

STORAGE NAME: h0331s1a.go

DATE: April 8, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: CS/HB 331

RELATING TO: State Correctional Facilities/Smoking

SPONSOR(S): Committee on Corrections, Representative Trovillion and others

COMPANION BILL(S): CS/SB 734 (similar)

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, would create s. 944.115, F.S., and would prohibit the use of tobacco products by inmates, employees, and visitors in "prohibited areas" of state correctional facilities, whether state or privately operated. These "prohibited areas" would specifically include any indoor areas of the facilities.

An inmate using tobacco products in a prohibited area would commit a disciplinary infraction and would be subject to punishment determined to be appropriate by the disciplinary authority in the facility, including forfeiture of gain-time or the right to earn gain-time in the future.

The bill would require the Department of Corrections (DOC) and the private vendors operating correctional facilities to make smoking cessation assistance available to inmates.

It would authorize the DOC to adopt rules, and private vendors to adopt policies and procedures, to implement the provisions of the bill, to designate prohibited areas and smoking areas, to discipline inmates and employees for violations, and to prohibit visitors from future visits for violations.

Although the fiscal impact of this bill has not yet been determined, CS/HB 331 could result in significant reductions in future inmate health care costs. Although there could be some costs associated with making smoking cessation programs available to inmates, such costs would likely be minimal, and might even be covered by private anti-smoking organizations.

This bill will become effective upon becoming law, and would require that all of its provisions be fully implemented by January 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Current Policy: Inmate Smoking in DOC Facilities

The Florida DOC currently allows inmates to purchase and use tobacco products within DOC facilities, with some restrictions.

Generally speaking, Rule 33-20.001, Florida Administrative Code, prohibits smoking in all indoor areas at DOC institutions and other facilities. However, a superintendent may designate areas where inmates are housed or where inmate activities are held as "smoking areas".

Adult inmates may purchase cigarettes from canteens in correctional institutions which generates monies that are deposited in the Inmate Welfare Trust Fund. Currently, profits earned from the sale of these cigarettes may be used to employ personnel and for expenses associated with providing literacy programs, vocational training, academic programs, libraries, chapels, and visiting pavilions, among other uses. (See, s. 945.215 (1) (b), F.S.)

Current Policy: Inmate Smoking in Private Correctional Facilities

According to the Correctional Privatization Commission (CPC), inmates are permitted to use tobacco products in designated smoking areas inside and outside buildings at the South Bay, Moore Haven, and Bay Correctional Facilities. These private correctional facilities operate under a policy which essentially parallels the rule adopted by the DOC. 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 DOC estimates that between 65 and 75 percent of the inmate population smokes cigarettes in prison, a rate about 2.5 times higher than the general male population.

The DOC 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 DOC has remained below the rate of cost increase for the average Florida citizen. Still, the cost of inmate medical care is high.

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 DOC.

Total Annual Inmate Health Care Expenditures	
Fiscal Year	Approximate Inmate Health Care Expenditure

Total Annual Inmate Health Care Expenditures	
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 the 1998-99 fiscal year, the Legislature appropriated over \$216 million for inmate health care, which represents approximately 14 percent of every dollar provided to the DOC.

A few years ago, the Office of Program Policy Analysis And Government Accountability (OPPAGA) analyzed the DOC's Office of Health Services, and made several suggestions for reducing or containing inmate health care costs. (See, *Review of Inmate Health Services Within the Department of Corrections*, Report Number 96-22, November 27, 1996.) One of the options OPPAGA analyzed was the implementation of additional preventative health care measures, such

as a smoking cessation program. In presenting this option, OPPAGA notes that there are advantages and disadvantages with these kinds of programs:

Advantages:

- Reduces long-term treatment costs as inmates maintain their health.
- Occupies inmates, reducing idleness.
- Educates and instills inmate responsibility for their health.

Disadvantages:

- Requires additional staff to develop and implement programs.
- Requires money to implement programs.
- Takes up limited institutional space.
- May not achieve measurable cost savings, or even impact inmate behavior.

Opinion Surveys of Tobacco Use in Prisons

In 1996, the Senate Criminal Justice Committee sent surveys to the superintendents at 54 major correctional institutions in Florida. Among the questions asked on the survey was whether the superintendents believed inmates should be prohibited from using tobacco products. Of the forty-six superintendents who responded to the survey, twenty-nine (63%) 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. Another primary reason was a concern about personal safety and fire hazards.

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. They also expressed concerns that, if banned, cigarettes would become a contraband problem, creating more work for correctional officers and creating a "black market" for cigarettes.

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 thirteen prison systems in the United States and at least two prison systems in Canada have implemented or are in the process of implementing a smoke-free policy. (See, *Corrections Alert*, p. 2, vol 2, no. 18 (special insert), 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. Five states--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, 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 in attempt 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.

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 DOC. 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

Non-smoking inmates nationwide have filed lawsuits alleging that adverse or hazardous prison conditions are caused by being in close proximity of inmates who smoke. Addressing this problem, the DOC currently has at least one non-smoking dormitory at each major institution. This policy was put into place in response to the 1993 U. S. Supreme Court opinion, *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 had been used by the Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), using the "objective-subjective" test to decide whether an inmate had successfully proven a violation of the Eighth Amendment right against cruel and unusual punishment. To be successful, an inmate must prove:

- (1) that he or she is being exposed to unreasonably high levels of environmental tobacco smoke;
- (2) 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;
- (3) that the risk of exposure is not one that today's society chooses to tolerate; and
- (4) that prison authorities' current attitudes and conduct ignore the possible dangers posed by exposure to environmental tobacco smoke.

In *McKinney*, the inmate succeeded 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 his health, which subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

B. EFFECT OF PROPOSED CHANGES:

CS/HB 331 would prohibit all persons from using tobacco products in a state or private correctional facility. Although employees, visitors, and inmates would be prohibited from using tobacco products indoors, they would still be allowed to possess tobacco products and to use such products on the premises of a state or private correctional facility as long as it is not in a prohibited area. The superintendents and wardens would be required to take reasonable steps to ensure that the prohibition of using tobacco products in a prohibited area is strictly enforced against all persons, including employees and visitors.

Pursuant to the statement of legislative intent, the DOC and the CPC would be required to make smoking cessation assistance **available** to inmates to implement the tobacco product prohibition. However, 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.

The bill would be effective upon becoming a law. The DOC and the CPC would be required to implement the provisions of this bill as soon as possible, but its requirements 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?

Yes. The bill increases the authority of the DOC and private vendors operating correctional facilities to make rules and policies regarding the use of tobacco by inmates, employees, and visitors.

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

Yes. This bill increases the responsibilities of the DOC and private correctional facilities by requiring them to enforce the prohibition against tobacco possession use by 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?

No.

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

An agency or program is not 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?

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. There will be certain costs associated with implementing the smoking cessation assistance to inmates that the DOC and private vendors must make available; these costs will, in theory, be borne by the state or private correctional facilities. In practice, however, private anti-tobacco organizations may voluntarily provide these services.

4. Individual Freedom:

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

This bill impairs the freedom 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 second-hand smoke.

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

Yes. This bill will restrict the ability of inmates, employees, and visitors to use tobacco products inside of state and private prison buildings, an activity which is currently allowed in designated areas.

5. Family Empowerment:

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

The bill does not purport 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?

No.

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:

The bill does not create or change a program providing services to families or children.

(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. 944.115, F.S.

E. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Although the DOC 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.

2. Recurring Effects:

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

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 DOC purchases tobacco products from the private sector to sell at its inmate canteens. Figures were unavailable concerning how much money is spent annually to purchase tobacco products from private vendors for resale by the DOC. Presumably, however, if many inmates either stopped smoking completely, or at a minimum, refrained from smoking inside, this would result in decreased sales by these private vendors.

2. Direct Private Sector Benefits:

A significant, and long-term, benefit of this legislation is the potential to reduce medical care costs as inmates maintain their health. This financial benefit could be realized by private health care providers as well as by the DOC and private prison corporations.

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

None.

D. FISCAL COMMENTS:

A final positive fiscal impact may be realized by the state if there is a reduction in inmate lawsuits stemming from exposure to second-hand smoke. Despite the DOC's efforts to separate smoking from non-smoking inmates, 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.

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:

In some places in CS/HB 331, it is not clear that this bill prohibits the use of **all** forms of tobacco, not just smoking tobacco (e.g., see, p. 4, l. 2).

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 including "state correctional facilities" from the list of "public places" delineated in s.386.302, F.S. 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:

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