

# 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/SB 742

SPONSOR: Regulated Industries Committee and Senator Diaz de la Portilla

SUBJECT: Smoking in the workplace

DATE: March 12, 2003      REVISED: \_\_\_\_\_

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

**I. Summary:**

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

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:**

The bill amends the "Florida Indoor Clean Air Act" ("the Act") to implement the directive in subsection (d) of the Constitutional Amendment that the Legislature 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 July 1, 2003, provide for administrative enforcement, provide for civil penalties, and authorize agency rules for implementation and enforcement of the amendment. 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.

The bill adopts and implements the exceptions in subsection (b) of the Constitutional Amendment. It also adopts and implements the definitions in subsection (c) of the Constitutional Amendment.

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 3 of the bill also excludes designated smoking rooms from the definition of 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 also excludes smoking rooms from the definition.

The bill creates s. 386.2045(3) 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 tobacco manufacturing facilities if they satisfy three criteria. The three criteria are: 1) tobacco smoking is essential to the manufacture of tobacco products or accessories; 2) tobacco smoking is essential to the manufacture of tobacco products or accessories cannot be performed in another place that is not an enclosed indoor

workplace, and 3) the prohibition of tobacco smoking would encroach upon rights protected by the United States Constitution.

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 70 percent of its gross revenue from the sale of alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof.” 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.

The 70 percent rule in s. 386.2045(5), F.S., differs from the 80 percent rule recommended by the select committee. The select committee’s recommendation compared alcoholic beverage sales to food sales. The 70 percent rule in the bill considers revenue from the sale of alcoholic beverages as a percentage of the business’ gross revenue, which may include revenue from the sale of food, cover charges, and souvenir merchandise, and other products or services.

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. The exception for stand-alone bar also provides that the revenue derived from the business’ package store sales is excluded from the calculation of alcoholic beverage sales as a percentage of gross revenue.

Section 386.2045(7), F.S., provides an exception for 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(17).” Section 386.203(a), 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. The exemption for a membership organization only applies to facilities 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 386.2045(1), F.S., provides an exception for designated smoking rooms. The requirements for a designated smoking room are detailed in subsection (1) to provide 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.”

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 exception 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 exception 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.

Section 386.2045, F.S., provides an exception for tobacco smoking to the extent it is that “tobacco smoking is an integral part of scientific, political, religious, ideological, or other expressive speech or activity, including, but not limited to, production by the entertainment industry as defined in s. 288.125, scientific and medical research, and exhibition of the arts as defined in s. 265.283.” It also provides an exception for tobacco smoking to the extent the “prohibition of tobacco smoking would encroach upon rights protected by the United States Constitution or the State Constitution.” This provision further provides that “each room in which tobacco smoking is permitted as part of scientific, political, religious, ideological, or other expressive speech or activity 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.

The Constitutional Amendment permits the Legislature to enact tobacco smoking prohibitions more restrictive than that provided in the Constitution. The bill amends s. 386.204, F.S., to prohibit smoking in a restaurant, including any outdoor areas of the restaurant where one or more persons engages in work. It also requires that a restaurant must “post signs outside the entryway and on the walls of the restaurant, place notices on each dining table of the restaurant, and include in any advertisement for the restaurant that the restaurant is a nonsmoking facility. The signs must comply with the lettering and placement requirements established in s. 386.206.”

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.

The bill amends s. 386.207, F.S., to change the primary enforcement responsibility from the Department of Health to the Department of Agriculture and Consumer Services (“the department”). This section provides that the department, the Department of Health, and the Division of Hotels and Restaurants (“the division”) may enforce the Act and the rules that the department must adopt to enforce the Act. Section 386.2125, F.S., is created to authorize the department to adopt rules in consultation with the Department of Health, the division, and the State Fire Marshal.

The bill amends the current ss. 386.207 and 386.208, F.S., to maintain the penalty amounts applicable for violations under the current Act.

The bill creates s. 386.213, F.S., to provide that if any provision of the Act is declared invalid, the entire act is held invalid and may not be applied to any person or circumstance.

**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:

Business that opt to designate smoking rooms as provided in section 6 of this bill, may incur financial cost incident to retrofitting current facilities or construction new facilities to meet the requirements for designated smoking rooms. The Florida Restaurant Association states that the restriction on smoking in outdoor areas of the restaurant, and the requirements for notice posting and advertising will impose a significant economic impact on the restaurant industry.

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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