

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 742

SPONSOR: Appropriations Subcommittee on General Government and Regulated Industries  
Committee and Senator Diaz de la Portilla

SUBJECT: Smoking in the workplace

DATE: April 15, 2003 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Favorable/CS</u>
2.	<u>DeLoach</u>	<u>Hayes</u>	<u>AGG</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>AP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

This bill implements Article X, Section 20, of the Florida Constitution, which prohibits tobacco smoking in enclosed indoor workplaces.

The bill amends the “Florida Indoor Clean Air Act” (“the Act”) to implement the Constitutional Amendment. It also adopts and implements the definitions in subsection (c) of the Constitutional Amendment. It clarifies that designated smoking rooms and facilities of membership organizations are not workplaces.

The bill prohibits tobacco smoking in enclosed indoor workplaces. The bill maintains the prohibition under current law that bars tobacco smoking in public places. It prohibits tobacco smoking within 10 feet of the entryway to a building that contains an enclosed indoor workplace or within 10 feet of intake equipment for a heating, ventilating or air conditioning system for a building that contains an enclosed indoor workplace. The bill provides requirements for designated smoking rooms that signage and air purification systems.

The bill adopts and implements the exceptions in subsection (b) of the Constitutional Amendment. The bill implements the exceptions in the constitutional amendment for private residences whenever not being used for certain commercial purposes, stand-alone bars, designated smoking rooms in hotels and other public lodging establishments, and retail tobacco shops. A stand-alone bar must maintain at least 25 percent of its gross revenue from the sale of food.

The bill exempts the enclosed indoor workplaces of a business that manufactures, imports, or distributes tobacco products or of a tobacco leaf dealer. It provides an exception for tobacco

smoking to the extent it is that tobacco smoking is an integral part of a smoking cessation program, medical research, and scientific research. It provides an exception for expressive speech or activity, including, but not limited to, a production by the entertainment industry, and an exhibition of the arts.

The bill provides for enforcement of the act by the Department of Health and the Department of Business and Professional Regulation. It increases from \$100 to \$1000 the penalty for first violations, and increases from \$500 to \$2500 the maximum penalty amounts applicable for subsequent violations.

The bill has an effective date of July 1, 2003 in section 15, provides civil penalties for violations in sections 8 and 9, provides for administrative enforcement in section 8, and requires and authorizes agency rules for implementation and enforcement in sections 8 and 13.

This bill substantially amends the following sections of the Florida Statutes: 386.202, 386.203, 386.204, 386.205, 386.206, 386.207, 386.208, and 386.211.

This bill creates the following sections of the Florida Statutes: 386.2045, 386.2125, and 386.213.

This bill reenacts the following sections of the Florida Statutes: 386.209, and 386.212.

## **II. Present Situation:**

On November 5, 2002, Article X of the Florida Constitution was amended to add Section 20, which prohibits tobacco smoking in enclosed indoor workplaces (“Constitutional Amendment”). The Constitutional Amendment defines an “enclosed indoor workplaces” in part as “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... without regard to whether work is occurring at any given time.” The Constitutional Amendment defines “work” as “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.” The Constitutional Amendment provides limited exceptions for private residences “whenever they are not being used commercially to provide child care, adult care, or health care, or any combination thereof,” retail tobacco shops, designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars.

The Constitutional Amendment directs the Legislature to implement the “amendment in a manner consistent with its broad purpose and stated terms.” The Constitutional Amendment requires that the implementing legislation have an effective date of no later than July 1, 2003. The implementing legislation must also provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for implementation and enforcement. The Constitutional Amendment further provides that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the State Constitution.

Part II of Chapter 386, F.S., constitutes the "Florida Clean Indoor Air Act," which regulates tobacco smoking in public places. The Florida Clean Indoor Air Act ("the Act") does not regulate enclosed indoor workplaces in a manner consistent with the Constitutional Amendment.

The President of the Senate appointed the Select Committee on Constitutional Amendment Implementation, chaired by Senator Lee, charging it with the responsibility of gathering information and develop recommendations on the implementation of constitutional amendments, including Amendment no. 6 dealing with Smoking in the Workplace. The committee met, received testimony, and discussed the issues relating to the implementation of the amendment. The select committee made the following recommendations:

Stand-alone bars: The language relating to stand-alone bars which limits their service to food that is "merely incidental" to the service of alcohol is ambiguous, and the Legislature must establish some standard for what food products the amendment allows these bars to serve. Two possible standards were suggested: 1) an exhaustive list of food items that may be served in such bars; and 2) a percentage limitation on the amount of food that may be served.

The percentage approach is more practical. The allowable percentage of food service should be some percentage not to exceed 20 percent, should be measured against gross revenue from sales of alcoholic beverages, and should include a time period for measurement which is sufficiently long to establish an accurate picture of the bar's overall business and income stream. However, even with a percentage limitation, the types of food served should be within the spirit of the amendment. Stand-alone bars should not be serving the same full menu of food items as restaurants.

The select committee also addressed the issue of enforcement. It recommended that:

For stand-alone bars, enforcement should be accomplished through a complaint-driven system, similar to the special restaurant liquor license process, and no new bureaucracy should be established. For other situations, the amendment should be enforced by the same agencies, in the same manner, and using the same penalties used under the existing Florida Clean Indoor Air Act.

Another issue of interest to the select committee concerned the definition of enclosed indoor workplaces. The select committee's report noted that:

Because the amendment applies only to workplaces, the Legislature should implement legislation to clarify those situations where no work is performed and where a non-workplace may be designated. Consistent with the spirit and purpose of the amendment, the Legislature should enact measures to protect people from involuntary exposure to second-hand tobacco smoke from any such designated area: designation (signage), reserved times for cleaning and maintenance, separate ventilation systems and negative pressure ventilation, and complete enclosure to avoid the escape of second-hand tobacco smoke into common areas.

The amendment does not specify standards for when an enclosed indoor workplace is predominantly or totally bounded by physical barriers. The detail associated with defining these architectural standards is more appropriately a matter for consideration by the standing committees, rather than by this select committee. However, any standards should be set within the spirit of the amendment.

Regarding tobacco shops, the select committee found that:

Retail tobacco shops are expressly excepted from the constitutional amendment. It is a logical extension of this exception to conclude that smoking which is integral to the operation of the cigar manufacturing and loose-leaf tobacco industries in this state is not prohibited under the amendment.

In conclusion, the select committee heard testimony that the amendment needed clarification on the constitutional amendment's effect on the activities of certain member-driven, non-profit organizations. The select committee recommended:

[T]hat consideration be given to clarifying that work does not include non-commercial activities conducted exclusively by the membership of community service or social organizations, such as religious, veterans, fraternal, charitable, and other non-profit groups. Legislation to provide this clarification should be drafted within the spirit of the amendment.

### **III. Effect of Proposed Changes:**

#### *Definitions.*

The Constitutional Amendment does not specify whether a workplace is an entire building or a room within a building. The Constitutional Amendment accordingly permits the Legislature to enact implementing legislation defining a "workplace." Section 3 of the bill, which amends s. 386.203, F.S., defines a workplace as a room where one or more persons performs work. The definition of workplace does not apply to the entire building, but applies only to those rooms where work is performed.

Section 386.203(19), F.S., further clarifies the definition of the term workplace to provide that the term does not include facilities owned or leased by a membership organization "and used exclusively for non-commercial activities performed by the members and guests of a membership organization, including social gatherings, meetings, dining, and dances; if no person or persons are engaged in work as defined in s. 386.203(18)." Section 386.203(9), F.S., defines membership organizations as charitable, nonprofit, veterans' organization, or religious organization that holds an exemption from federal taxation under the Internal Revenue Code. This bill does not exempt these facilities from the smoking prohibition for enclosed indoor workplaces. Instead, it clarifies that these places are not subject to the prohibition. A membership organization facility is not a workplace if it is used exclusively for non-commercial activities. Subsection (c)(3) of the Constitutional Amendment defines "work" as "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.” Subsection (c)(3) of the Constitutional Amendment clarifies that work performed by a volunteer is still work. However, the definition of work in the Constitutional Amendment does not mean that all activities performed by volunteers, or by any of the other persons listed in the definition, also constitute work. Section 386.2045(7) provides that social gatherings, meetings of membership organizations, dances, and dinners are not work activities as the term is defined in subsection (c)(3) of the Constitutional Amendment and in s. 386.203, F.S.

Section 386.203(19), F.S., also clarifies that designated smoking rooms are not included within the meaning of the term “workplace.”

Subsection (c)(4) of the Constitutional Amendment defines an “enclosed indoor workplace” as a place that “is predominantly or totally bounded on all sides and above by physical barriers...” The term “predominantly or totally bounded on all sides and above” is subject to legislative determination. The bill defines an “enclosed indoor workplace” as not including:

[A] workplace that does not have physical barriers of any kind from above, a workplace that is totally bounded from above but of which at least 25 percent of contiguous surface area of the sides is without a physical barrier of any kind separating the workplace from the exterior of the building within which the workplace is located, or a workplace that is bounded on all sides and above by physical barriers consisting of no more than 50 percent of the total bounded surface area of the workplace.

The bill’s definition of the term “enclosed indoor workplace” provides a separate definition of the term for restaurants. As regards restaurants, the bill provides that a workplace in a restaurant is not enclosed if it is bounded on all sides and above by physical barriers of no more than 25 percent of the total bounded surface area of the workplace. For example, the bill would permit smoking in a patio area of a restaurant if 75 percent or more of the patio area was without barriers of any kind.

#### *Prohibitions.*

The bill amends section 386.204, F.S., to prohibit tobacco smoking in enclosed indoor workplaces. The bill maintains the prohibition under current law that bars tobacco smoking in certain public places.

Section 386.204, F.S., also prohibits tobacco smoking “within 10 feet of the entryway to a building that contains an enclosed indoor workplace or within 10 feet of intake equipment for a heating, ventilating or air conditioning system (HVAC system) for a building that contains an enclosed indoor workplace.” It provides an exception to this provision for the entryway to public transportation facility, including, but not limited to, railroad stations, bus stations, ship ports, ferry terminals, roadside welcome stations, highway service plazas, airports served by regular passenger service, and highway rest stations.

#### *Exceptions*

The bill implements the exceptions in the constitutional amendment for private residences

whenever not being used for certain commercial purposes, stand-alone bars, designated smoking rooms in hotels and other public lodging establishments, and retail tobacco shops.

The bill creates s. 386.2045(2) to implement the exception in subsection (c)(6) of the Constitutional Amendment for retail tobacco shop. Subsection (c)(6) of the Constitutional Amendment defines retail tobacco shop as “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.” Section 386.2045(3), F.S., adopts the definition of retail tobacco shop in the Constitutional Amendment. It includes a business that manufactures or distributes tobacco products and accessories and a cigar leaf dealer as meeting the definition of retail tobacco shop.

Section 386.2045(3), F.S., provides that retail tobacco shops must comply with the requirements for designated smoking rooms in ss. 386.205 and 386.206. Retail tobacco shops holding a retail tobacco products dealer permit under s. 569.003 on the effective date of the act are exempted from the smoking room requirements in s. 386.205. However, all retail tobacco shops are required to comply with the signage requirements in s. 386.206. This subsection also provides a specific exception for enclosed indoor workplaces of a business that manufactures, imports, or distributes tobacco products or of a tobacco leaf dealer.

The bill creates s. 386.2045(5), F.S., to implement the exception in the Constitutional Amendment for stand-alone bars. Subsection (c)(8) of the Constitutional Amendment defines a stand-alone bar as “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.” Section 386.2045(5), F.S., adopts the exception for stand-alone bar in section (c)(8) of the Constitutional Amendment.

The definition for stand-alone bar in subsection (c)(8) of the Constitutional Amendment contains several terms and phrases that are subject to legislative determination. The exception for stand-alone bar defines those terms and phrases. This subsection clarifies the relevant time period in subsection (c)(8) of the Constitutional Amendment of “during any time of operation” to mean “during all times of operation.”

Section 386.2045(5), F.S., also defines the condition in the Constitutional Amendment that the place of business must be devoted predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors with “the serving of food, if any,” as “merely incidental to the consumption of any such beverage.” The terms “predominantly” and “merely incidental” are subject to legislative determination. It requires that a “business must derive at least 25 percent of its gross revenue from the sale of food. These provisions do not define the types of food that a stand-alone bar may serve. Subsection (c)(8) of the Constitutional Amendment does not require that the implementing legislation define the types of food that a stand-alone bar may serve. As noted by the select committee, a statutory definition or listing of

foods that a stand-alone bar may serve would seem to be impractical, particularly in the context Florida's rich cultural and ethnic diversity.

Section 386.2045(5), F.S., also provides that package stores may share an entryway or common indoor area with a package store. A package store is defined by the act as a workplace in which alcoholic beverages are sold only for consumption off the premises and which shares an entry way or common indoor area with a stand-alone bar.

Section 386.2045(5), F.S., provides an exception for tobacco smoking to the extent it is that "tobacco smoking is an integral part of a smoking cessation program, medical research, and scientific research. This provision further provides that each room in which tobacco smoking is permitted must comply with the signage requirements for a designated smoking room.

Section 386.2045(6), F.S., provides an exception for expressive speech or activity, including, but not limited to, production by the entertainment industry as defined in s. 288.125, F.S., and an exhibition of the arts as defined in s. 265.283, F.S. This provision also requires that each room in which tobacco smoking is permitted must comply with the signage requirements for a designated smoking room.

Section 386.2045(9), F.S., provides an exception for smoking in state correctional facilities to the extent that smoking is not prohibited by s. 944.115, F.S. Section 944.115, F.S., bans smoking in state correctional facilities, but permits tobacco smoking in maximum security inmate housing areas of the facility.

*Designated Smoking rooms.*

Section 386.205, F.S., provides for designated smoking rooms. The requirements for a designated smoking room are detailed in subsection (1), which provides that "work, other than essential services," must not be performed in the room at any given time, that "tobacco smoking must not be permitted in the room for at least 30 minutes before any essential services are performed in the room," that "each smoking room must be enclosed by physical barriers that are impenetrable by second-hand tobacco smoke and prevent the escape of second-hand tobacco smoke into a common area or an enclosed indoor workplace," and that "each smoking room must comply with signage requirements." Essential services are defined in s. 386.203(7), F.S., as "those services that are essential to the maintenance of every enclosed indoor room, regardless of whether any room is a workplace, including, but not limited to, janitorial services, repairs, or renovations." Designated smoking rooms must use a mechanical air purification system that removes no less than 99.97% of particles that are 0.3 microns and larger. Designated smoking room must also not share a heating ventilating, or air-conditioning system (HVAC) with any enclosed indoor workplace.

The exception for designated smoking rooms is based on the assumption that every enclosed indoor space requires the performance of essential services. Absent such recognition, every nonresidential enclosed indoor space would necessarily be considered an enclosed indoor workspace without regard to whether the enclosed indoor space was otherwise exclusively dedicated to the performance of non-work activities. Every enclosed nonresidential indoor space, except those spaces specified in the Constitutional Amendment, would therefore be subject to the tobacco smoking prohibition.

The provision for designated smoking rooms protects the persons who perform essential services from second hand smoke by requiring that tobacco smoking must not be permitted in the room for at least 30 minutes before any essential services are performed. The provision for designated smoking rooms also protects other persons from second hand smoke by requiring that “each smoking room must be enclosed by physical barriers that are impenetrable by second-hand tobacco smoke and prevent the escape of second-hand tobacco smoke into a common area or an enclosed indoor workplace.”

The bill also amends the current s. 386.205, F.S., pertaining to the limitation of smoking areas, to limit places where a smoking room may be designated. The list of places that cannot be designated as smoking rooms, is more expansive than the current limitation on areas that can be designated as a smoking area under the Act. The limitation is expanded to include nursing homes, health care facilities, libraries, courtrooms, jury waiting rooms, museums, theaters, auditoriums, arenas, recreational facilities, restaurants, and retail stores except as provided in s. 386.2045, F.S., and grocery stores.

*Enforcement.*

The bill amends s. 386.207, F.S., to provide for enforcement of the act by the Department of Health and the Department of Business and Professional Regulation. This section authorizes the departments to adopt rules in consultation with the Department of Agriculture and Consumer Services and the State Fire Marshal.

The bill amends the current ss. 386.207 and 386.208, F.S., to increase from \$100 to \$1000 the penalty for first violations, and to increase from \$500 to \$2500 the maximum penalty amounts applicable for subsequent violations.

The bill creates s. 386.213, F.S., to provide that if any exception or definition of the Act is declared invalid is severable from the rest of the act and shall not affect the validity other provisions.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.



**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Businesses that opt to designate smoking rooms as provided in section 6 of this bill, may incur financial costs incident to retrofitting current facilities or construction of new facilities to meet the requirements for designated smoking rooms.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of The bill's sponsor or the Florida Senate.

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