

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1143 Florida Clean Indoor Air Act

SPONSOR(S): Harrison

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	10 Y, 2 N	Guzzo	O'Callaghan
2) Business & Professions Subcommittee			
3) Health & Human Services Committee			

SUMMARY ANALYSIS

The Florida Clean Indoor Air Act (Act) was created by the legislature in 1985 to protect the health, comfort, and environment of the public by creating areas in public places and at public meetings that are reasonably free from tobacco smoke. The Act permitted smoking in designated areas of specified indoor public places including workplaces.

In Florida's General Election of 2002, voters approved a Constitutional Amendment to prohibit tobacco smoking in enclosed indoor workplaces. As required by the amendment, the legislature enacted implementing legislation by amending the Act to prohibit smoking in an enclosed indoor workplace. The Act defines "smoking" as inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product.

The Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) are responsible for enforcement of the Act. If the proprietor of an enclosed indoor workplace violates the prohibition, DOH or DBPR may assess a civil penalty against the person. Fines of \$250 for a first offense, \$500 for a second offense, and \$1,000 for a third offense may be assessed for specific violations. In addition, any person who violates the smoking prohibition commits a noncriminal violation punishable by a fine of not more than \$100 for the first violation and not more than \$500 for each subsequent violation.

Recently, some states have applied laws similar to Florida's Act to the use of nicotine dispensing devices. A nicotine dispensing device is any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.

HB 1143 amends the Act to prohibit the use of nicotine dispensing devices in enclosed indoor workplaces. Specifically, the bill amends the definition of "smoking" to include, inhaling, exhaling, carrying, or possessing a nicotine dispensing device.

The bill is expected to have an indeterminate, yet likely significant negative fiscal impact on DOH and DBPR related to enforcement of the prohibition.

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida Clean Indoor Air Act

The Florida Clean Indoor Air Act¹ (Act) was created by the legislature in 1985² to protect the health, comfort, and environment of the public by creating areas in public places and at public meetings that are reasonably free from tobacco smoke. The Act permitted smoking in designated areas of specified public places, including government buildings, public means of transportation, elevators, health care facilities, educational facilities, public school buses, libraries, courtrooms, jury waiting rooms, museums, theatres, auditoriums, arenas, recreational facilities, restaurants, retail stores, grocery stores, and places of employment.³ The Act required the person in charge of a public place to post signs stating that smoking is permitted in such an area.

In Florida's General Election of 2002, voters approved a Constitutional Amendment to protect people from the health hazards of second-hand smoke by prohibiting tobacco smoking in enclosed indoor workplaces.⁴ As required by the amendment, the legislature enacted implementing legislation by amending the Act to prohibit smoking in an enclosed indoor workplace.⁵ The Act defines "smoking" as inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product.⁶

The Act provides certain exceptions to the smoking prohibition. Specifically, the Act permits tobacco smoking in:

- Private residences;
- Retail tobacco shops;⁷
- Designated smoking guest rooms in public lodging establishments;
- Stand-alone bars;⁸
- Smoking cessation programs in an enclosed indoor workplace where tobacco smoking is an integral part of a smoking cessation program, or medical or scientific research is conducted therein; and
- Customs smoking rooms in an airport in-transit lounge.⁹

The Act also requires the proprietor or other person in charge of the enclosed indoor workplace to develop and implement a policy regarding the smoking prohibition.¹⁰ The policy may include

¹ Part II, ch. 386, F.S.

² Ch. 1985-257, Laws of Fla.

³ Id.

⁴ Fla. Const., art. X, s. 20.

⁵ S. 386.203(5), F.S., "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, without limitation, uncovered openings; screened or otherwise partially covered openings; or open or closed windows, жалousies, doors, or the like. A place is "predominantly" bounded by physical barriers during any time when both of the following exist: it is more than 50 percent covered from above by a physical barrier that excludes rain; and more than 50 percent of the combined surface area of its sides is covered by closed physical barriers. The term does not include any facility owned or leased by and used exclusively for noncommercial activities performed by the members and guests of a membership association, including social gatherings, meetings, dining, and dances, if no persons are in engaged in work.

⁶ S. 386.203(10), F.S.

⁷ S. 386.203(8), F.S., "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.

⁸ S. 386.203(11), F.S., "stand-alone bar" means any licensed premises devoted during any time of operation predominantly or totally to serving alcoholic beverages for consumption; in which the consumption of food, if any, is merely incidental to the consumption of any such beverage; and the licensed premises is not located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace.

⁹ S. 386.2045, F.S.

procedures to be taken when the proprietor witnesses or is made aware of a violation of the smoking prohibition and must include a policy which prohibits an employee from smoking in the enclosed indoor workplace. In order to increase public awareness, the person in charge of an enclosed indoor workplace may post “no smoking” signs as deemed appropriate.¹¹

The regulation of smoking is expressly preempted to the state and supersedes any municipal or county ordinance on the subject.¹²

Violations and Fines

An individual found by law enforcement to be in violation of the Act for smoking in an enclosed indoor workplace commits a noncriminal violation¹³ punishable by a fine of not more than \$100 for the first violation and not more than \$500 for each subsequent violation.¹⁴ Jurisdiction of the noncriminal violation is with the appropriate county court.¹⁵

The Department of Health (DOH) and the Division of Alcoholic Beverages and Tobacco or the Division of Hotels and Restaurants of the Department of Business and Professional Regulation (DBPR) are responsible for enforcement of the Act and ensuring that proprietors of enclosed indoor workplaces are in compliance with the Act.¹⁶

Upon notification of an observed violation of the Act, DOH must issue the proprietor a notice to comply.¹⁷ The proprietor or other person in charge must respond in writing within 30 days of receiving the notice to comply. If the proprietor or other person in charge fails to respond within 30 days or if an additional complaint is received, DOH must forward a copy of the complaint or notification of observed violation to the county health department director in the county where the violation occurred and request an on-site inspection.¹⁸ If the investigation determines that a proprietor or other person in charge of an enclosed indoor workplace has failed to correct the violations, DOH is authorized to assess a civil penalty against the person. Fines of \$250 for a first offense, \$500 for a second offense, and \$1,000 for a third offense may be assessed. If an individual refuses to comply after being assessed a penalty, DOH is authorized to file a complaint in the circuit court of the county in which the enclosed indoor workplace is located.¹⁹

Upon notification of an observed violation of the Act, DBPR must issue the proprietor a notice to comply.²⁰ The proprietor or other person in charge must respond in writing within 30 days of receiving the notice to comply. If the proprietor or other person in charge fails to respond within 30 days, DBPR may assess fines of \$275 for a first offense, \$550 for a second offense, \$750 for a third offense, and \$1,750 for each subsequent offense. If an individual refuses to comply after being assessed a penalty, DBPR is authorized to file a complaint in the circuit court of the county in which the enclosed indoor workplace is located.²¹

All the fine money collected by DOH and DBPR is required to be used for children’s medical services programs.²²

¹⁰ S. 386.206(1), F.S.

¹¹ Id.

¹² S. 386.209, F.S., however, school districts may further restrict smoking by persons on school district property.

¹³ S. 775.08(3), F.S., “noncriminal violation” means any offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by no other penalty than a fine, forfeiture, or other civil penalty. A noncriminal violation does not constitute a crime, and conviction for a noncriminal violation shall not give rise to any legal disability based on a criminal offense. The term “noncriminal violation” does not mean any conviction for any violation of any municipal or county ordinance.

¹⁴ S. 386.208, F.S.

¹⁵ Id.

¹⁶ S. 386.207(1), F.S.

¹⁷ S. 386.207(3), F.S., and rule 64I-4.001, F.A.C.

¹⁸ Id.

¹⁹ S. 386.207(3), F.S.

²⁰ S. 386.206(1), F.S., and rule 61A-7.010, F.A.C.

²¹ Id.

²² S. 386.207(4), F.S.

Nicotine Dispensing Devices

A nicotine dispensing device is a product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette (e-cigarette), electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any preplacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within a nicotine product.²³ The common name used for nicotine dispensing devices is e-cigarette.

The percentage of adults nationwide who have used an e-cigarette at least once rose from 3.3% in 2010 to 8.5% in 2013.²⁴ In Florida, from 2011-2014, the number of middle school students who have tried an e-cigarette at least once increased by 183.3%, with 8.5% of middle school students having tried an e-cigarette at least once in 2014.²⁵ E-cigarette use in Florida high school students increased by 241.7% from 2011-2014, with 20.5% of high school students having tried an e-cigarette at least once.

Currently, municipal and county ordinances are not preempted from the regulation of e-cigarettes. Several counties and cities within Florida have passed local ordinances to restrict the public use of e-cigarettes, including the City of Green Cove Springs, the City of Sebastian, the City of Vero Beach, the City of Stuart, and the Town of Orange Park.

As of September 30, 2015, six states have passed comprehensive smoke-free indoor air laws that include e-cigarettes.²⁶ The six states are Delaware, Hawaii, New Jersey, North Dakota, Oregon, and Utah. These laws prohibit the use of e-cigarettes in indoor areas of private worksites, restaurants, and bars.

