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DATE: March 18, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CORRECTIONS
ANALYSIS**

BILL #: CS/HB 331

RELATING TO: State Correctional Facilities/Smoking

SPONSOR(S): Committee on Corrections & Representative Trovillion & Representative Kosmas

COMPANION BILL(S): SB 734

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

- (1) CORRECTIONS YEAS 5 NAYS 3
- (2) GOVERNMENTAL OPERATIONS
- (3) CRIMINAL JUSTICE APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

CS/HB 331, relating to the Florida Clean Air Act, would prohibit the possession and use of tobacco products by inmates, employees and visitors in state and private correctional facilities. Provisions include:

- providing that inmates who possess or use tobacco products would commit a disciplinary infraction and would be subject to punishment determined to be appropriate by the disciplinary authority in the facility, which could include forfeiture of gain-time or the right to earn future gain-time;
- requiring the Department of Corrections and the private vendors operating correctional facilities to provide smoking cessation assistance to inmates;
- authorizing the department and private vendors operating correctional facilities to adopt policies permitting tobacco use by employees and visitors only outside of the secure perimeter of a facility and not within the presence of any inmate; and
- providing legislative intent to have a certain percentage of health care cost savings found to be attributable to the removal of tobacco from correctional facilities appropriated for incentive bonuses for correctional and correctional probation officers.

CS/HB 331 is intended to significantly reduce inmate health care costs in the future. The extent to which inmate health care costs will be avoided is indeterminant, but potentially significant.

According to the department, there will be some costs associated with providing smoking cessation programs for inmates; however, such costs are likely to be minimal.

This bill will become effective upon becoming law, and its provisions must be fully implemented by January 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Current Policy

The Florida Department of Corrections currently allows inmates to purchase and use tobacco products within state correctional facilities. Rule 33-20.001, Florida Administrative Code, restricts smoking in all indoor areas at state correctional facilities. A superintendent may designate a smoking area where inmates are housed or where inmate activities occur. Inmates are prohibited from smoking in dormitories or housing areas which are designated as non-smoking areas. A superintendent has the discretion to restrict areas where inmates may use tobacco-related products. For instance, individual superintendents may restrict smoking in their institutions by not allowing smoking by inmates or visitors in visiting parks. If smoking in the visiting parks is not permitted, superintendents may also prohibit inmates and visitors from leaving the visiting park to go to an outdoor area to smoke and return to the visiting park.

Adult inmates may purchase cigarettes from canteens in correctional institutions which generates monies that are deposited in the Inmate Welfare Trust Fund. Currently, such moneys may be used to employ personnel and for operating and fixed capital expenses associated with correctional education to provide literacy programs, vocational training, and academic programs, fixed capital and operating expenses to employ personnel to operate libraries, chapels, and visiting pavilions, among other uses. s. 945.215 (1) (b), F.S.

Inmate Smoking in Private Correctional Facilities

According to the Correctional Privatization Commission, inmates are permitted to use tobacco products in designated smoking areas inside and outside buildings at South Bay, Moore Haven, and Bay Correctional Institutions. Private correctional facilities operate under a policy which essentially parallels the rule adopted by the Department of Corrections. In states in which inmates are prohibited from smoking, such as Texas, private correctional vendors are required to adhere to the non-smoking policy.

Gadsden Correctional Institution under contract with DOC and operated by Corrections Corporation of America operates as a tobacco free facility.

Tobacco Use and Health Care

The department estimates that between 65% and 75% of the inmate population smokes cigarettes in prison, a rate about 2.5 times as high as the general male population.

The Department of Corrections acknowledges that smoking contributes to or exacerbates certain health-related conditions such as hypertension, pulmonary disease, and diabetes among inmates. At this time, the department cannot determine the number of inmates who have medical conditions caused solely by the use of tobacco or who are currently receiving treatment for medical conditions which have been exacerbated by the use of tobacco. Some data collected by the department suggests, however, that total yearly costs related to tobacco use have been exceeding \$2 million for some time.

The total annual expenditures for inmate health care have been increasing rapidly over the last several years due to prison health system reforms and the increasing inmate population. Nevertheless, the rate of annual inmate health care costs for the Department of Corrections has remained significantly below the annual health care cost rate for the average Florida citizen.

The following tables give an approximate fiscal year expenditure on inmate health care, per diem rate for health care, and the average annual expenditure on health care per inmate by the Department of Corrections.

Total Annual Inmate Health Care Expenditures	
Fiscal Year	Approximate Inmate Health Care Expenditure
1992-93	\$ 151.5 million
1993-94	\$172 million
1994-95	\$176 million
1995-96	\$194.5 million
1996-97	\$205 million
1997-98	\$220.5 million

Source: Department of Corrections, Office of Health Services

Per Diem Rates on Inmate Health Care by Fiscal Year	
Fiscal Year	Per Diem on Health Care
1992-93	\$8.14
1993-94	\$8.25
1994-95	\$8.36
1995-96	\$8.60
1996-97	\$9.11
1997-98	\$9.57

Source: Department of Corrections, Office of Health Services

Increases in Inmate Health Expenditures	
Fiscal Year	Annual Cost Per Inmate
1990-91	\$2,923
1991-92	\$3,080
1992-93	\$3,147
1993-94	\$3,163
1994-95	\$3,048
1995-96	\$3,139
1996-97	\$2,960
1997-98	\$3,493

Source: Department of Corrections, Office of Health Services

For FY 1998-99, the Legislature appropriated over \$216 million for inmate health care, which represented approximately 14 percent of every dollar provided to the Department of Corrections.

An Office of Program Policy Analysis And Governmental Accountability (OPPAGA) report analyzed inmate health care costs to determine ways to reduce or contain those costs. (Report Number 96-22, November 27, 1996). In its analysis, the researchers reported the following advantages and disadvantages of implementing smoking cessation programs in prisons.

Advantages:

- Reduction in long term treatment costs as inmates maintain their health.
- Program(s) act to occupy inmates, reducing idleness.
- Educate and instill inmate responsibility for their health.

Disadvantages:

- Additional staff required to develop and implement programs.
- Cost of program implementation.
- Institutional space limitations.
- May not achieve measurable cost savings, or even impact inmate behavior.

Opinion Surveys of Tobacco Use in Prisons

In 1996, staff of the Senate Criminal Justice Committee conducted a survey of the superintendents at 54 major correctional institutions in Florida. Twenty-nine (63%) of the superintendents surveyed reported that they did not believe that inmates should be prohibited from using tobacco products. Fourteen (30%) of the superintendents surveyed reported that inmates should be prohibited from using tobacco products.

The reason cited most often by those superintendents who believed that inmates should be prohibited from using tobacco products was health-related, including the reduction in costs of providing health care services to inmates.

Of those superintendents who believed that inmates should be permitted to use tobacco products, the most frequently cited reason was that prohibiting inmates from using tobacco products would increase their anxiety and stress, creating a hostile environment and resulting in security problems.

States Restricting Tobacco Use in Prisons

Many states, however, have restricted, but not eliminated, the use of tobacco products in prison. The Federal Bureau of Prisons, in addition to state prison systems, has begun to examine the possibility of implementing a smoke-free environment or restricting tobacco use in prisons. According to the publication, *Corrections Alert*, issued in 1995, at least 13 prison systems in the United States and at least 2 prison systems in Canada had implemented or were in the process of implementing a smoke-free policy. See, *Corrections Alert*, p. 2, vol 2, no. 18 (special insert) (Aspen Publishers, Inc.) (December 11, 1995). Another publication, *On the Line*, which is published by the American Correctional Association, has provided updated and detailed information relating to the use of tobacco products in correctional facilities across the country. See, American Correctional Association, *On the Line*, p. 1, 3 (Vol. 21, No.1) (January 1998). As of late 1997, prison systems within the United States which have implemented, or are in the process of implementing, a total smoking ban, as reported in *On the Line* are: Alabama, Connecticut, Idaho, Indiana, Minnesota, Montana, North Dakota, Oregon, Texas, and Utah. Delaware, Illinois, Missouri, Nevada and Ohio reportedly have no restrictions of tobacco use in prison.

Prison systems which have implemented a ban on smoking have been able to incorporate the assistance of the American Heart Association, the American Lung Association, and the American Cancer Society. These associations have provided videos, reading materials, instructional materials, and funding to some states to implement their smoke-free policies. Texas received funding and assistance from these associations. Because of their assistance, Texas did not expend *any state funds* to provide policy-transition assistance such as smoking cessation assistance.

Georgia, which had implemented a smoke-free policy, has rescinded its smoking ban in February, 1996, citing problems with contraband and "black marketing." Georgia, however, has maintained smoking restrictions by prohibiting indoor smoking by inmates. Georgia does not sell any matches or lighters at its commissaries to discourage smoking. Inmates may now only light cigarettes at lighters that are permanently mounted outdoors.

Counties Restricting Tobacco Use in Jails

Subsection 951.22(1), F.S., prohibits the possession or introduction of any tobacco products by inmates in any county detention facility, if it is not otherwise authorized by the sheriff or officer in charge of any jail. Local jails that have banned inmate smoking have done so by jail rule. The rules invoked by sheriffs or jail administrators declare that cigarettes and tobacco products are contraband. As such, tobacco products are confiscated if they are possessed by a person who is being "booked" into a jail.

The large majority of the jails that have prohibited tobacco products have also prohibited indoor smoking for staff. Therefore, in most Florida jails, staff may only smoke tobacco outside.

According to the Florida Sheriffs Association, when county detention facilities instituted their ban on inmate possession of tobacco products, most did so with little or no time for transition for smoking inmates. Therefore, most jails originally had their smoking inmates go "cold turkey." Currently, all jails that prohibit inmate possession of tobacco products have smoking defendants go "cold turkey" upon being processed into a jail. Sheriffs and jail administrators maintain that they have not had any incidence of inmate violence or riotous behavior as a result of prohibitions on inmate possession of tobacco, according to the Florida Sheriffs Association.

Sheriffs and jail administrators noted a marked increase in sales of candies and other items in their commissaries after implementing bans on inmate possession of tobacco in their jails. Sales of these kind have remained higher since inmate tobacco bans were implemented.

Persons accused of crimes may often be held in pre-trial detention for long periods of time. During this time, most inmates are not allowed to use tobacco products because of the prohibitions instituted in almost all of Florida's jails. Many defendants also remain in jails after they have been sentenced while they await transport to a facility of the Department of Corrections. These defendants also are prohibited from using tobacco if the respective jails have banned it. Therefore, the vast majority of inmates who are considered "smokers" who are coming into the state correctional system have been smoke-free or tobacco-free for a considerable period of time before coming into the state system. As a result, if the state assumed a tobacco-free policy, most inmates coming into the state correctional system would simply be maintaining the tobacco-free status that they were subject to while they were in local detention facilities.

In March, 1997, the Committee on Intergovernmental Relations conducted a survey at the request of the House Corrections Committee on the use of tobacco products in county jail facilities. Twenty-eight of the 67 counties surveyed (42%) contacted for this survey responded. Significant survey findings include:

- Only 2 of the 28 counties restrict tobacco use by inmates.
- 10 of the 28 counties restrict tobacco use by staff.
- 26 of the 28 counties prohibit tobacco use by inmates.
- 18 of the 28 counties prohibit tobacco use by staff.
- No counties reported staff losses as a result of tobacco prohibition policies.
- No counties reported significant problems during the "transition period" prior to full implementation of a smoke-free policy.

Litigation on Smoking in Prisons

There have been lawsuits filed nationwide by non-smoking inmates alleging that adverse or hazardous prison conditions are caused by the close proximity of inmates who smoke. To alleviate this problem for non-smoking inmates in Florida, the department has at each major institution at least one non-smoking dormitory. In 1993, the Florida Department of Corrections designated at least one non-smoking dormitory in each prison in response to the U. S. Supreme Court case of *Helling v. McKinney*, No. 91-1958 (decided June 18, 1993) which involved a Nevada state prisoner. The *McKinney* case expanded the "deliberate indifference" test that was used by the Court in *Estelle v. Gamble*, 429 U.S. 97 (1976). In *McKinney*, the Court used the "objective-subjective" test for an inmate to prove a violation of the Eighth Amendment right against cruel and unusual punishment. To be successful in a legal action, an inmate would need to prove:

- (a) that he or she is being exposed to unreasonably high levels of environmental tobacco smoke;
- (b) that scientific and statistical evidence support the assertion that the potential harm from exposure to environmental tobacco smoke is serious, and that it is likely that injury to health will result in the future as a result of the exposure;
- © that the risk of exposure is not one that today's society chooses to tolerate; and
- (d) that prison authorities' current attitudes and conduct ignore the possible dangers posed by exposure to environmental tobacco smoke.

In *Helling v. McKinney, supra*, the inmate, McKinney, was successful in his claim that his involuntary exposure to the environmental tobacco smoke (commonly referred to as "second-hand smoke") of his cell mate and other inmates' posed an unreasonable risk to McKinney's health, which subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

B. EFFECT OF PROPOSED CHANGES:

Indoor use of tobacco products by all persons would be prohibited inside a state or private correctional facility. The bill defines a "prohibited area" as any indoor area of any building or portable or other enclosed structure within a state correctional facility. Employees of the Department of Corrections or a privatized facility would still be allowed to possess and use tobacco products on the premises of a state correctional facility. The superintendent or supervisor of each state correctional facility would be permitted to designate other special smoking areas for use by employees besides the out-of-doors, generally. The superintendents must also establish policies for the disposal of used tobacco products by employees to avoid possession and use by inmates.

An inmate in the state correctional system who possesses or uses any tobacco product would commit a disciplinary infraction and could be subject to forfeiture of gain-time or the right to earn gain-time in the future as well as any other punishment deemed appropriate by the disciplinary authority. Other such punishments would include confinement.

The bill would provide authority to the Department of Corrections to adopt rules to designate all prohibited areas within an institution that would be prohibited by this bill and to impose penalties for violations of the provisions of the bill. Privatized prisons would be authorized to adopt policies and procedures to implement the provisions of this bill.

Pursuant to the statement of legislative intent, the Department of Corrections and the Correctional Privatization Commission would be required to make smoking cessation assistance *available* to inmates to implement the tobacco product prohibition. This requirement does not necessarily mean that the department or the commission are directly responsible for *providing* such assistance. Rather, such assistance may be made available to inmates by outside sources actually providing the assistance.

The bill would be effective upon becoming a law. The Department of Corrections and the Correctional Privatization Commission would be required to implement the provisions of this bill as soon as possible, but the requirements of this bill must be fully implemented by January 1, 2000.

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?

The bill increases the authority of the Department of Corrections and private vendors operating correctional facilities to make rules by authorizing the development of rules and procedures to allow tobacco possession and use by employees and visitors under very limited circumstances.

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

This bill increases the responsibilities of the Department of Corrections and private correctional facilities by requiring them to enforce the prohibition against tobacco possession and use for inmates, employees and visitors, to provide smoking cessation assistance to inmates, and to fully implement a program by January 1, 2000.

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

Currently, tobacco products are sold through the inmate canteens in prisons. By prohibiting the possession and use of tobacco products, these items would no longer be available for purchase.

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

This bill possibly could reduce the need for health services provided by the state for inmates who experience improved health as a result of not smoking.

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

None.

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

None.

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

None.

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?

This bill may reduce the need for health care services provided to inmates by the state if their health improves as a result of not smoking.

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

While there may be certain costs associated with implementing the smoking cessation assistance to inmates that the Department of Corrections and private vendors must provide, these costs will be borne by the state or private correctional facilities.

Inmates who need non-emergency health care are assessed medical co-payments. Those inmates who experience better health as a result of not using tobacco products may have less need for health care and may pay fewer costs in medical co-payments.

4. Individual Freedom:

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

This bill decreases the option of inmates, employees and visitors who smoke to use tobacco products within state-operated and privately-operated correctional facilities; however, the nonsmoking inmates, employees and visitors will benefit in that they are not subjected to secondhand smoke.

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

This bill will restrict the ability of inmates, employees and visitors to possess and use tobacco products in prisons, an activity which is currently allowed in designated areas.

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:

This bill creates s. 386.213, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates s. 944.115, F.S.; provides legislative intent; requires the Department of Corrections and private vendors operating state correctional facilities to make smoking-cessation assistance available to inmates; requires full implementation by January 1, 2000; provides definitions; prohibits an inmate within a state correctional facility from using tobacco products in prohibited areas; prohibits employees or visitors from using tobacco in prohibited areas; provides penalties and authorizes the department to adopt rules.

Section 2. Provides for an effective date.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Although the Department of Corrections can likely provide for the smoking cessation program within existing staff resources, there will be material-related costs involved (i.e., pamphlets, reports, and training aids). The costs of these materials cannot be determined at this time; however, they are likely to be minimal. According to the department, these costs may involve a one-time program or a continuing program.

2. Recurring Effects:

According to the department, there could be recurring material-related costs associated with the smoking cessation program; however, these costs are anticipated to be minimal.

HB 331 will result in the state receiving an indeterminate but most likely **significant loss in revenues from the taxation** of tobacco products sold to state inmates.

HB 331 may result in the Department of Corrections receiving **fewer profits from the inmate canteen due to the loss of tobacco sales**. It is likely, however, that the sale of other goods, such as gum, candy and smoking cessation products, will offset to some extent the profits lost from tobacco sales.

3. Long Run Effects Other Than Normal Growth:

A significant, but long-term, benefit of this legislation is the potential to **reduce long-term treatment costs** as inmates maintain their health. This financial benefit to be realized by the state over time could be sizable. However, any future health care cost savings to be achieved due to HB 331 are difficult to reasonably predict and quantify.

4. Total Revenues and Expenditures:

See III., A. 1. & 2.

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:

The Department of Corrections purchases tobacco products from the private sector to sell at its inmate canteens. Figures were unavailable on how much money is spent annually to purchase tobacco products for resale by the Department of Corrections. Consequently, a negative fiscal impact on the tobacco products industry may be significant and result in an annual loss of sales.

According to the Correctional Privatization Commission, passage of this bill may result in decreased sales in the private facilities' canteens which will reduce the funds in the Inmate

Welfare Trust Fund; however, the lost tobacco product sales will probably be offset by an increase in sales of other products.

Additionally, organizations in the private sector may choose to donate time and materials related to smoking cessation classes for inmates.

2. Direct Private Sector Benefits:

Although the sale of tobacco products to inmates would be eliminated in this bill, it is likely that the sale of other goods, such as gum, candy and smoking cessation products, will increase, and private sector industries producing such products would financially benefit accordingly.

A significant, but long-term, benefit of this legislation is the potential to reduce long-term treatment costs as inmates maintain their health. This financial benefit could be realized by private health care providers as well as by private prison management companies under contract to either the Department of Corrections or to the Correctional Privatization Commission.

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

None.

D. FISCAL COMMENTS:

The department is not necessarily required by this bill to expend funds to provide smoking cessation assistance for smoking inmates as part of the implementation of the ban. The bill only requires that smoking-cessation assistance be made *available* to inmates. Other states that have implemented a smoke-free policy, such as Texas and Georgia, did not have their respective Department of Corrections expend additional funds to provide smoking cessation assistance. In both states, external private resources were tapped to obtain written materials and video tapes to assist smoking inmates making the transition. Both states obtained assistance from the American Cancer Society, the American Lung Association, and the American Heart Association. Although no longer banning tobacco products in state prison, Georgia provided additional smoking cessation assistance through its counseling services that were already provided in its prisons.

If a ban on indoor smoking and the provision of smoking cessation classes result in a reduction of smoking-related illnesses, The State of Florida could experience a positive fiscal impact. By seeing a reduction in the number of persons who contract illnesses directly from smoking or a reduction in illnesses that are directly or indirectly aggravated from smoking or second-hand smoke exposure, there should be a long-term indeterminate reduction in health care expenditures as a result.

A positive fiscal impact may be realized by the state if there is a reduction in inmate lawsuits stemming from environmental tobacco smoke (ETS), or second-hand smoke exposure. Despite the department's efforts to separate smoking from non-smoking inmates, ETS litigation from non-smoking inmates has persisted. If outdoor smoking results in less or no second-hand smoke exposure, future litigation on this issue may decrease.

The department may assume a slight cost in promulgating rules that may be necessary to implement the provisions of this bill. It also may assume an indeterminate cost if the department decides to be the source that makes the provision of smoking cessation assistance available to inmates.

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.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of counties or municipalities to raise revenue.

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

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

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Representative Trovillion offered a strike everything amendment on March 18, 1999 to the Corrections Committee which removed the language which included "state correctional facilities" in the list of s.386.302, F.S., which delineates the places that are "public places." Under this section, "public places" are currently deemed to be "enclosed indoor areas used by the general public." This amendment conforms the bill to identical language in CS/SB 734 which was adopted in the Senate's Criminal Justice committee meeting on March 10, 1999 . The amendment was favorably adopted by the Corrections Committee and a committee substitute was made.

VII. SIGNATURES:

COMMITTEE ON CORRECTIONS:

Prepared by:

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