Legislative Analysis

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REMOVE CERTAIN ABORTION EXCLUSIONS FROM EMPLOYMENT DISCRIMINATION PROVISIONS

Senate Bill 147 (proposed substitute H-1)
Sponsor: Sen. Erika Geiss
House Committee: Judiciary
Senate Committee: Civil Rights, Judiciary, and Public Safety
Complete to 4-18-23

SUMMARY:

Senate Bill 147 would amend Article 2 of the Elliott-Larsen Civil Rights Act, which among other things prohibits employment discrimination based on sex, to prohibit discrimination based on an individual's termination of a pregnancy.

The act now specifically *excludes* a "nontherapeutic abortion not intended to save the life of the mother" from the medical conditions related to pregnancy or childbirth that are included in the definition of ***sex*** for purposes of Article 2. The bill would remove this exception and instead add "termination of a pregnancy" to conditions included in the term ***sex*** (see **Background**, below).

The bill also would prohibit an employer from treating an employee affected by the termination of a pregnancy differently, for employment purposes, from another employee who has a similar ability or inability to work but is not affected by the termination of a pregnancy. The act now specifically *excludes* a "nontherapeutic abortion not intended to save the life of the mother" from the medical conditions related to pregnancy or childbirth that are protected from different treatment as described above. The bill would remove this exception.

As they relate to discrimination and adverse employment actions based on whether an individual is considering having an abortion or on their decision to have an abortion or not have an abortion, the provisions of the bill appear to currently apply under federal law to all Michigan employers with 15 or more employees (see **Background**, below). If the bill were enacted, its provisions would apply to all Michigan employers.

MCL 37.2201 and 37.2202

BACKGROUND:

The Elliott-Larsen Civil Rights Act, generally speaking, prohibits discriminatory practices, policies, and customs based on religion, race, color, national origin, age, sex, height, weight, familial status [having children], or marital status. These are often called "protected categories" with reference to the act. The act is enforced by private lawsuits and by the Michigan Civil Rights Commission (MCRC), which through the Michigan Department of Civil Rights investigates and acts on discrimination complaints.

Article 2 of the act prohibits the following conduct on the basis of ***sex***:

- An employer cannot do any of the following based on an individual's sex:
  - Refuse or fail to hire or recruit an individual.
  - Fire an individual.

    - Otherwise discriminate against an individual regarding employment, compensation, or a term, condition, or privilege of employment.
    - Limit, segregate, or classify an employee or applicant for employment in a way that deprives them of an employment opportunity.
- An employer cannot print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to employment by the employer that indicates a preference, limitation, specification, or discrimination based on sex.
- Except as allowed by rules of the MCRC or an applicable federal law, an employer or employment agency cannot do any of the following:
    - Make or use a written or oral inquiry eliciting or attempting to elicit information about a prospective employee's sex.
    - Make, keep, or disclose a record of the information described above.
    - Make or use a written or oral inquiry or form of application expressing a preference, limitation, specification, or discrimination based on a prospective employee's sex.
- An employment agency cannot do either of the following:
    - Refuse or fail to procure, refer, recruit, or place for employment, or otherwise discriminate against, an individual based on their sex.
    - Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to a classification or referral for employment by the employment agency that indicates a preference, limitation, specification or discrimination based on sex.
- An employment agency cannot print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to a classification or referral for employment by the agency that indicates a preference, limitation, specification, or discrimination based on sex.
- A labor organization cannot do any of the following based on an individual's sex:
    - Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership.
    - Limit, segregate, or classify membership or applicants for membership.
    - Classify or refuse or fail to refer for employment an individual in a way that deprives them of an employment opportunity.
    - Classify or refuse or fail to refer for employment an individual in a way that would adversely affect wages, hours, or employment conditions.
    - Fail to fairly and adequately represent a member in a grievance process.
    - Otherwise adversely affect the status of an employee or applicant for employment.
- A labor organization cannot print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to a membership in or a classification or referral for employment by the labor organization that indicates a preference, limitation, specification, or discrimination based on sex.
- An employer, labor organization, or joint labor-management committee that controls an apprenticeship, on the job, or other training or retraining program cannot discriminate against an individual regarding admission to, or employment or continuation in, the program on the basis of the individual's sex.
- An individual seeking employment cannot publish a notice or advertisement that does either of the following:
    - Specifies or indicates the individual's sex.

- Expresses a preference, limitation, specification, or discrimination as to the sex of a prospective employer.

In addition, under Article 2, a contract to which the state, a political subdivision, or an agency of the state or a political subdivision is a party must contain a covenant by the contractor and subcontractors not to discriminate against an employee or applicant on the basis of sex with respect to hire, tenure, terms, conditions, or privileges of employment or a matter directly or indirectly related to employment.

Title VII of the federal Civil Rights Act of 1964 applies to any employer with 15 or more employees and prohibits employment discrimination based on color, national origin, race, religion, or sex. The Pregnancy Discrimination Act of 1978[1] amended the Civil Rights Act to provide that discrimination or harassment in the workplace based on pregnancy, childbirth, or related medical conditions is unlawful sex discrimination under Title VII.[2] The U.S. Equal Employment Opportunity Commission has found that the Pregnancy Discrimination Act protects employees from discrimination and adverse employment actions based on whether they are considering having an abortion or based on their decision either to have an abortion or *not* to have an abortion.[3] Federal courts have ruled similarly.

Section 28 of Article I was added to the state constitution when Michigan voters approved Ballot Proposal 3 in the November 2022 election.[4] Among other things, section 28 provides that "[e]very individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy," including at least prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care.

The H-1 substitute for SB 147 is a "conflict substitute" that makes no substantive changes to the bill as passed by the Senate. It updates section 202 in the bill to reflect changes recently made by 2023 PA 6.

FISCAL IMPACT:

The bill would have no fiscal impact on the Department of Civil Rights or on local units of government. The bill may result in a marginal increase of civil rights complaints and ensuing investigation cases from the bill's removal of the exemption from the Elliot-Larsen Civil Rights Act. The potential increase would likely be absorbed by the department's ongoing appropriations and staffing levels.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

[1] https://www.eeoc.gov/statutes/pregnancy-discrimination-act-1978
[2] See https://www.eeoc.gov/pregnancy-discrimination
[3] https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues
[4] See https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_3_of_2022.pdf