

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1757 Clean Indoor Air Act; Implementation of Article X, Section 20
SPONSOR(S): Committee on Business Regulation and Priguez
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 742

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) BUSINESS REGULATION	29 Y, 5 N	Morris	Liepshutz
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Article X, Section 20 of the Florida Constitution was created by the passage of Amendment No. 6, a citizens' initiative, at the November 2002 General Election. The Constitutional Amendment prohibits tobacco smoking in enclosed indoor workplaces with four narrow exceptions and authorized the Legislature to implement more restrictive legislation. This bill implements the constitutional amendment.

The bill adopts, without modification, the definitions provided in the Constitutional Amendment for the following terms: smoking; second-hand smoke; work; enclosed-indoor workplace; commercial; and designated smoking guest rooms at public lodging establishments. The bill amended the definition of "retail tobacco shop" to include manufacturing, importing, distributing and leaf tobacco dealer activities as an extension of that commercial activity.

This bill implemented three of the four authorized exceptions but does not allow smoking in "stand-alone bars."

The bill maintains the same basic enforcement structure and the same penalty structure as presently found in the Florida Clean Indoor Air Act and is not expected to have any appreciable impact on state expenditures.

The bill has an effective date of July 1, 2003.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1757.br.doc
DATE: March 21, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

3. This bill attempts to enact the Constitutional Amendment creating s.20, Art. X, in a manner consistent with its broad purpose and stated terms. The Constitutional Amendment restricts places where an individual may smoke; therefore, the bill restricts an individual’s personal freedom with regard to smoking in enclosed indoor workplaces.

B. EFFECT OF PROPOSED CHANGES:

Article X, Section 20

Article X, Section 20 of the Florida Constitution titled “Workplaces without tobacco smoke” was created by the passage of Amendment No. 6^A at the November 2002 General Election. The stated purpose of this citizens’ initiative was to protect people from the health hazards of second-hand tobacco smoke by prohibiting smoking in enclosed indoor workplaces. Pursuant to Article XI, Section 5(d) this initiative became part of the Constitution on January 7, 2003. The amendment requires the Legislature to enact implementing legislation no later than July 1, 2003, in a manner that is consistent with the amendment’s broad purpose and stated terms. The Legislature may implement more stringent legislation.

The amendment provides definitions for the terms: smoking; second-hand smoke; work; enclosed-indoor workplace; commercial; retail tobacco shop; designated smoking guest rooms at public lodging establishments; and, stand-alone bar. [See Endnote A for full text.]

In addition, the amendment provides four narrow exceptions:

1. Retail tobacco shops;
2. Designated guest rooms at public lodging establishments;
3. Private residences that are not being used commercially to provide child care, adult care, or health care; and
4. Stand-alone bars.

Florida Clean Indoor Air Act

The Florida Clean Indoor Air Act¹ [FCIAA] was originally passed by the Florida Legislature in 1985. The stated purpose of FCIAA is to protect the public health, comfort, and environment by creating areas in public places and at public meetings that are reasonably free from tobacco smoke by providing a uniform statewide maximum code. The FCIAA allows smoking to be permitted in designated smoking areas of specified indoor public places, e.g., places of employment, retail stores, indoor arenas, restaurants, etc. The act specifically prohibits smoking in certain other indoor public places, e.g.,

¹ Part II, Chapter 386

elevators, restrooms, public transportation, day care centers, etc. Smoking is not permitted in the common areas [lobby, hallway, stairwell, etc.] of any indoor public place.

The FCIAA requires a person in charge of an indoor public place to post signs in areas designated as smoking areas stating that smoking is permitted in that area. The FCIAA also requires an employer to develop, implement and post a smoking policy in a workplace.

The Department of Health and the Division of Hotels and Restaurants in the Department of Business and Professional Regulation are given regulatory authority to enforce the requirements of the CIAA. Sections 386.205 and 386.206, F.S., require employers to implement a written smoking policy, develop and implement policies with regard to designated smoking areas and to post and enforce those policies. The statutes allow the imposition of civil penalties,² up to \$100 for the first violation and up to \$500 for any subsequent violation, for failing to comply with these requirements. Enforcement of the FCIAA is complaint driven through a toll free telephone number.

An individual smoking in a public place in other than a designated smoking area is in violation of the FCIAA and commits a noncriminal violation³ punishable by a fine of not more than \$100 for the first violation and not more than \$500 for each subsequent violation. Civil citations may be issued to any such individual by any law enforcement officer and jurisdiction is with the county court.

Combining the FCIAA and Section 20, Article X

While the current provisions of the FCIAA extend to *indoor public places* used by the general public or to which the general public could have access, when the plain language of the Constitutional Amendment, particularly the definitions of “work” and “enclosed indoor workplace,” are read, it appears that the Constitutional Amendment prohibits smoking in *all enclosed indoor places*, regardless of whether the general public would have access to that portion of the building, with the four narrow enumerated exceptions. For example, under the provisions of the FCIAA smoking could have been permitted in an individual’s private office to which the general public could not reasonably have been expected to have access; under the provisions of the Constitutional Amendment smoking may not be permitted in that same office, even though the public’s access to that office has not changed, because smoking is now prohibited in all enclosed indoor workplaces, excluding the exceptions.

In recognition of the conflicts between the Constitutional Amendment and the FCIAA, this bill amends Part II of chapter 386 to conform conflicting provisions regarding indoor smoking.

Under the FCIAA any indoor public place that allowed smoking was required to post signs in any portion of the building where smoking was allowed. Under the provisions of this bill, those same public places must continue to post signs but these signs must state that *smoking is no longer allowed* in that building. This requirement expires in two years.

The FCIAA also required a business owner to develop, implement and post a policy regarding the designation of smoking and nonsmoking areas or smoking rooms. This bill deletes the authorization for these designated smoking areas or rooms and included in that deleted statute was the requirement that the proprietor of the business develop, implement and post their written smoking policy. This bill establishes similar responsibilities on the part of the proprietor of the business by requiring the proprietor to develop and implement a no-smoking policy. Such policy *may* include procedures to take when a customer violates the no-smoking law and *must* include a prohibition on employee smoking in the workplace.

The bill adopts, without modification, the definitions provided in the Constitutional Amendment for the following terms: smoking; second-hand smoke; work; enclosed-indoor workplace; commercial; and

² s. 386.207, F.S. and ch.64E-25, F.A.C

³ s. 775.08(3), F.S.

designated smoking guest rooms at public lodging establishments. The bill amended the definition of "retail tobacco shop" to include manufacturing, importing, distributing and leaf tobacco dealer activities as an extension of that commercial activity.

The Constitutional Amendment authorized the Legislature to enact more restrictive legislation;⁴ in accord with that prerogative, the bill does not allow smoking in "stand-alone bars."⁵

The bill maintains the current enforcement and penalty structure as found in the FCIAA:

- Individuals smoking in an enclosed indoor workplace commit a noncriminal civil violation, punishable by a fine of up to \$100 for the first violation and up to \$500 for each subsequent violation. Jurisdiction is with the county courts.
- Proprietors in violation of these prohibitions are subject to civil penalties which may be assessed by the Department of Health or the Division of Hotels and Restaurants of the Department of Business and Professional Regulation in an amount not to exceed \$100 for the first violation and not to exceed \$500 for each subsequent violation.

The bill provides that the amendments to Part II of Chapter 386, the Florida Clean Indoor Air Act will take effect on July 1, 2003.

C. SECTION DIRECTORY:

Section 1. Reenacts s. 386.201, F.S., entitling Part II of ch. 386 the Florida Clean Indoor Air Act.

Section 2. Amends s. 386.202, F.S., providing legislative intent.

Section 3. Amends s. 386.203, F. S., deleting obsolete definitions and providing new definitions.

Section 4. Amends s. 386.204, F.S., providing exceptions to the prohibition against smoking in enclosed indoor workplaces.

Section 5. Amends s. 386.206, F.S., requiring the posting of signs. A provision is added to this section requiring the proprietor of a business to develop and implement a no-smoking policy and providing for the expiration of the signage requirement in two years.

Sections 6. Amends s. 386.207, F.S., making conforming amendments regarding enforcement of the provisions of this act. Existing subsection (3) which allows the department to grant exceptions to the law on a case-by-case basis is deleted.

Section 7. Technical amendment to s. 386.208, F.S.

Section 8. Reenacts s. 386.209, F.S., preempting regulation of smoking to the state.

Section 9. Amends s. 386.211, F.S., to make conforming amendments regarding public announcements.

Section 10. Reenacts s. 386.212, F.S., prohibiting smoking within a specified distance of school property.

Section 11. Repeals s. 386.205, F.S., which had allowed the designation of smoking areas in public places.

⁴ paragraph (d), s. 20, Art. X

⁵ (8) "Stand-alone bar" means any place of business devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and that is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue. s. 20, Art. X

Section 12. Provides a severability clause.

Section 13. Provides an effective date of July 1, 2003.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Department of Health through its Bureau of Facility Programs currently maintains a database of FCIAA complaints and resolutions received via the toll-free telephone number. These program costs are not expected to increase.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to representatives of the cigar industry, implementation of Article X, Section 20 without modification will prohibit the continued manufacturing, importing and cigar leaf dealer activities in the state. These industries may be required to relocate all or a portion of their business to another state or out of the country. According to industry statistics, approximately 40% of all cigars manufactured in the United States in 2001 were produced by Florida-based manufacturers. Total production for that year was 5.6 billion large and little cigars with an estimated wholesale price of approximately \$400 M.

Cigar industry representatives indicate that the industry requires a substantial non-tobacco related service and support infrastructure, e.g., box manufacturing, paper printing, trucking, maritime, seaports and petroleum, that accounts for more than \$75 M in business with other Florida-based companies annually. In addition, the industry employs more than 2,500 people with a cumulative annual payroll in excess of \$90 M.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or cities to spend funds or take an action requiring the expenditure of funds; does not reduce the authority that cities or counties have to raise revenues in the aggregate; and does not reduce the percentage of a state tax shared with cities or counties.

2. Other:

The cigar industry [manufacturers, distributors, leaf dealers] argues that this constitutional revision violates the Supremacy Clause and the Commerce Clause of the U. S. Constitution and restricts legal business activities that are protected by the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution.

The industry had filed suit in U. S. District Court in Tampa seeking to overturn the amendment and to prevent the Governor, the Attorney General and the Legislature from taking steps to implement and enforce the amendment but has subsequently asked for a stay pending Legislative response to these concerns.

B. RULE-MAKING AUTHORITY:

The bill appears to grant sufficient rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None noted.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

^A **ARTICLE X, SECTION 20**

SECTION 20. Workplaces without tobacco smoke.--

- (a) **PROHIBITION.** As a Florida health initiative to protect people from the health hazards of second-hand tobacco smoke, tobacco smoking is prohibited in enclosed indoor workplaces.
- (b) **EXCEPTIONS.** As further explained in the definitions below, tobacco smoking may be permitted in private residences whenever they are not being used commercially to provide child care, adult care, or health care, or any combination thereof; and further may be permitted in retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments; and stand-alone bars. However, nothing in this section or in its implementing legislation or regulations shall prohibit the owner, lessee, or other person in control of the use of an enclosed indoor workplace from further prohibiting or limiting smoking therein.
- (c) **DEFINITIONS.** For purposes of this section, the following words and terms shall have the stated meanings:
- (1) "Smoking" means inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product.
- (2) "Second-hand smoke," also known as environmental tobacco smoke (ETS), means smoke emitted from lighted, smoldering, or burning tobacco when the smoker is not inhaling; smoke emitted at the mouthpiece during puff drawing; and smoke exhaled by the smoker.
- (3) "Work" means any person's providing any employment or employment-type service for or at the request of another individual or individuals or any public or private entity, whether for compensation or not, whether full or part-time, whether legally or not. "Work" includes, without limitation, any such service performed by an employee, independent contractor, agent, partner, proprietor, manager, officer, director, apprentice, trainee, associate, servant, volunteer, and the like.
- (4) "Enclosed indoor workplace" means any place where one or more persons engages in work, and which place is predominantly or totally bounded on all sides and above by physical barriers, regardless of whether such barriers consist of or include uncovered openings, screened or otherwise partially covered openings; or open or closed windows, jalousies, doors, or the like. This section applies to all such enclosed indoor workplaces without regard to whether work is occurring at any given time.
- (5) "Commercial" use of a private residence means any time during which the owner, lessee, or other person occupying or controlling the use of the private residence is furnishing in the private residence, or causing or allowing to be furnished in the private residence, child care, adult care, or health care, or any combination thereof, and receiving or expecting to receive compensation therefor.
- (6) "Retail tobacco shop" means any enclosed indoor workplace dedicated to or predominantly for the retail sale of tobacco, tobacco products, and accessories for such products, in which the sale of other products or services is merely incidental.
- (7) "Designated smoking guest rooms at public lodging establishments" means the sleeping rooms and directly associated private areas, such as bathrooms, living rooms, and kitchen areas, if any, rented to guests for their exclusive transient occupancy in public lodging establishments including hotels, motels, resort condominiums, transient apartments, transient lodging establishments, rooming houses, boarding houses, resort dwellings, bed and breakfast inns, and the like; and designated by the person or persons having management authority over such public lodging establishment as rooms in which smoking may be permitted.
- (8) "Stand-alone bar" means any place of business devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises; in which the serving of food, if any, is merely incidental to the consumption of any such beverage; and that is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue.
- (d) **LEGISLATION.** In the next regular legislative session occurring after voter approval of this amendment, the Florida Legislature shall adopt legislation to implement this amendment in a manner consistent with its broad purpose and stated terms, and having an effective date no later than July 1 of the year following voter approval. Such legislation shall include, without limitation, civil penalties for violations of this section; provisions for administrative enforcement; and the requirement and authorization of agency rules for implementation and enforcement. Nothing herein shall preclude the Legislature from enacting any law constituting or allowing a more restrictive regulation of tobacco smoking than is provided in this section.

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