

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Innovation, Industry, and Technology

BILL: SB 630

INTRODUCER: Senator Mayfield

SUBJECT: Regulation of Smoking

DATE: January 27, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	Favorable
2.	<u>Oxamendi</u>	<u>Imhof</u>	<u>IT</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 630 amends the “Florida Clean Indoor Air Act” in part II of ch. 386, F.S., which regulates vaping and tobacco smoking in Florida, to allow counties and municipalities to restrict smoking within the boundaries of any park they own. Currently, the regulation of smoking is preempted to the state and counties and municipalities are prohibited from regulating smoking. “Smoking” is defined in ch. 386, F.S., as “inhaling, exhaling, burning, carrying, or possessing any lighted tobacco product, including cigarettes, cigars, pipe tobacco, and any other lighted tobacco product.”

The bill takes effect July 1, 2020.

II. Present Situation:

The Florida Clean Indoor Air Act (act) in part II of ch. 386, F.S., regulates vaping and tobacco smoking in Florida. The legislative purpose of the act is to protect the public from the health hazards of secondhand tobacco smoke and to implement the Florida health initiative in s. 20, Art. X of the State Constitution.¹

Florida Constitution

Tobacco Smoking

On November 5, 2002, the voters of Florida approved Amendment 6 to the State Constitution, which prohibits tobacco smoking in enclosed indoor workplaces. Codified as s. 20, Art. X, Florida Constitution, the amendment defines an “enclosed indoor workplace,” 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

¹ Section 386.202, F.S.

occurring at any given time.” The amendment defines “work” as “any persons 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 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 directed the Legislature to implement the “amendment in a manner consistent with its broad purpose and stated terms.” The amendment required that implementing legislation have an effective date of no later than July 1, 2003, and required that implementing legislation provide civil penalties for violations; provided for administrative enforcement, and required and authorized agency rules for implementation and enforcement. The amendment further provided that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the Florida Constitution.

Vaping

On November 6, 2018, the voters of Florida approved Amendment 9 to the Florida Constitution, to ban the use of vapor-generating electronic devices, such as electronic cigarettes (e-cigarettes), in enclosed indoor workplaces.² The use of e-cigarettes is commonly referred to as vaping.

Amendment 9 adds vapor-generating electronic devices to the current prohibition against tobacco smoking in enclosed indoor workplaces. The amendment makes exceptions for the same enclosed indoor workplace locations where tobacco smoking is permitted and further permits tobacco smoking and the use of vapor-generating electronic devices in a “vapor-generating electronic device retailer.”

The amendment defines a “vapor-generating electronic device retailer” to mean “any enclosed indoor workplace dedicated to or predominantly for the retail sale of vapor-generating electronic devices and components, parts, and accessories for such products, in which the sale of other products or services is merely incidental.”

A vapor-generating electronic device is defined as “any product that employs an electronic, a chemical, or a mechanical means capable of producing vapor or aerosol from a nicotine product or any other substance.” The definition includes electronic cigarettes, electronic cigars, electronic cigarillos, electronic pipes, and other similar devices or products, replacement cartridge for such devices, and other containers of a solution or other substance intended to be used with or within the devices.

Section 20, Art. X, Florida Constitution, as amended, directs the Legislature to implement the “amendment in a manner consistent with its broad purpose and stated terms.” The implementing legislation must have an effective date of no later than July 1 of the year following approval (July 1, 2019). The implementing legislation must also provide civil penalties for violations; provide for administrative enforcement; and require and authorize agency rules for

² Amendment 9 also bans offshore oil and natural gas drilling on lands beneath state waters. *See* FLA. CONST. art II, s. 7.

implementation and enforcement. The Legislature may enact legislation more restrictive of tobacco smoking or vaping than that provided in the State Constitution.

Under the amendment, local governments may adopt more restrictive local ordinances on the use of vapor-generating electronic devices.

Florida's Clean Indoor Air Act

The Legislature implemented the smoking ban by enacting ch. 2003-398, Laws of Fla., which amended part. II of ch. 386, F.S., and created s. 561.695, F.S., of the Beverage Law. The act, as amended, implements the constitutional amendment's prohibition. Specifically, s. 386.204, F.S., prohibits smoking in an enclosed indoor workplace unless the act provides an exception. The act adopts and implements the amendment's definitions and adopts the amendment's exceptions for private residences whenever not being used for certain commercial purposes;³ stand-alone bars;⁴ designated smoking rooms in hotels and other public lodging establishments;⁵ and retail tobacco shops, including businesses that manufacture, import, or distribute tobacco products and tobacco loose leaf dealers.⁶

Section 386.207, F.S., provides for enforcement of the act by the Department of Health (DOH) and the Department of Business and Professional Regulation (DBPR) within each department's specific areas of regulatory authority. Sections 386.207(1) and 386.2125, F.S., grant rulemaking authority to the DOH and the DBPR and require that the departments consult with the State Fire Marshal during the rulemaking process.

Section 386.207(3), F.S., provides penalties for violations of the act by proprietors or persons in charge of an enclosed indoor workplace.⁷ The penalty for a first violation is a fine of not less than \$250 and not more than \$750. The act provides fines for subsequent violations in the amount of not less than \$500 and not more than \$2,000. Penalties for individuals who violate the act are provided in s. 386.208, F.S., which provides for a fine of not more than \$100 for a first violation and not more than \$500 for a subsequent violation. The penalty range for an individual violation is identical to the penalties for violations of the act before the implementation of the constitutional smoking prohibition.

During the 2019, Regular Session, the Legislature amended part II of 386, F.S., to ban the use of vapor-generating electronic devices, such as electronic cigarettes (e-cigarettes), in enclosed indoor workplaces. The use of e-cigarettes is commonly referred to as vaping.⁸

Smoking Prohibited Near School Property

Section 386.212(1), F.S., prohibits smoking by any person under 18 years of age in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary

³ Section 386.2045(1), F.S. *See also* definition of the term "private residence" in s. 386.203(1), F.S.

⁴ Section 386.2045(4), F.S. *See also* definition of the term "stand-alone bar" in s. 386.203(11), F.S.

⁵ Section 386.2045(3), F.S. *See also* definition of the term "designated guest smoking room" in s. 386.203(4), F.S.

⁶ Section 386.2045(2), F.S. *See also* definition of the term "retail tobacco shop" in s. 386.203(8), F.S.

⁷ The applicable penalties for violations by designated stand-alone bars are set forth in s. 561.695(8), F.S.

⁸ *See* ch. 2019-14, Laws of Fla.

school between the hours of 6 a.m. and midnight. The prohibition does not apply to any person occupying a moving vehicle or within a private residence.

Enforcement

Section 386.212(2), F.S., authorizes law enforcement officers to issue citations in the form as prescribed by a county or municipality to any person violating the provisions of ch. 386, F.S., and prescribes the information that must be included in the citation.

The issuance of a citation under s. 386.212(2), F.S., constitutes a civil infraction punishable by a maximum civil penalty not to exceed \$25, or 50 hours of community service or, where available, successful completion of a school-approved anti-tobacco “alternative to suspension” program.⁹

If a person fails to comply with the directions on the citation, the person will waive his or her right to contest the citation, and the court may issue an order to show cause.¹⁰

Regulation of Smoking Preempted to State

Section 386.209, F.S., provides that the act expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject.

As an exception to the state’s preemption of smoking regulation, s. 386.209, F.S., permits school districts to further restrict smoking by persons on school district property.

Section 386.209, F.S., adopts and implements the Florida Constitution’s grant of authority to local governments to adopt more restrictive local ordinances on the use of vapor-generating electronic devices.

Regarding the issue of preemption, a Florida Attorney General Opinion concluded that the St. Johns Water Management District could not adopt a regulation prohibiting smoking by all persons on district property.¹¹ The Attorney General reasoned that s. 386.209, F.S., represents a clear expression of the legislative intent that the act preempts the field of smoking regulation for indoor and outdoor smoking. The Attorney General noted that the 2011 amendment of s. 386.209, F.S.,¹² authorizes school districts to prohibit smoking on school district property and concluded that further legislative authorization would be required for the water management district to regulate smoking on its property.

⁹ Section 386.212(3), F.S.

¹⁰ Section 386.212(4), F.S.

¹¹ Op. Att’y Gen. Fla. 2011-15 (July 21, 2011). *See also*, Op. Att’y Gen. Fla. 2005-63 (Nov. 21, 2005), which opined that a municipality is preempted from regulating smoking in a public park other than as prescribed by the Legislature.

¹² Chapter 2011-108, L.O.F.

Public Parks Owned by Counties and Municipalities

In Florida, there are 67 separate county park systems and more than 400 separate municipal park systems.¹³ For example, Orange County Florida maintains and operates 118 county-owned parks, which consist of a wide array of available activities and facilities.¹⁴ Parks provide a variety of activities to the public, including nature trails, bird watching, youth and adult athletics, bike paths, horse trails, boat ramps, fishing piers, metal detecting locations, outdoor gyms, and outdoor pavilions.¹⁵ Additionally, municipalities within Orange County also own and operate parks and outdoor recreational facilities. For example, the city of Winter Park, within Orange County, owns and operates 11 city parks, which offer similar recreational activities.¹⁶

The Division of Recreation and Parks within the Florida Department of Environmental Protection maintains a comprehensive inventory of the existing park facilities and outdoor resources in Florida. The inventory provides details about the parks and recreation areas in the state and consists of over 13,000 separate records, the majority of which are county and municipal parks.¹⁷

Laws in Other States

In 2009, Maine passed a law prohibiting “[smoking] tobacco or any other substance in, on or within 20 feet of a beach, playground, snack bar, group picnic shelter, business facility, enclosed area, public place or restroom in a state park or state historic site.”¹⁸ In 2015, Hawaii passed a law prohibiting smoking within its state park system.¹⁹ In 2018, New Jersey banned smoking at public parks and beaches.²⁰ New Jersey’s legislature found that “[t]he prohibition of smoking at public parks and beaches would better preserve and maintain the natural assets of this State by reducing litter and increasing fire safety in those areas, while lessening exposure to secondhand tobacco smoke and providing for a more pleasant park or beach experience for the public[.]”²¹

¹³ Florida Division of Recreation and Parks, *Frequently Asked Questions*, available at: <http://prodenv.dep.state.fl.us/DrpOrpcr/StaticFiles/FAQ.pdf> (last visited Jan. 27, 2020).

¹⁴ Orange County Government Florida, *Parks*, available at: <http://www.orangecountyfl.net/CultureParks/Parks.aspx?m=lstaz#.Xcwjw8GP6Uk> (last visited Jan. 27, 2020).

¹⁵ *Id.*

¹⁶ City of Winter Park, *Parks*, available at: <https://cityofwinterpark.org/departments/parks-recreation/parks-playgrounds/parks/> (last visited Jan. 27, 2020).

¹⁷ Florida Division of Recreation and Parks, *Florida Outdoor Recreation Inventory*, available at: <https://floridadep.gov/parks/florida-outdoor-recreation-inventory> (last visited Jan. 27, 2020).

¹⁸ Me. Rev. Stat. tit. 22, ss. 1580-E(2) and 1541(6). Under Maine law, “‘Smoking’ includes carrying or having in one’s possession a lighted or heated cigarette, cigar or pipe or a lighted or heated tobacco or plant product intended for human consumption through inhalation whether natural or synthetic in any manner or in any form. ‘Smoking’ includes the use of an electronic smoking device.”

¹⁹ Haw. Rev. Stat. Ann. § 184-4.5. “Smoking” is defined in the statute as “inhaling or exhaling upon, burning, or carrying any lit cigarette, cigar, or pipe or the use of an electronic smoking device.”

²⁰ 2018 NJ Sess. Law Serv. Ch. 64, S. 2534 (2018), available at: https://www.njleg.state.nj.us/2018/Bills/PL18/64_.PDF (last visited Jan. 27, 2020). The law defines “smoking” as “the burning of, inhaling from, exhaling the smoke from, or the possession of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco or any other matter that can be smoked, or the inhaling or exhaling of smoke or vapor from an electronic smoking device.”

²¹ N.J. Stat. Ann. § 26:3D-56(e).

Alaska law prohibits individuals from smoking outdoors “within 10 feet of playground equipment located at a public or private school or a state or municipal park while children are present.”²² Puerto Rico prohibits smoking in “public or private recreational installations.”²³ The definition of public or private recreational installations under Puerto Rico law includes parks.²⁴ Oklahoma law designates all buildings and other properties owned or operated by the state as nonsmoking, effectively prohibiting smoking at state parks in Oklahoma, except for at any designated outdoor smoking areas.²⁵

Oregon’s Parks and Recreation Department prohibits smoking tobacco products at park properties but provides exceptions, including smoking in vehicles and at designated campsites.²⁶ Outside of Florida, many local governments in the United States have restricted or prohibited smoking in public parks.²⁷

Health and Environmental Concerns

In 2018, an estimated 16 percent of the adults in Florida were tobacco smokers.²⁸ Tobacco smoke contains over 7,000 chemicals, including hundreds that are toxic and up to 69 that are known to cause cancer.²⁹ Exposure to secondhand smoke can cause numerous health problems and has been causally linked to cancer and other fatal diseases.³⁰ Secondhand smoke is generally defined as smoke from burning tobacco products or smoke that is exhaled by a tobacco smoker.³¹ Studies suggest that secondhand smoke in crowded outdoor areas can cause concentrations of air contaminants comparable to those caused by indoor smoking.³²

²² Alaska Stat. Ann. ss. 18.35.301(c)(1) and 18.35.399(12). Alaska law defines “smoking” as “using an e-cigarette or other oral smoking device or inhaling, exhaling, burning, or carrying a lighted or heated cigar, cigarette, pipe, or tobacco or plant product intended for inhalation.”

²³ 24 L.P.R.A. ss. 891 and 892. “Smoking” is defined as “the activity of inhaling and exhaling smoke from [tobacco] and other substances that are lit in cigars, cigarettes, and pipes, and to possess or transport cigars, cigarettes, pipes, and smoking articles while lit and it shall also include the use of the so-called electronic cigarette.”

²⁴ 24 L.P.R.A. § 891.

²⁵ Okla. Stat. Ann. tit. 21, § 1247(B).

²⁶ Or. Admin. R. 736-010-0040(8)(j).

²⁷ American Nonsmokers’ Rights Foundation, *Municipalities with Smokefree Park Laws* (2017), available at: <https://no-smoke.org/wp-content/uploads/pdf/SmokefreeParks.pdf> (last visited Jan. 27, 2020). This document lists local governments in the U.S. that have created laws that restrict or prohibit smoking in public parks within their jurisdiction.

²⁸ United Health Foundation, *America’s Health Rankings, Annual Report*, available at: <https://www.americashealthrankings.org/explore/annual/measure/Smoking/state/FL> (last visited Jan. 27, 2020).

²⁹ *Id.*; U.S. Department of Health and Human Services, *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, 148 (2014), available at: <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf> (last visited Jan. 27, 2020).

³⁰ U.S. Department of Health and Human Services, *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, 7 (2014); Center for Disease Control and Prevention, *Secondhand Smoke (SHS) Facts*, available at: https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm (last visited Jan. 27, 2020).

³¹ Center for Disease Control and Prevention, *Secondhand Smoke (SHS) Facts*, available at: https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm (last visited Jan. 27, 2020).

³² Nipapun Kungskulniti et al., *Secondhand Smoke Point-Source Exposures Assessed By Particulate Matter At Two Popular Public Beaches in Thailand*, 40 J. PUBLIC HEALTH 3, 527–532 (2017), available at: <https://academic.oup.com/jpubhealth/article/40/3/527/4110319?guestAccessKey=5947c328-fd75-4b6c-acfe-28f989c4c639> (last visited Jan. 27, 2020); James Repace, *Benefits of Smoke-free Regulations in Outdoor Settings: Beaches, Golf Courses*,

Another significant issue with tobacco smoking in natural areas is litter consisting of used cigarette filters, commonly known as cigarette butts. Cigarette butts are typically comprised mainly of cellulose acetate, a plastic-like material that can take years to decompose.³³ It is estimated that, of the roughly 6 trillion cigarettes smoked annually worldwide, up to two-thirds of the cigarette butts are discarded as litter.³⁴ Furthermore, cigarette butts contain hazardous substances, and studies have shown these substances to be potentially toxic to animals.³⁵

Under Florida law, it is illegal to discard any tobacco product as litter.³⁶ Discarding a cigarette butt is a noncriminal infraction, punishable by a penalty of \$100 in addition to any court-ordered litter pickup or other commensurate labor.³⁷

Fires are another significant issue regarding smoking tobacco in public parks. The Legislature has found that cigarettes are the leading cause of fire deaths in Florida and the nation.³⁸ Florida law requires that cigarettes sold in the state meet standards for reduced ignition propensity.³⁹ In addition to the risk of fires in buildings, Florida generally has a year-round risk of wildfire.⁴⁰ Cigarettes or other smoking materials can cause wildfires when discarded as litter. Data from the United States Forest Service shows that a significant number of wildfires were started by “smoking” between 1992 and 2015.⁴¹ The Florida Forest Service has reported an increased risk of wildfires for areas of northwest Florida in the aftermath of Hurricane Michael, due to factors such as increased fuel loadings and reduced access for fire mitigation equipment.⁴²

Parks, Patios and in Motor Vehicles, 34 WM MITCHELL L. REV. 1621, 1622–1624 (2008), available at: <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-symposium-repace.pdf> (last visited Jan. 27, 2020).

