domestic violence;
- Make the employee's home secure from the perpetrator of the domestic violence or to seek new housing to escape the perpetrator; or
- Seek legal assistance to address issues arising from the act of domestic violence and to attend and prepare for court-related proceedings arising from the act of domestic violence.

Application of the bill is limited to employers with 50 or more employees and to employees who have been employed by the employer for at least 12 months. The employee is required to provide advance notice of the leave except in cases of imminent danger to the employee or the employee's family. The employer is authorized to require documentation of the act of domestic violence.

The employee must use all available annual or vacation leave, personal leave, and sick leave available to the employee prior to using the leave provided for in this bill, unless this requirement is waived by the employer.

The employer is required to keep all information relating to the employee's leave under this section confidential. The employer is prohibited from taking any disciplinary action against the employee for exercising rights under this bill; but the employee is not granted any rights under the bill to continued employment or other benefits not available outside the provisions of the bill.

The remedy for damages to an employee aggrieved under the bill is limited to a civil suit for damages or equitable relief in the circuit court. The employee may claim as damages all wages and benefits that would have been due the person, up to and including the date of judgment, had the act violating this bill not occurred, but the employee is not relieved from the obligation to mitigate damages.

Domestic Violence - Statistics

Currently, each agency that is involved with the enforcement, monitoring, or prosecution of crimes of domestic violence must collect and maintain records of each domestic violence incident for access by investigators preparing for bond hearings and prosecutions for acts of domestic violence.³⁷ The information must be provided to the court at first appearance hearings and all subsequent hearings.

³⁵ *Gilbert v. Department of Corrections*, 696 So2d 416 (1st DCA 1997).

³⁶ *Hall v. Florida Unemployment Appeals Commission*, 697 So.2d 541 (1st DCA 1997).

³⁷ s. 943.1702, F.S.

Effect of the Bill

This bill requires the judicial branch to collect the above-information in regards to noncriminal actions related to domestic violence, including petitions seeking injunctions for protection.

C. SECTION DIRECTORY:

Section 1. Amends s. 741.29, F.S., providing domestic violence centers access to certain materials that are part of an active domestic violence criminal investigation that are exempt from disclosure; providing continuing exemption of such material from disclosure.

Section 2. Amends s. 741.30, F.S., authorizing law enforcement officers to obtain emergency protection orders immediately following incidents of domestic violence in certain circumstances; requiring a law enforcement officer to reduce such orders to writing; providing for expiration of such orders; specifying procedures relating to such orders.

Section 3. Creates s. 741.313, F.S., defining the terms “domestic violence,” “family or household member,” and “victim”; requiring certain employers to permit certain employees to take leave from work to undertake activities resulting from an act of domestic violence; specifying the activities for which employees may take leave; requiring the employee to notify the employer of the leave; providing exceptions; requiring that employers keep an employee’s leave information confidential; prohibiting employers from taking certain actions against employees for exercising rights specified in the bill.

Section 4. Amends s. 943.1702, F.S., requiring collection of statistics on noncriminal judicial actions concerning domestic violence.

Section 5. Provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Qualifying state employers will be required to grant leave to employees who are victims of domestic violence regardless of whether the employee has accrued sufficient paid leave to cover the absence. However, since many state agencies may have already provided (in their personnel policies) for this leave as the result of the 1997 Model Policy, state agencies may be less affected than private employers.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

To the extent the bill requires law enforcement agencies to include victim and witness statements and other active criminal investigative information to domestic violence centers, there may be an increased workload impact on law enforcement agencies. It is not anticipated that any impact would be significant in that law enforcement agencies are currently required to send police reports to domestic violence centers.

To the extent the bill authorizes a judge to grant an emergency protection order and requires law enforcement officers to take certain actions regarding such orders, there could be an increased workload on courts and law enforcement agencies.

Qualifying local government employers will be required to grant leave to employees who are victims of domestic violence regardless of whether the employee has accrued sufficient paid leave to cover the absence.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Employers will be required to grant leave (with or without pay) to employees who are victims of domestic violence regardless of whether the employee has accrued sufficient paid leave to cover the absence. Such employees will also be able to retain employment despite absences caused by domestic violence.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill would require that the entire report, including victim and witness statements or other materials that are part of an active criminal investigation and are exempt from disclosure to be furnished to the domestic violence center, who may then only give the victim access. However, as noted above, victims and defendants/respondents may currently obtain such information by going to the involved law enforcement agency and requesting it. Although providing such information to the domestic violence center might give victims better access to the material, it should be noted that many victims never go to the domestic violence center and therefore would not receive this benefit. Additionally, the defendant/respondent will rarely be at the domestic violence center and therefore would not benefit from having the information provided to the centers. If the intent of the bill is to give victims and defendants/respondents better access to material that will assist them in the injunction process, the material could be sent to a neutral location (e.g. the clerk's office) and both victims and defendants/respondents should be allowed access.

As noted above law enforcement agencies currently have discretion as to whether to release exempt material to victims, etc... There may be times when a law enforcement agency refuses to give exempt criminal investigative information to victims, etc... because doing so could interfere with an active criminal investigation. Currently, law enforcement agencies have discretion as to whether to release such material to victims and defendants/respondents and could thus opt not to release the material.

Agencies would not have this discretion under the bill – they would be required to send the information to the domestic violence centers.

Under the bill, it is not clear whether law enforcement must decide whether to request an emergency protection order or whether requesting the order is the victim's decision. It is unlikely that law enforcement agencies would want the responsibility of deciding when to request such an order because of liability concerns. This issue could be resolved with the following language:

“ In an emergency situation immediately following an incident of domestic violence by a household member, an emergency protection order may be issued if a law enforcement officer, at the request of the victim, states under oath...”

To get a temporary injunction, the court must find that an “immediate and *present* danger of domestic violence exists.” Under the bill, a court may grant an emergency protection order if it find that there is an “immediate danger of domestic violence.” The standards for obtaining both types of orders should likely be identical.

The lack of a definition for the term “employer” as used in the bill may lead to confusion as to which employers—public or private—are affected by its provisions. The definition of employer as used in ch. 440.02(16)(a), F.S., related to Workers' Compensation, which alludes to both public and private employers, may be instructive. That definition states: “Employer means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person.”

A companion bill, HB 1507, has been filed to provide the public records exemption needed to keep confidential the information covered by this bill in public employee personnel files.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES