

STORAGE NAME: h1719.grr
DATE: April 7, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1719

RELATING TO: Professions, Occupations, and Businesses

SPONSOR(S): Representative Feeney

STATUTE(S) AFFECTED: None

COMPANION BILL(S): SB 616

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL RULES AND REGULATIONS
- (2) FINANCE AND TAXATION
- (3)
- (4)
- (5)

I. SUMMARY:

Presently, state agencies may bring criminal, civil or administrative actions against persons violating laws or rules enforceable by that agency. Statutory limitations exist for criminal actions, civil actions, and actions to collect taxes.

HB 1719 provides that any state agency which collects taxes or regulates the activities of any profession, occupation or business is prohibited from enforcing a regulation if the individual did not have prior knowledge of the regulation. In such instances, a state agency must inform the individual of the requirements of the regulation and give the person a reasonable time to comply. This provision does not apply if the violation constitutes a felony. Additionally, the bill provides that it is a defense to a violation of a regulation that a state agency has failed to uniformly enforce the regulation.

The bill also provides that if an agency knew or should have known about a violation and did not give the individual notice of the requirements of the regulation within one year, then the agency is estopped from enforcing the regulation, unless the individual had prior actual knowledge of the requirements of the regulation.

The fiscal impact of this bill is indeterminate. The Department of Business and Professional Regulation indicates that the bill will have a negative fiscal impact on state agencies.

This act shall take effect upon becoming a law.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Presently, state agencies possess limited statutory authority to promulgate rules which have the effect of law. Agency rules must be noticed in the Florida Administrative Weekly, a publication available by subscription or in public libraries, prior to taking effect and may be challenged pursuant to the hearing process set forth in chapter 120, F.S. According to the Joint Administrative Procedures Committee, there are currently 25,000 rules in the Florida Administrative Code. Consequently, it may be impossible for the average citizen or businessperson to be aware of every rule that may impact their business or personal activities.

Currently, if an individual does not comply with a rule, the violation may result in a fine or other administrative penalty. Some agencies have established "recommended penalties" for each violation, which establishes the maximum and minimum penalty available for each offense. This recommendation may take into account the severity of the violation as well as whether it is a first or subsequent offense.

Additionally, most licensed professionals are required to be tested on the laws and rules of that particular profession as a requisite for licensure. Many licensees are also required to complete continuing education courses in order to renew their license. The subject matter of such courses typically address any changes to the laws and rules governing that profession. Many professional associations send newsletters to licensees, informing them of changes to the laws or rules which govern or may affect their particular industry. Also, various business organizations, such as the National Federation of Independent Business and Associated Industries of Florida, furnish information to their members regarding certain statutory or rule changes.

Finally, ignorance of the law is not a defense to not complying with the law. "Ignorance or mistake of law will not excuse an act in violation of the laws so long as the laws clearly and unambiguously proscribe the conduct alleged." Moncrief v. State, Comm'r of Ins., 415 So.2d 785 (Fla. 1st DCA 1982).

Statutes of Limitations

Presently, state agencies may bring criminal, civil, or administrative actions depending on the statute that governs the regulated activity. Administrative actions are controlled by the Administrative Procedures Act and more generally, constitutional Due Process considerations. Additionally, Florida Statutes provide for limitations on the time in which an action must be brought. Criminal action must be brought within the time limitations found in s. 775.15 F.S. (1995), and civil actions must be brought within the time limitations found in s. 95.11, F.S. (1995). Finally, the doctrine of laches provides that where there is an undue lapse of time in enforcing a right of action, one is considered negligent for failing to act more promptly. Black's Law Dictionary 266-7 (3d ed. 1991). In Florida, laches is an affirmative defense, and is based upon a plaintiff's unreasonable delay in asserting a known right which causes undue prejudice to the party against whom the claim is asserted. See Corona Properties of Fla. v. Monroe County, 485 So.2d 1314 (Fla. 3d DCA 1986) and Brumby v. Brumby, 647 So.2d 330 (Fla. 4th DCA 1994). The undue delay may prejudice the defendant's ability to defend against an action because evidence necessary to defend against the claim may be unavailable or

lost, or witness' memories of the events may dim with time. Black's Law Dictionary 266-7 (3d.ed 1991).

The Administrative Procedures Act

Chapter 120, F.S., the Administrative Procedures Act (APA), requires state agencies to adopt their policies as rules, provides procedures for agencies to adopt rules, and provides for persons to challenge such rules. The APA also provides procedures for addressing administrative disputes that affect a citizen's substantial interests. The APA was substantially revised during the 1996 Legislative Session. Chapter 96-159, Laws of Florida, restricted agency rulemaking power, providing that state agencies may only adopt rules that implement, interpret, or make specific particular powers and duties granted by the enabling statute.

Section 120.542, F.S. (1996 Supp.), authorizes the use of rule waiver and variance procedures by state agencies. A waiver or variance of a rule must be given when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by that person by other means and when the application of a rule would create a substantial hardship or would violate principles of fairness.

The APA also requires state agencies to review their rules to determine which rules, if violated, would constitute a "minor" violation. According to s. 120.695(2)(a), F.S., the legislative intent is for each agency to issue a notice of noncompliance as the first response to a minor violation of a rule. Such notice must identify the rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time to comply with the rule. However, according to the reports that were filed, very few rules were designated for a "Notice of Noncompliance" by state agencies.

B. EFFECT OF PROPOSED CHANGES:

HB 1719 provides that state agencies may not initiate a criminal, civil, or administrative proceeding against an individual who has violated a regulation until the agency informs that individual of the requirements of the regulation and gives them a reasonable time to comply. This provision does not apply if the violation constitutes a felony or if the violator had prior, actual knowledge of the requirements of the regulation. Additionally, the bill provides that it is a defense to the charge of violating the regulation that the state agency has a pattern of failure to enforce the regulation uniformly.

Additionally, if an agency has had actual or imputed knowledge of a violation for a period of more than one year and did not notify the violator of the requirements of the regulation during that time, the agency is estopped from enforcing the regulation against that person. This provision does not apply if the violator had knowledge of the requirements of the regulation.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. State agencies must inform an individual of the requirements of a regulation prior to instituting a criminal, civil or administrative proceeding against that individual for violation of a regulation.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

NA

(2) what is the cost of such responsibility at the new level/agency?

NA

(3) how is the new agency accountable to the people governed?

NA

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. If an individual did not know about a regulation, the state agency would have to inform the individual of the requirements of the regulation and allow a reasonable time for compliance before any penalties are assessed. Additionally, in any criminal, civil or administrative proceeding, it is a defense to the violation charged that the state agency has failed to uniformly enforce the regulation.

Also, if an agency knew or should have known about a violation and did not give the violator notice of the requirements of the regulation within one year, the agency is estopped from enforcing the regulation, unless the violator had prior actual knowledge of the requirements of the regulation.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

NA

- (2) Who makes the decisions?

NA

- (3) Are private alternatives permitted?

NA

- (4) Are families required to participate in a program?

NA

- (5) Are families penalized for not participating in a program?

NA

- b. Does the bill directly affect the legal rights and obligations between family members?

NA

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

NA

(2) service providers?

NA

(3) government employees/agencies?

NA

D. SECTION-BY-SECTION RESEARCH:

Please see Effect of Proposed Changes section above.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. See Fiscal Comments section.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

Indeterminate. See Fiscal Comments section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

Individuals who had no prior actual knowledge of a violation of an agency regulation will be notified of the requirements of the regulation and given the opportunity to comply with the regulation prior to being penalized for the violation.

Furthermore, it is a defense that the state agency has a pattern of failure to uniformly enforce a regulation. In such instances, the state agency would be prohibited from penalizing an individual for the violation of the regulation.

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate.

D. **FISCAL COMMENTS:**

The Department of Business and Professional Regulation (DBPR) suggests that it may be difficult to collect penalties, fines, regulatory fees or to recover costs associated with investigations of complaints. DBPR indicates that such costs will have to be recovered from other licensees.

The Department of Revenue (DOR) indicates that this bill will impair their ability to collect taxes.

Additionally, the costs associated with informing an individual of the requirements of a regulation will depend upon the notification method used by the agency (mailed notice, personal service, posted on the Internet, etc.) The bill does not specify how an agency shall provide such notice.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. **APPLICABILITY OF THE MANDATES PROVISION:**

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

The term "regulation" is not defined in the bill. It is unclear whether such "regulations" are intended to include laws and rules. The Administrative Procedures Act defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement of solicits any information not specifically required by statute or by an existing rule". s. 120.52(15), F.S. (1996 Supp.).

The bill requires state agencies "to inform the person of the requirements of the regulation and gives the person a reasonable time to comply". DBPR and DOR indicate that the bill does not clearly state what agency action must be taken to properly "inform" a person of the requirements of the regulation. DBPR and DOR are also unclear as to what constitutes "a reasonable time". Further, it is unclear whether there is any presumption to be applied with the defense of any agency not uniformly enforcing a regulation.

DBPR is also concerned with the term "actual or imputed knowledge". The point at which an agency will be determined to have actual or imputed knowledge of a violation is unclear. The department indicates that if the intent of the bill is to vest the agency with imputed knowledge at the time a complaint is made, the agency will be estopped from enforcing the law, unless the agency can complete its investigation and issue a complaint within one year.

Currently, section 120.695(2)(a), F.S., of the Administrative Procedures Act, prescribes that any Notice of Noncompliance for a minor violation of a rule must (1) identify the specific rule that is being violated; (2) provide information on how to comply with the rule; and (3) specify a reasonable time for the violator to comply with the rule. In this instance, the agency determines what constitutes "a reasonable time" for compliance.

According to the National Federation of Independent Business (NFIB), it would be a full-time job for each professional or businessperson to be aware of all the regulatory requirements to which they are subject. Their position is that professionals and businesses want to comply with the laws, but government has made it impossible to know the details of newly-established laws. Similarly, they point out that many long-established laws are so unclear that the regulating agencies and the courts often disagree as to their application or impact, and assert that the professional or businessperson cannot be legitimately expected to always be clear on how to comply with even the laws of which he or she is aware.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

STORAGE NAME: h1719.grr

DATE: April 7, 1997

PAGE 10

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:

Legislative Research Director:

Angela Price

David M. Greenbaum