Nicotine Dispensing Device Retailers

In Florida, nicotine dispensing device retailers, commonly known as vape shops, are prohibited from selling nicotine dispensing devices by means of self-service merchandising, unless, the vape shop prohibits persons under the age of 18 from entering.²⁷ Self-service merchandising means the open display of nicotine products or nicotine dispensing devices for customer use, before purchase and without the assistance of the retailer.²⁸

Effect of Proposed Changes

The bill amends the Florida Clean Indoor Air Act to prohibit the use of nicotine dispensing devices in enclosed indoor workplaces. The bill accomplishes this by amending the definition of “smoking” to include inhaling, exhaling, carrying, or possessing a nicotine dispensing device. Section 386.204, F.S., prohibits a person from smoking in an enclosed indoor workplace. As a result, an individual who is caught inhaling, exhaling, carrying, or possessing a nicotine dispensing device in an enclosed indoor workplace commits a noncriminal violation punishable by a fine of not more than \$100 for the first violation and not more than \$500 for each subsequent violation. Although current law does not penalize a person for carrying or possessing an unlit cigarette in an enclosed indoor workplace, this bill would penalize a person for carrying or possessing a nicotine dispensing device, regardless of whether it is being used.

²³ S. 877.112(1)(a), F.S.

²⁴ Centers for Disease Control and Prevention, *Trends in Awareness and Use of Electronic Cigarettes Among U.S. Adults, 2010-2013*, available at http://www.cdc.gov/tobacco/basic_information/e-cigarettes/adult-trends/ (last viewed January 15, 2016).

²⁵ Florida Department of Health, *Tobacco Free Florida, 2014 Florida Youth Tobacco Survey*, available at <http://www.floridahealth.gov/statistics-and-data/survey-data/fl-youth-tobacco-survey/documents/2014-state/index.html> (last viewed January 15, 2016).

²⁶ Centers for Disease Control and Prevention, *State System E-Cigarette Fact Sheet*, available at <https://chronicdata.cdc.gov/Legislation/STATE-System-E-Cigarette-Fact-Sheet/qte6-7jwd> (last viewed January 15, 2016).

²⁷ S. 877.112(11), F.S.

²⁸ S. 877.112(1)(c), F.S.

Because the bill prohibits the inhaling, exhaling, carrying, or possessing of a nicotine dispensing device inside any enclosed indoor workplace, a vape store will no longer be able to allow customers to sample products inside of their stores.

The bill provides an effective date of July 1, 2016.

B. SECTION DIRECTORY:

Section 1: Amends s. 386.203, F.S., relating to definitions.

Section 2: Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See fiscal comments.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Municipalities and counties wishing to restrict the use of e-cigarettes will not have to spend funds to pass local ordinances to do so.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may result in vape shop businesses having reduced sales of their products as a result of the bill prohibiting the use or possession of nicotine dispensing devices in enclosed indoor workplaces, such as restaurants, businesses, or even vape shops.

D. FISCAL COMMENTS:

DOH and DBPR are expected to experience an increase in costs related to enforcement of the bill's prohibitions. The increase in costs is associated with an expected increase in complaints and violations related to inhaling, exhaling, carrying, or possessing a nicotine dispensing device in an enclosed indoor workplace.

Currently, if DOH receives a complaint that an enclosed indoor workplace is allowing smoking to take place in a prohibited area, they send a notice to comply to the proprietor. If the proprietor fails to respond to the notice to comply, the complaint is investigated by the applicable county health department. DOH may assess fines to the proprietor of an enclosed indoor workplace of \$250 for a first offense, \$500 for a second offense, and \$1,000 for a third offense for violations found during an investigation resulting from a complaint.

The complaint process is similar for DBPR, but the fines for violations range from \$275 to \$1,750.

The bill is likely to have a significant negative fiscal impact on DOH and DBPR, however the total dollar amount is not known.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

No additional rulemaking is necessary to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Nicotine dispensing devices emit vapor, not smoke. Therefore, it may be more appropriate to define vapor and use that term instead of smoke when referring to nicotine dispensing devices.

Because the Act refers to tobacco smoke throughout, it is unclear whether those references would apply to nicotine dispensing devices because nicotine dispensing devices use nicotine products and emit a vapor instead of tobacco smoke. If nicotine dispensing devices are not captured under such terms, the exceptions for residential use or use in a retail tobacco shop, for example, would not apply to nicotine dispensing devices.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES