

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 139 Public Lodging Establishments
SPONSOR(S): Homan, (Co-Sponsor) McInvale
TIED BILLS: **IDEN./SIM. BILLS:** SB 280

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation		Gallen	Liepshutz
2) Judiciary			
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill prohibits the distribution of handbills, without permission, on private property controlled by any public lodging establishment upon which it is posted that advertising or solicitation is prohibited. The term "handbill" is defined as any flier, leaflet, pamphlet, or other written material that seeks to advertise, promote, or inform persons about an individual or business.

The bill makes it a first degree misdemeanor to violate this prohibition or direct another to violate this provision. Additionally, the bill enhances the penalty for a battery, to a third degree felony, if a battery is committed while in violation of the handbill provision.

The bill does not appear to have a significant fiscal impact on state or local government.

The bill takes effect July 1, 2004.

The *due process* provisions of the state and federal constitution restrict government from engaging in arbitrary action which deprives persons of life, liberty, or property. The bill provides that a person commits a third degree felony when they direct another, such as an employee, to distribute handbills in violation of this act and that employee commits a battery. This provision may raise constitutional concerns.

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

STORAGE NAME h0139.br.doc
DATE January 9, 2004

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 type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input 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:

1. The bill prohibits a business or individual from distributing handbills, without permission, on the premises of a public lodging establishment.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Lodging Establishments

Chapter 509, F.S., sets out the regulations for public lodging establishments through the Division of Hotels and Restaurants of the Department of Business and Professional Regulation. A public lodging establishment is defined as "any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings, which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests."¹ "Guest" means any patron, customer, tenant, lodger, boarder, or occupant of a public lodging establishment.²

Additionally, Chapter 509, F.S. addresses the behavior of guests on public lodging establishment property. The owner of a public lodging establishment may, among other things, remove intoxicated guests or guests using profanity or who are involved in a brawl³. An owner may refuse service to an intoxicated guest or to a guest who is using profane language or brawling⁴. An owner of an establishment may take a guest into custody, through reasonable means, who the owner believes is in violation of s. 877.03, F.S., (breach of the peace or disorderly conduct) if that conduct is threatening the life or safety of that person or others⁵.

Trespass in structure

Chapter 810, F.S. provides that whoever, without being authorized, licensed, or invited willfully enters or remains in any structure⁶ or having been authorized is warned by the owner or lessee or a person authorized by the owner or lessee to depart and refuses to do so commits a second degree misdemeanor⁷. In this context, a person authorized to warn someone to depart includes any law enforcement officer whose department has received written authorization to communicate an order to

¹ s. 509.013(4)(a), F.S.

² s. 509.013(3), F.S.

³ s. 509.141(1), F.S.

⁴ s. 509.142, F.S.

⁵ s. 509.143(1), F.S.

⁶ The term "structure" means a building of any kind, whether temporary or permanent, which has a roof over it, together with the cartilage thereof." This section also applies to trespass in a conveyance.

⁷ s. 810.08, F.S.

depart the property in the case of a threat to public safety or welfare. If there is a human being in the structure at the time that the offender trespassed, the offense is a first degree misdemeanor, punishable by up to one year of incarceration.

Trespass on property other than structure

A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance as to which notice against entering or remaining is given, either by actual communication to the offender or by posting or fencing commits a first degree misdemeanor, punishable by up to one year of incarceration⁸.

“Posted land”⁹ is land upon which signs are placed not more than 500 feet apart along, and at each corner of, the boundaries of the land. They must be posted in a manner and in a position as to be clearly noticeable from outside the boundary line. The signs must have the words “no trespassing” displayed prominently, in letters no less than 2 inches in height, as well as the name of the owner, lessee, or occupant of the land.

“Fenced land” is land which has been enclosed by a fence of substantial construction which stands at least 3 feet in height.¹⁰

Effect of Proposed Changes

The bill amends part I of chapter 509, F.S., relating to the regulation of public lodging establishments, to define the term “handbill” and to make it unlawful to distribute without permission a handbill on private property controlled by any public lodging establishment upon which it is posted that advertising or solicitation is prohibited.

A handbill is defined as any flier, leaflet, pamphlet, or other written material that seeks to advertise, promote, or inform persons about an individual, business, company, or food service establishment.

The bill makes it unlawful to distribute without permission a handbill on the private property controlled by any public lodging establishment upon which it is posted that “advertising or solicitation is prohibited on private property controlled by any public lodging establishment.” Two penalties are created under this section.

The bill creates a first degree misdemeanor offense, punishable by up to 1 year in prison and a fine up to \$1,000, which would require proof of the following elements:

1. an individual, agent, contractor, or volunteer who was acting on behalf of any individual, business, company or food service establishment¹¹;
2. delivered, distributed, or placed or attempted to deliver, distribute, or place;
3. any handbill;
4. on the private property controlled by any public lodging establishment;
5. without permission;

⁸ s. 810.09, F.S.

⁹ s. 810.011(5)(a), F.S.

¹⁰ s. 810.011(7), F.S. The fence can be constructed with “rails, logs, post and railing, iron, steel, barbed wire, other wire or other material”

¹¹ Section 509.013(5), F.S. defines the term “public food service establishment” to mean “any building, vehicle, place, or structure, or any room or division in a building, vehicle, place, or structure where food is prepared, served, or sold for immediate consumption on or in the vicinity of the premises; called for or taken out by customers; or prepared prior to being delivered to another location for consumption.” The section also excludes a number of facilities from the definition of public food service establishment including school cafeterias, eating places maintained by a nonprofit organization and theaters. See s. 509.013(5)(b), F.S.

6. whereupon it was posted in a reasonably conspicuous manner that advertising or solicitation is prohibited on the premises of the public lodging establishment.

Further, the bill makes it a first degree misdemeanor to direct any other person to distribute handbills in the manner described above.

The bill provides that any person who violates this section and who also commits a battery¹² on any person who is on the premises of the public lodging establishment commits a third degree felony, punishable by up to five years in prison and a fine up to \$5,000. The penalty for a battery in this instance is enhanced from a first degree misdemeanor to a third degree felony.

Additionally, the bill makes it a third degree felony for a person to direct any other person, such as an employee, to distribute handbills without permission if the employee also commits a battery. This provision may raise a constitutional due process concern because it has the potential to hold an employer, who has unlawfully directed an employee to distribute handbills, strictly liable for a battery committed by an employee. (see Comments, p. 6)

The bill will take effect July 1, 2004.

C. SECTION DIRECTORY:

Section 1: Provides popular name "Tourist Safety Act of 2004"

Section 2: Amends s. 509.013, F.S., by adding the definition of the term "handbill"

Section 3: Creates s. 509.144, F.S., prohibiting the distribution of handbills without permission; provides penalties

Section 4: Provides an effective date

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

The bill makes it a third degree felony offense for any person, or person that directed a person, who commits a battery while distributing handbills on specified private property without permission. The Criminal Justice Impact Conference has not met to consider whether this bill will have any impact on the prison bed population at the Department of Corrections. However, the conference has historically determined that a third degree felony which is not ranked in the Offense Severity Ranking Chart of the Criminal Punishment Code will have an insignificant impact because the lowest permissible sentence for such an offense is any non-state prison sanction.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

¹² Section 784.03(1) provides that the offense of battery occurs when a person: 1) Actually and intentionally touches or strikes another person against the will of the other; or 2) Intentionally causes bodily harm to another person. The offense is a first degree misdemeanor.

1. Revenues:

None

2. Expenditures:

Although the bill creates a prohibition that must be enforced, the fiscal impact should be minimal.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will prohibit private companies and individuals from distributing handbills on the premises of certain public lodging establishments. This may have an undetermined negative economic impact on an individual or business who distributes handbills as well as any business that uses handbills as a method of advertising.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision does apply because this bill may require counties to take additional police action to enforce the prohibition; however, an exemption applies because it is a criminal law.

3. Other:

First Amendment

The bill prohibits the distribution of a handbill that seeks to advertise, promote or inform persons about an individual or business on the property of a public lodging establishment where a warning is posted. This could limit the distribution of information regarding a number of topics ranging from political pamphlets to commercial advertisements.

The First Amendment provides: "Congress shall make no law ...abridging the freedom of speech, or of the press" The Fourteenth Amendment makes this limitation applicable to the States. In Lloyd Corporation v. Tanner, 92 S.Ct. 2219 (1972), the United States Supreme Court considered the issue of whether a privately owned shopping mall could prohibit the distribution of handbills on its property. The respondent argued that because the mall was open to the public, it was essentially a public forum and the private company could therefore not enforce a restriction against handbilling on the premises. In ruling that the respondents were not entitled to exercise their First Amendment rights on the mall property, the court noted that, "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." Id. at 2228. The court also ruled that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."¹³ The bill does not impact the right of an individual to distribute handbills on public property - it only applies to public lodging establishments and, therefore, does not appear to violate the First Amendment.

¹³ See also, Cape Cod Nursing Home Council v. Rambling Rose Rest Home, 667 F.2d. 238 (1st Cir. 1981)(holding that police action in removing individuals from private nursing home did not create a first amendment right of access where none would otherwise exist).

Due Process

The *due process* clause of the state and federal constitution restrict government from engaging in arbitrary action which deprives persons of life, liberty, or property.

The bill creates a third degree felony offense for an employer that directs an employee to distribute handbills in violation of this act when the employee commits a battery during the distribution of the handbills. Even though the employer is not present during the commission of the battery, the employer is held strictly liable.

Strict liability offenses are those in which the criminal intent of the actor is not an element that must be proven to show guilt. Under the bill, proof of intent for the battery offense is not required in order to hold an employer liable for a battery committed by an employee. Courts have expressed concern over statutes that impose strict liability; furthermore, courts disfavor holding employers liable for the intentional illegal acts of their employees.

The United States Supreme Court has stated that strict liability statutes that serve a regulatory function are distinguishable from those that involve crimes against a person or property where jail time is likely.¹⁴ Wherein crimes against a person or property depend on mental elements to show guilt, regulatory offenses generally depend on no mental element and consist only of forbidden acts or omissions.¹⁵ Courts have noted that the common law rule requiring the element of mental intent has been followed in regard to statutory crimes even when the statutory definition does not include it.¹⁶ The exception to this rule are regulatory statutes; where courts have upheld strict liability offenses when statutes imposed penalties that were relatively small, and that conviction did not do grave damage to the offenders reputation.¹⁷

Here, the bill creates a strict liability offense that contains a relatively severe penalty, which may require jail time. If this provision were to be challenged, at issue would be whether the offense created is regulatory in nature or whether it is a crime against a person or property.

Generally, courts will not hold an employer liable for an act committed by their employee unless the act is within the "scope of employment." In Meigs v. State, an employer was held liable for violating a regulatory statute because an employee possessed fish of a prohibited size; the court found the employee was acting within the scope of employment.¹⁸ An employee's conduct is within the scope of employment when the conduct is of the kind they were employed to perform, occurs substantially within the time and space limits authorized or required by the work performed, and is activated at least in part by the purpose to serve the master.¹⁹ Courts continue to use the "scope of employment" test in both criminal and civil actions when determining whether to hold an employer liable for the actions of their employees.

At issue under the bill is whether an employee is acting within the scope of employment when they commit a battery after being directed to distribute handbills in violation of this act. It may be determined that the act of distributing handbills invites the circumstance for a battery to occur and the battery was in furtherance to serve the employer.

B. RULE-MAKING AUTHORITY:

¹⁴ Morissette v. United States, 342 U.S. 246 (1952)

¹⁵ Id.

¹⁶ Staples v. United States, 511 U.S. 600 (1994)

¹⁷ Id., see also United States v. Freed, 401 U.S. 601 (1971)(where court held it was not a violation of due process to charge defendants for violating the National Firearms Act, a regulatory statute, that omitted the element of mental state or intent)

¹⁸ 94 Fla. 808 (1927)

¹⁹ Iglesia Cristina La Casa Del Senor, Inc. v. L.M., 783 So.2d 353 (FL DCA 3d 2001)

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES