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DATE: January 18, 1999

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

BILL #: HB 173
RELATING TO: State Agency Rules
SPONSOR(S): Rep. Argenziano
COMPANION BILL(S):

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

- (1) GOVERNMENTAL RULES AND REGULATIONS
 - (2) FINANCE AND TAXATION
 - (3) GENERAL GOVERNMENT APPROPRIATIONS
 - (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 173 provides that state agencies may not initiate a criminal, civil, or administrative proceeding against an individual who has violated a rules until the agency informs that individual of the requirements of the rules 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 rule; or
- violation of the rule would affect an agency's ability to obtain or retain a federally delegated approved environmental program.

The bill provides that it is a defense to the charge of violating the rule to demonstrate that the state agency has a pattern of failure to enforce the rule with respect to substantially the same violation committed by others.

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 rule during that time, the agency is estopped from enforcing the rule against that person. This provision does not apply if the violator had knowledge of the requirements of the rule within that time period.

The provisions of the act do not apply to taxes, penalties, fees, surcharges, or interest imposed by statute. Additionally, the provisions of the act do not apply to rules directly related to the practice of a profession, occupation, or business subject to licensure by the state.

The bill has an indeterminate fiscal effect and takes effect upon becoming a law.

II. SUBSTANTIVE ANALYSIS:

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, as of September 1998, there were an estimated 28,500 rules published in the Florida Administrative Code.

Currently, if an individual does not comply with a rule, the violation may result in a fine or other administrative penalty. Some agencies have created "recommended penalties" for each violation, which establish the maximum and minimum penalty applicable 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 that address changes to the laws and rules governing that profession in order to renew their license. 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 Procedure 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. (1998 Supp.), and civil actions must be brought within the time limitations found in s. 95.11, F.S. (1998 Supp.). 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 Procedure Act

Chapter 120, F.S., the Administrative Procedure Act (APA), requires state agencies to adopt policies that have the force of law, 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, restricts agency rulemaking power and provide 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. (1997), 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 173 provides that state agencies may not initiate a criminal, civil, or administrative proceeding against an individual who has violated a rule until the agency informs that individual of the requirements of the rules 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 rule; or
- violation of the rule would affect an agency's ability to obtain or retain a federally delegated approved environmental program.

The bill provides that it is a defense to the charge of violating the rule to demonstrate that the state agency has a pattern of failure to enforce the rule with respect to substantially the same violation committed by others.

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 rule during that time, the agency is estopped from enforcing the rule against that person. This provision does not apply if the violator had knowledge of the requirements of the rule within that time period.

The provisions of the act do not apply to taxes, penalties, fees, surcharges, or interest imposed by statute. Additionally, the provisions of the act do not apply to rules directly

related to the practice of a profession, occupation, or business subject to licensure by the state.

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?

N/A

(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 rule prior to instituting a criminal, civil or administrative proceeding against that individual for violation of a rule.

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

N/A

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?

N/A

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

N/A

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

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

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

N/A

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

N/A

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

N/A

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

N/A

3. Personal Responsibility:

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

N/A

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

N/A

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 rule, the state agency would have to inform the individual of the requirements of the rule 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 rule.

Also, if an agency knew or should have known about a violation and did not give the violator notice of the requirements of the rule within one year, the agency is

estopped from enforcing the rule, unless the violator had prior actual knowledge of the requirements of the rule.

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

N/A

5. Family Empowerment:

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

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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

N/A

- 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?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

N/A

E. SECTION-BY-SECTION ANALYSIS:

Please see section II.B., Effect of Proposed Changes, for discussion.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

Indeterminate. The provisions of the act could impact on the amount of revenue collected by agencies as a result of investigations of violations of administrative rules.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

Individuals who had no prior actual knowledge of a violation of an agency rule will be notified of the requirements of the rule and given the opportunity to comply with the rule 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 rule. In such instances, the state agency would be prohibited from penalizing an individual for the violation of the rule.

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

N/A

D. FISCAL COMMENTS:

N/A

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require the 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 revenue 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:

It appears that the bill has conflicts among its provisions as well as inconsistencies within its provisions. It appears that the bill would effect those agencies that collect a tax, impose a fee, or regulate a profession, occupation, or business, but the bill also exempts statutorily imposed taxes and fees, and agency rules regulating a profession, occupation, or business. Section one of the bill targets those agencies that collect taxes and those agencies that regulate professions, occupations, and businesses. However, section three of the bill exempts statutorily imposed taxes and fees from the provisions of the bill. Moreover, the Florida Constitution provides that no tax shall be levied except according to law. Fla. Const. art. VII, §§ 1(a), 9(a). See also *Department of Revenue v. Young American Builders*, 358 So.2d 1096 (Fla. 1st DCA 1978) (A tax sought to be imposed without legislative authority is a nullity.), *aff'd per curiam*, 376 So.2d 849 (1979). Additionally, section three exempts the rules regulating the practice of a profession, occupation or business regulated by the state from the provisions of the bill. Therefore, it appears that the practical effect of the bill is to exempt from the provisions of the bill those agencies that collect a tax or impose a fee, or regulate a profession, occupation, and business as a normal course of business.

The bill appears to be inconsistent among its requirements of agency knowledge of a violation prior to applying penalty. The bill requires in section one that an agency demonstrate knowledge that a person has violated a rule and must give opportunity to cure prior to instituting a proceeding. In section two, the bill requires that the agency demonstrate actual knowledge of the violation or demonstrate due diligence in investigating a situation that would result in a violation, and then demonstrate that it did not have actual or imputed knowledge of the violation for more than one year prior to instituting a violation proceeding.

Finally, several activities demanded of agencies by the bill are not defined in the bill. Section one does not describe the manner by which an agency is to inform a potential violator of the infraction, nor does it establish what reasonable period of time would be allowable to remedy the violation. Section two does not define the manner by which a violator is to have been given notice of the rule requirements where the agency is demonstrating it is not estopped from instituting a violation proceeding.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

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VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

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