

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7119 PCB HHS 19-03 Use of Regulated Substances
SPONSOR(S): Health & Human Services Committee, Duran and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	16 Y, 1 N	Royal	Calamas
1) Appropriations Committee	27 Y, 2 N	Mielke	Pridgeon

SUMMARY ANALYSIS

Current law prohibits anyone under the age of 18 from purchasing or knowingly possessing tobacco products, nicotine products, and nicotine dispensing devices. Current law prohibits a physician from certifying patients under the age of 18 for the medical use of marijuana in a form for smoking, with certain exceptions.

The bill:

- Increases the minimum age to lawfully purchase and knowingly possess tobacco products, nicotine products, and nicotine dispensing devices in Florida from 18 to 21.
- Prohibits the sale, delivery, bartering, furnishing, shipping, or giving tobacco products, nicotine products, or electronic nicotine dispensing devices to persons under the age of 21.
- Preempts the establishment of the minimum age to possess or purchase nicotine dispensing devices, nicotine products, and tobacco products, and the regulation of the marketing of such products to the state. However, such preemption does not prohibit a local government's ability to require licensure for the retail sale of tobacco products.
- Increases the minimum age for the medical use of marijuana in a form for smoking from 18 to 21.

The bill will have a significant, negative fiscal impact and may have an indeterminate, positive fiscal impact on state government. The bill has an insignificant fiscal impact on local governments.

The bill has an effective date of October 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Federal Regulation of Tobacco Products

Federal law requires states to set a minimum age requirement of 18 years for the sale and purchase of tobacco products. State and local laws may extend this prohibition, prohibit supply, possession and consumption, or increase the age beyond 18. The law is enforced by withholding FEMA disaster and non-disaster grants from states that have purchasing ages under 18.¹

The Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act) gives the Food and Drug Administration (FDA) authority to regulate the manufacture, distribution, and marketing of tobacco products to protect the public health.²

Federal law requires a retailer to sell cigarettes and smokeless tobacco only in “direct, face-to-face exchanges between the retailer and the customer.” This language, referred to as the “behind the counter” provision in the industry, explicitly prohibits vending machines and self-service displays.³

Federal law explicitly preserves the right of states, or any political subdivision of a state, to provide any other law, rule, regulation or other measure related to “prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of” tobacco products to require more stringent requirements for tobacco products beyond federal requirements.⁴

Effective August 8, 2016, the FDA extended the definition of “tobacco products” regulated under the Act to include electronic nicotine delivery systems, including e-cigarettes, e-cigars, e-hookah, vape pens, personal vaporizers and electronic pipes and included components and parts such as e-liquids, tanks, cartridges, pods, wicks, and atomizers.⁵

Food and Drug Administration

The FDA, an agency within the U.S. Department of Health and Human Services, protects the public health by assuring the safety, effectiveness, and security of human and veterinary drugs, vaccines and other biological products for human use, and medical devices. The agency also is responsible for the safety and security of our nation’s food supply, cosmetics, dietary supplements, products that give off electronic radiation, and for regulating tobacco products.⁶

The FDA contracted with the Institute of Medicine (IOM) in 2013 to conduct a study to better understand the potential health benefits of raising the minimum age to purchase tobacco. In 2015, the IOM published their report and it was submitted to Congress, which concluded that raising the minimum age to purchase tobacco to 21.⁷

¹ 21 U.S.C. § 387f(d)(3)(A)(ii).

² Federal Food, Drug, and Cosmetic Act, 21 USC s. 351 et seq; 15 U.S.C. s. 1333, s. 1335 (2017); 21 U.S.C. s. 387g, s. 387f (2017).

³ 21 C.F.R. § 1140.14.

⁴ 21 U.S.C. s. 387p (2017).

⁵ Food and Drug Administration, *Summary of Federal Rules for Tobacco Retailers*, <https://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/Retail/ucm205021.htm> (last visited Mar. 22, 2019).

⁶ Federal Drug Administration, Statement from FDA Commissioner Scott Gottlieb, M.D., on advancing new policies aimed at preventing youth access to, and appeal of, flavored tobacco products, including e-cigarettes and cigars <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm633291.htm> (last visited Mar. 23, 2019).

⁷ Institute of Medicine, *Public Health Implications Raising the Minimum Age of Legal Access to Tobacco Products Report Brief*, (March http://www.nationalacademies.org/hmd/~media/Files/Report%20Files/2015/TobaccoMinAge/tobacco_minimum_age_report_brief.pdf (last visited on Mar. 27, 2019).

- would most likely lead to substantial reduction in smoking related mortality, and
- could result in significant health benefits for those born between 2000 and 2018, including:
 - approximately 223,000 fewer premature deaths,
 - 50,000 fewer deaths from lung cancer; and
 - 4.2 million fewer years of life lost.

The report also concluded that the age group most affected by the increasing the minimum age to purchase tobacco products to 21 would be those who are age 15 to 17 years old. Because 21 year olds are less likely than 18 year olds to be in the same social circles of 15-17 year olds, increasing the minimum age would likely result in 15 to 17 year olds having less access to tobacco products and delaying the age that a person is first exposed to tobacco.

According to the report, delaying the date a person uses a tobacco product is critical because the adolescent brain is uniquely vulnerable to nicotine and adolescents are particularly susceptible to peer pressure. Delaying the age a person is first exposed to tobacco will likely decrease the prevalence of tobacco users.⁸

The FDA also reported that between 2011 and 2014, the number of high school students who had used an e-cigarette in the last 30 days increased nearly 800 percent, with 13.4 percent of high school students reporting usage in 2014.⁹ In 2018, over 4.9 million middle and high school students were current users of e-cigarettes.¹⁰ As of 2018, more than one in four high school seniors and one in ten middle school students used e-cigarettes.¹¹

The FDA began a Youth Tobacco Prevention Plan that has three main components: preventing youth access to tobacco products, ending marketing aimed at youth, educating youth about the dangers of using tobacco and educating retailers about their role in preventing underage usage of tobacco.¹²

Recently, members of the nicotine product manufacturing industry indicated support for increasing the minimum age to purchase tobacco products, including nicotine products, and nicotine dispensing products, from 18 to 21. The chief executive of Juul Labs, the largest e-cigarette company, stated that Juul Labs supports raising the minimum age to purchase tobacco products, nicotine products, and nicotine dispensing products from 18 to 21. The chief executive stated:

“We applaud California, Hawaii, Maine, Massachusetts, New Jersey, Oregon, and Virginia, which have passed ‘T21’ legislation, and urge the federal government and every state to pass legislation to raise the minimum-purchasing age to 21.”¹³

Tobacco Products Regulation in Florida

The Division of Alcoholic Beverage and Tobacco (Division) within the Department of Business and Professional Regulation is the state agency responsible for the regulation and enforcement of tobacco products under ch. 569, F.S. Tobacco products are defined in ch. 569 to include loose tobacco leaves,

⁸ *Id.*

⁹ Food and Drug Administration, 81 C.F.R. 28973, <https://www.federalregister.gov/d/2016-10685/p-635> (last visited Mar. 22, 2019).

¹⁰ Food and Drug Administration, *Statement from FDA Commissioner Scott Gottlieb, M.D., on new data demonstrating rising youth use of tobacco products and the agency’s ongoing actions to confront the epidemic of youth e-cigarette use*, <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm631112.htm> (last visited Mar. 22, 2019).

¹¹ *Id.*

¹² Food and Drug Administration, *FDA’s Youth Tobacco Prevention Plan*, <https://www.fda.gov/TobaccoProducts/PublicHealthEducation/ProtectingKidsfromTobacco/ucm608433.htm> (last visited Mar. 22, 2019).

¹³ Kevin Burns, *Vape makers must do more to stop kids from using e-cigarettes*, The Washington Post (Mar 30, 2019) https://www.washingtonpost.com/opinions/2019/03/30/vape-makers-must-do-more-stop-kids-using-e-cigarettes/?noredirect=on&utm_term=.1e2c8a6c7085 (last visited Apr. 1, 2019); Angelica LaVito, *Popular e-cigarette Juul’s sales have surged almost 800 percent over the past year*, CNBC (July 2, 2018) <https://www.cnbc.com/2018/07/02/juul-e-cigarette-sales-have-surged-over-the-past-year.html> (last visited Apr. 1, 2019).

and products made from tobacco leaves, in whole or in part, and cigarette wrappers, which can be used for smoking, sniffing, or chewing.

In order to sell tobacco products at retail, or operate a tobacco products vending machine, in Florida, a person, firm, association, or corporation must obtain a retail tobacco products dealer permit from the Division for each place of business or the premises where tobacco products are sold. The fee for such a permit is \$50. The Division may only issue permits to persons who are 18 years or older or corporations with officers who are 18 years or older.¹⁴

In order to manufacture, import, or export cigarettes or tobacco products within the state each person, firm, or corporation must have a cigarette or tobacco products manufacturer permit from the Division. The Division may only issue cigarette manufacturer or distributor permits to persons who are 18 years or older or corporations with officers who are 18 years or older. The fee for such permits is \$100. There is no age requirement to obtain a tobacco products manufacturer or distributor permit, which includes all tobacco products except for cigarettes, from the Division. The fee for such permit is \$25.¹⁵

Florida law prohibits:

- The sale, delivery, bartering, furnishing or giving of tobacco products to persons under the age of 18. A violation of this prohibition is a second degree misdemeanor. A second or subsequent violation within one year of the first violation is a first degree misdemeanor.¹⁶
 - It is a complete defense to a person charged with such a violation if the buyer or recipient falsely evidenced that he or she was 18 years of age or older, a prudent person would believe the buyer or recipient to be 18 years of age or older, and the buyer or recipient presented false identification upon which the person relied upon in good faith.¹⁷
- Persons under the age of 18 years from knowingly possessing, directly or indirectly, any tobacco products or misrepresenting their age or military service in order to purchase tobacco products.¹⁸ However, a person “under the age of 18” does not include any person under the age of 18 who:¹⁹
 - Has had his or her disability of nonage removed under ch. 743, F.S.;
 - Is in the military reserve or on active duty in the Armed Forces of the United States;
 - Is otherwise emancipated by a court of competent jurisdiction and released from parental care and responsibility; or
 - Is acting in his or her scope of lawful employment with an entity licensed by the Division.
- Any person under the age of 18 from smoking tobacco within 1,000 feet of a public or private elementary, middle, or secondary school between the hours of 6 a.m. and midnight. A violation of this prohibition is punishable by a maximum noncriminal civil penalty not to exceed \$25, or 50 hours of community service or, where available, successful completion of a school-approved anti-tobacco “alternative to suspension” program.²⁰

¹⁴ S. 569.003, F.S.

¹⁵ Ss. 210.15(1), & 210.35, F.S.; Florida Division of Alcoholic Beverages and Tobacco, *Licenses and Permits for Alcoholic Beverages, Cigarettes, and Other Tobacco Products*, (Nov. 28, 2017) <http://www.myfloridalicense.com/dbpr/abt/documents/ABTLicenses.pdf> (last visited Apr. 1, 2019).

¹⁶ S. 569.101, F.S.

¹⁷ S. 569.101(3), F.S.

¹⁸ S. 569.11, F.S.

¹⁹ S. 569.002(7), F.S.

²⁰ S. 386.212, F.S.

An underage person who knowingly possesses tobacco products or misrepresents their age or military service in order to purchase tobacco products commits a noncriminal violation are punishable as follows:²¹

- A first violation of this prohibition is a non-criminal violation with a penalty of 16 hours of community service or a \$25 fine, and attendance at a school-approved anti-tobacco program, if locally available.
- A second violation within 12 weeks of the first violation is punishable with a \$25 fine.
- A third or subsequent violation within 12 weeks of the first violation requires that the person be punished with the suspension or revocation of his or her driver's license or driving privilege, as provided in s. 322.056, F.S.²²
- A court must revoke, suspend, or delay of eligibility for, a driver license for persons under 18 years of age who failed to complete the noncriminal penalties for knowingly possessing or misrepresenting their age in order to purchase tobacco products.²³

Requirements for Tobacco Products Dealers

Retail tobacco products dealers (retailers) must post a clear and conspicuous sign that the sale of tobacco products is prohibited to persons under the age of 18 and that proof of age is required for purchase. The Division is required to make the signs available to retailers. Retailers must also have instructional material in the form of a calendar or similar format to assist in determining the age of the person attempting to purchase a tobacco product.²⁴

In order to prevent persons under 18 years of age from purchasing or receiving tobacco products, the sale or delivery of tobacco products is prohibited, except when those products are under the direct control or line of sight of the dealer or the dealer's agent or employee. If a tobacco product is sold from a vending machine, the vending machine must have:

- An operational lockout device which is under the control of the dealer or the dealer's agent or employee who directly regulates the sale of items through the machine by triggering the lockout device to allow the dispensing of one tobacco product;
- A mechanism on the lockout device to prevent the machine from functioning if the power source for the lockout device fails or if the lockout device is disabled;
- A mechanism to ensure that only one tobacco product is dispensed at a time.²⁵

These requirements for the sale of tobacco products do not apply to an establishment that prohibits persons under 18 years of age on premises and do not apply to the sale or delivery of cigars and pipe tobacco.²⁶

If the Division discovers a tobacco dealer's employee illegally sold tobacco products to a person under 18 years, the Division may mitigate penalties, if:

- The dealer is qualified as a responsible dealer by establishing and implementing specified practices designed to ensure that the dealer's employees comply with ch. 569, F.S., such as employee training.
- The dealer had no knowledge of that employee's violation at the time of the violation and did not direct, approve, or participate in the violation.
- The sale was made through a vending machine equipped with an operational lock-out device.²⁷

²¹ S. 569.11, F.S.

²² Section 322.056, F.S., requires the mandatory revocation or suspension of, or delay of eligibility for, a driver license for persons under 18 years of age found guilty of certain alcohol, drug, tobacco or nicotine product and nicotine dispensing device offenses. Penalties range from a 30-day suspension to a two-year revocation of a driver license. However, a court may, in its discretion, order a restricted driver license for business or employment purposes.

²³ S. 322.056, F.S.

²⁴ S. 569.14, F.S.

²⁵ S. 569.007(1), F.S.

²⁶ S. 569.007(2)-(3), F.S.

Mail Order and Internet Sales of Tobacco Products in Florida

Section 210.095(5), F.S., provides requirements for the delivery of mail order, Internet, and other remote sales of tobacco products and cigarettes, referred to as “delivery sales.” Each person who mails, ships, or otherwise delivers tobacco products or cigarettes in connection with an order for a delivery sale is required to:

- Include, as part of the shipping documents, in a clear and conspicuous manner, the following statement: “Tobacco Products: Florida law prohibits shipping to individuals under 18 years of age and requires the payment of all applicable taxes.”
- Use a method of mailing, shipping, or delivery which obligates the delivery service to:
 - Require the signature of an adult who resides at the delivery address and obtain proof of the legal minimum purchase age of the individual accepting delivery, if the individual appears to be under 27 years of age.
 - Require proof that the individual accepting delivery is either the addressee or the adult designated by the addressee, in the form of a valid, government-issued identification card bearing a photograph of the individual who signs to accept delivery of the shipping container.
- Provide to the delivery service, if such service is used, evidence of full compliance with requirements for the collection and remittance of all taxes imposed on tobacco products or cigarettes by this state with respect to the delivery sale.²⁸

If a person accepts a purchase order for a delivery sale and delivers the tobacco products or cigarettes without using a delivery service, the person must comply with all of the requirements that apply to a delivery service.²⁹

Section 210.095(8), F.S., currently provides that the penalty for the following violations of the delivery sale requirements is a misdemeanor of the third degree.³⁰

- A delivery of tobacco products, on behalf of a delivery service, to an individual who is under 18 years of age.
- A person under the age of 18 who violates any of the provisions of the mail order or internet sales requirements.

These provisions do not apply to nicotine products and nicotine dispensing devices. However, it is illegal for a person to deliver nicotine products or nicotine dispensing devices to persons under 18 years of age.³¹

Nicotine Products Regulation in Florida

Laws related to nicotine products are substantially the same as tobacco laws in the following ways:

- The sale, delivery, or giving of nicotine products or nicotine dispensing devices to any person under 18 years of age is prohibited and punishable as a second degree misdemeanor.³²
 - It is a complete defense to a violation if an underage person falsely misrepresented his or her age, the underage person had the appearance to a prudent person to 18 years of age or older, and the person carefully checked, and relied on, the driver license or identification card of the recipient.³³

²⁷ See s. 569.008(3), F.S.

²⁸ Section 210.095(5), F.S.

²⁹ Id.

³⁰ Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S. provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

³¹ S. 877.112(5), F.S.

³² Section 775.082, F.S., provides that a misdemeanor of the second degree is punishable by a term of imprisonment not to exceed 60 days. Section 775.083, F.S. provides that a misdemeanor of the second degree is punishable by a fine not to exceed \$500.

³³ S. 877.112(5), F.S.

- Persons under 18 years of age are prohibited from knowingly possessing, purchasing, or misrepresenting their age or military service to obtain nicotine products or nicotine dispensing devices commit a noncriminal violation. A person who violates this commits a noncriminal penalty.³⁴
 - A court must revoke, suspend, or delay of eligibility for, a driver license for persons under 18 years of age who failed to complete the noncriminal penalties for knowingly possessing or misrepresenting their age in order to purchase nicotine products or nicotine dispensing devices.³⁵
- Retail dealers of nicotine products and nicotine dispensing devices are required to post signs that the sale of nicotine products and nicotine dispensing devices to persons under 18 years of age is prohibited.³⁶
- Nicotine products or nicotine dispensing devices may not be sold or delivered by self-service merchandising, except when such products are under the direct control, or line of sight where effective control may be reasonably maintained by the retailer or their agent or employee.³⁷

Laws related to nicotine products and nicotine dispensing devices are different from tobacco laws in the following ways:

- Retailers are not required to obtain a tobacco products dealer permit from the Division;
- Retailers are not subject to inspection without a search warrant.
- Manufacturers and distributors of nicotine products and nicotine dispensing devices are not required to obtain a permit from the Division.
- The requirements for remote sales of tobacco products do not apply to nicotine products or nicotine dispensing devices.
- There are no exemptions for the prohibition of the purchase and possession of nicotine products and nicotine dispensing products by persons under 18 years old, such as military service.

Section 877.112, F.S., provides for the regulation of nicotine products and nicotine dispensing devices, such as electronic cigarettes (e-cigarettes). A “nicotine dispensing device” is:

any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.³⁸

A “nicotine product” is any product that contains nicotine, including liquid nicotine intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means. The definition does not include a tobacco product under Florida law, a drug or device under federal law, or a product that contains incidental nicotine.³⁹

Jurisdictions that Raised the Age from 18 to 21

Nine states, and the U.S. Territory of Guam, have passed legislation raising the minimum age for a person to lawfully possess or purchase tobacco products and nicotine products to 21 years of age:

³⁴ Ss. 877.112(6), (7), F.S.

³⁵ S. 322.056, F.S.

³⁶ S. 877.112(10), F.S.

³⁷ S. 877.112(11), F.S.

³⁸ S. 877.112(1)(a), F.S.

³⁹ S. 877.112(1)(b), F.S.

- Arkansas;
- California;
- New Jersey;
- Oregon;
- Hawaii;
- Maine;
- Massachusetts;
- Utah (effective July 1, 2021); and
- Virginia (effective July 1, 2019).⁴⁰

At least 445 localities, including New York City, Chicago, San Francisco, San Antonio, Boston, Cincinnati, Cleveland, Columbus, and Kansas City (in Kansas and Missouri), plus Washington, D.C., have also raised the minimum to 21 years of age. Additionally, the Illinois, New York, and Washington Legislatures have passed bills raising the minimum age to purchase tobacco and nicotine products from 18 to 21, and have sent the bills to their respective Governors.⁴¹

In January of 2019, Alachua County became the first county in Florida to raise the minimum legal age to purchase tobacco to 21. The ordinance applies to tobacco products, e-cigarettes, vaping products and liquid nicotine devices. Municipalities in the county are authorized to opt out of the ordinance if they choose. In addition, retailers are required to purchase and maintain a special license to sell tobacco and nicotine products. Businesses located within 1,000 feet of a public school are prohibited from licensure; however, businesses previously licensed to sell tobacco products by the state are grandfathered in. Penalties for violations include license suspensions ranging from seven days up to losing the license permanently for four violations in a 24-month period.⁴²

Local Government Authority

The Florida Constitution grants local governments broad home rule authority. Specifically, non-charter county governments may exercise those powers of self-government that are provided by general or special law.⁴³ Those counties operating under a county charter have all powers of self-government not inconsistent with general law or special law approved by vote of the electors.⁴⁴

Likewise, municipalities⁴⁵ have those governmental, corporate, and proprietary powers that enable them to conduct municipal government, perform their functions and provide services, and exercise any power for municipal purposes, except as otherwise provided by law.⁴⁶

⁴⁰ See Campaign for Tobacco-Free Kids, States and Localities that have Raised the Minimum Legal Sale Age for Tobacco Products to 21, available at <https://www.tobaccofreekids.org/what-we-do/us/sale-age-21> (last visited Apr. 3, 2019); Public Health Law Center, *Youth Access to E-Cigarettes*, December 15, 2018 <https://publichealthlawcenter.org/sites/default/files/States-with-Laws-Restricting-Youth-Access-to-ECigarettes-Dec2018.pdf> (last visited April 1, 2019).

⁴¹ *Id.* Rebecca Anzel, *Bills to raise age to buy tobacco products sent to Gov. Pritzker*, Chicago Sun Times (Mar. 14, 2019) <https://chicago.suntimes.com/business/tobacco-21-illinois-legal-age-vaping-ecigarettes/> (last visited Apr. 1, 2019); Kristin Lam *Washington set to become ninth state to raise smoking and vaping age to 21*, USA Today (Mar. 27, 2019) <https://www.usatoday.com/story/news/nation/2019/03/27/washington-state-poised-raise-smoking-and-vaping-age-21/3294447002/> (last visited Apr. 1, 2019); Associated Press, *New York moving smoking age from 18 to 21*, The Times Herald-Record (Apr. 2, 2019) <https://www.recordonline.com/news/20190402/new-york-moving-smoking-age-from-18-to-21> (last visited Apr. 3, 2019).

⁴² Ord. No. 2019-04

⁴³ Art. VIII, s. 1(f), Fla. Const.

⁴⁴ Art. VIII, s. 1(g), Fla. Const.

⁴⁵ A municipality is a local government entity created to perform functions and provide services for the particular benefit of the population within the municipality, in addition to those provided by the county. The term “municipality” may be used interchangeably with the terms “town,” “city,” and “village.”

⁴⁶ Art. VIII, s. 2(b), Fla. Const. See also s. 166.021(1), F.S.

Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment may be inconsistent with state law if (1) the Legislature "has preempted a particular subject area" or (2) the local enactment conflicts with a state statute. Where state preemption applies, it precludes a local government from exercising authority in that particular area.⁴⁷

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.⁴⁸ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.⁴⁹ In cases where the Legislature expressly or specifically preempts an area, the intent of the Legislature is readily ascertained.⁵⁰ In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.⁵¹

Smoking of Medical Marijuana by Minors

Current law prohibits a qualified physician⁵² from certifying patients under the age of 18 for the medical use of marijuana in a form for smoking, unless the patient is diagnosed with a terminal condition,⁵³ the physician determines that smoking is the most effective route of administration, and a second board-certified pediatrician concurs with the qualified physician's determination. The physician must document such determination in the patient's medical record and the medical marijuana use registry. The physician must also obtain the written informed consent of the patient's parent or legal guardian using a standardized form created by the Board of Medicine or Board of Osteopathic Medicine that includes information addressing the negative health effects of smoking marijuana on individuals under age of 18.

Effect of the Bill

The bill increases the minimum age to lawfully purchase and knowingly possess tobacco products, nicotine products, and nicotine dispensing devices in Florida from 18 years old to 21 years old. The bill:

- Prohibits the sale, delivery, bartering, furnishing, shipping, or giving tobacco products, nicotine products, or nicotine dispensing devices to persons under the age of 21;
- Provides that anyone under the age of 21 commits a noncriminal penalty for knowingly possessing tobacco products, nicotine products, or nicotine dispensing devices or misrepresenting his or her age or military service to purchase them;
- Provides that anyone under the age of 21 commits a criminal offense for knowingly violating any of the requirements for remote sales of tobacco products and cigarettes;
- Requires establishments to sell tobacco products, nicotine products, and nicotine dispensing devices in a certain manner unless the establishment prohibits persons under the age of 21 on the establishment's premises;

⁴⁷ Wolf, *The Effectiveness of Home Rule: A Preemption and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009), available at <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/> (last visited Apr. 3, 2019).

⁴⁸ See *City of Hollywood v. Mulligan*, 934 So. 2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309 (Fla. 2008).

⁴⁹ *Mulligan*, 934 So. 2d at 1243.

⁵⁰ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

⁵¹ See, e.g., *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

⁵² To certify patients for medical use of marijuana, a physician must hold an active, unrestricted license as an allopathic physician under chapter 458 or as an osteopathic physician under chapter 459 and comply with certain physician education requirements. See ss. 381.986(1)(m), F.S. and 381.986(3)(a), F.S.

⁵³ S. 381.986, defines a terminal condition as a progressive disease or medical or surgical condition that causes significant functional impairment, is not considered by a treating physician to be reversible without the administration of life-sustaining procedures, and will result in death within 1 year after diagnosis if the condition runs its normal course. The terminal condition must be diagnosed by a physician other than the qualified physician issuing the physician certification.

- Allows certain exemptions related to the sale or possession of tobacco products, nicotine products, and nicotine dispensing units for persons under the age of 21, including members of the military and retail employees; and
- Removes the following exemptions:
 - A person who has had his or her disability of nonage removed under ch. 743, F.S; and
 - A person who is emancipated by a court of competent jurisdiction and released from parental care and responsibility.

The bill also preempts to the state the establishment of the minimum age to knowingly possess or purchase sale tobacco products, nicotine products, and nicotine dispensing devices, and the regulation of the marketing of such products. However, the preemption does not prohibit a local government's ability to require licensure for the retail sale of tobacco products.

The bill also prohibits a qualified physician from certifying a patient under the age of 21 for the medical use of marijuana in a form for smoking, unless the patient is terminal, the physician determines that smoking is the most effective route of administration for the patient, and a second physician who is a board-certified pediatrician concurs with such determination. Consistent with current law, the physician must obtain the written informed consent of the patient's parent or legal guardian if the patient is under the age of 18.

The bill provides an effective date of October 1, 2019.

B. SECTION DIRECTORY:

Section 1: Amends s. 210.095, F.S., relating to shipping notice requirements for tobacco products, and violations thereof, and increasing the age of a person who may receive tobacco products that have been shipped and violations thereof.

Section 2: Amends s. 381.986, F.S., relating to medical use of marijuana, and increasing the age of a person who may use medical marijuana in a form for smoking.

Section 3: Amends s. 386.212, F.S., amending the age to use tobacco within a certain distance of a school.

Section 4: Amends s. 569.002, F.S., conforming provisions.

Section 5: Amends s. 569.007, F.S., conforming provisions.

Section 6: Amends s. 569.0075, F.S., conforming provisions.

Section 7: Amends s. 569.008, F.S., conforming provisions.

Section 8: Amends s. 569.101, F.S., increasing the age of persons who may lawfully purchase tobacco products.

Section 9: Amends s. 569.11, F.S., increasing the age of persons who may lawfully purchase or possess tobacco products.

Section 10: Amends s. 569.12, F.S., conforming provisions.

Section 11: Amends s. 569.14, F.S., conforming provisions.

Section 12: Amends s. 569.19, F.S., conforming provisions.

Section 13: Amends 877.112, F.S., increasing the age of persons who may lawfully purchase or possess nicotine products and electronic nicotine dispensing devices.

Section 14: Provides an effective date of October 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

On April 12, 2019, the Revenue Estimating Impact Conference reviewed the bill and estimated it will result in a reduction in Tobacco Tax and Surcharge collections. The following chart shows the impact over the next five fiscal years (in millions):⁵⁴

Fiscal Year	General Revenue	Trust Fund	Total
2019-20	\$ (0.4)	\$ (1.1)	\$ (1.6)
2020-21	\$ (0.6)	\$ (1.7)	\$ (2.3)
2021-22	\$ (0.9)	\$ (2.2)	\$ (3.1)
2022-23	\$ (1.1)	\$ (2.8)	\$ (3.9)
2023-24	\$ (1.1)	\$ (2.8)	\$ (3.9)

2. Expenditures:

There may be an indeterminate positive fiscal impact on the state due to a possible reduction in treatment of smoking related diseases if these persons received services from a state program (e.g., Medicaid).

The Office of Medical Marijuana Use will incur costs related to rulemaking to implement the bill's requirements. Current resources are adequate to absorb these costs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

On April 12, 2019, the Revenue Estimating Impact Conference reviewed the bill and estimated the local government fiscal impact to be insignificant.⁵⁵

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Businesses will no longer be able to sell tobacco products, nicotine products, and nicotine dispensing devices to persons who are older than 18 but younger than 21. Individuals who are older than 18 but younger than 21 will no longer be able to purchase or possess tobacco products, nicotine products, and nicotine dispensing devices until they reach the age of 21.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

⁵⁴ Office of Economic & Demographic Research, April 12, 2019 Revenue Estimating Conference (http://edr.state.fl.us/Content/conferences/revenueimpact/archives/2019/_pdf/Impact0412.pdf). Note: There is a possible negative impact on sales tax collected on nicotine dispensing devices. The EDR analysis only focuses on the impact on Tobacco Tax and Surcharge.

⁵⁵ *Id.*

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 3, 2019, the Health and Human Services adopted three amendments and reported PCB HHS 19-03 favorably as amended.

The amendments:

- Preempt the establishment of the minimum age to possess or purchase nicotine dispensing devices, nicotine products, and tobacco products, and the regulation of the marketing of such products to the state.
- Clarify that such preemption does not prohibit a local government's ability to require licensure for the retail sale of tobacco products.
- Conforms the regulation of nicotine products and nicotine dispensing devices to the regulations for tobacco products by providing that the minimum age requirement to purchase and possess nicotine products and nicotine dispensing devices does not apply to individuals who are:
 - In the military reserve or on active duty in the Armed Forces of the United States; or
 - Acting within the scope of their lawful employment with an entity that sells, manufactures, or distributes nicotine products or nicotine dispensing devices.
- Require a physician certifying the medical use of marijuana in a form for smoking for a patient under the age of 18 to obtain the written informed consent of the patient's parent or legal guardian.