³³ NOAA, National Ocean Service, *What Is the Most Common Form of Ocean Litter?* available at: <https://oceanservice.noaa.gov/facts/most-common-ocean-litter.html> (last visited Nov. 13, 2019); Bonanomi, Giuliano et al., *Cigarette Butt Decomposition and Associated Chemical Changes Assessed by 13C CPMAS NMR*, 10 PLOS ONE 1 e0117393, 2 (2015), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4307979/pdf/pone.0117393.pdf> (last visited Jan. 27, 2020).

³⁴ World Health Organization, *Tobacco and Its Environmental Impact: An Overview*, 24 (2017) available at: <https://apps.who.int/iris/bitstream/handle/10665/255574/9789241512497-eng.pdf;jsessionid=8E8DFDA81D9C76448B2C9EAD445BC784?sequence=1> (last visited Jan. 27, 2020); Thomas E. Novotny and Elli Slaughter, *Tobacco Product Waste: An Environmental Approach to Reduce Tobacco Waste*, 1 CURR. ENVIRON. HEALTH REP. 3: 208–216, 208 (2014), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4129234/> (last visited Jan. 27, 2020).

³⁵ Wenjau Lee and Chih Chun Lee, *Developmental Toxicity of Cigarette Butts - An Underdeveloped Issue*, 113 ECOTOXICOLOGY AND ENVIRON. SAFETY 362-368, 362–363, 367 (2015), available at: http://tweb.cjcu.edu.tw/journal/2015_03_04_11_23_24.114.pdf (last visited Jan. 27, 2020); Stephanie L. Wright, *Bioaccumulation and Biological Effects of Cigarette Litter in Marine Worms*, 2015 SCI. REP. 5: 14119, 1 (2015), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4569891/> (last visited Jan. 27, 2020).

³⁶ Section 403.413(2)(d) and (f), (4), F.S.

³⁷ Section 403.413(6)(a), F.S. Littering is a noncriminal infraction if the litter does not exceed 15 pounds in weight or 27 cubic feet in volume.

³⁸ Section 633.142(2)(a), F.S.

³⁹ Section 633.142, F.S.

⁴⁰ Florida Department of Agriculture and Consumer Services, *Wildland Fire, Prevention*, available at: <https://www.freshfromflorida.com/Divisions-Offices/Florida-Forest-Service/Wildland-Fire> (last visited Jan. 27, 2020).

⁴¹ Karen C. Short, *Spatial Wildfire Occurrence Data For the United States, 1992-2015* (2017), available at: <https://www.fs.usda.gov/rds/archive/Product/RDS-2013-0009.4/> (last visited Jan. 27, 2020). The data can be viewed by clicking on the file labeled “RDS-2013-0009.4_ACCDB.zip,” and viewing the column labeled “STAT_CAUSE_DESCR.”

⁴² Jim Karels, Director, Florida Forest Service, Presentation to the Florida Senate Environment and Natural Resources Committee, January 8, 2019, *Hurricane Michael Impacts, Actions and Needs*, slides 14-16, 18 (2019).

III. Effect of Proposed Changes:

Section 1 amends s. 386.209, F.S., within part II of ch. 386, F.S. The bill allows municipalities and counties to further restrict smoking within the boundaries of any public park they own. Given the existing definition of “smoking” in ch. 386, F.S., the bill would allow municipalities and counties to further restrict the ability for any person to inhale, exhale, burn, carry, or possess any lighted tobacco product, including cigarettes, cigars, pipe tobacco, or any other lighted tobacco product, in a public county or municipal park.

Although this bill specifically relates to “smoking,” counties and municipalities are currently allowed to impose more restrictive regulation on the use of vapor-generating devices under s. 386.209, F.S.

Section 2 provides an effective date of July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Visitors to county or municipal parks who violate smoking restrictions imposed by a county or municipality may be subject to the applicable fines or civil penalty for such violations.

C. Government Sector Impact:

Counties and municipalities that opt to restrict smoking within the boundaries of public parks may incur indeterminate expenses related to enacting and enforcing such restrictions.

To the extent any imposed smoking restrictions deter or encourage visitation of a county or municipal park, a county or municipality may experience fluctuation in revenues generated by a public park admittance fee.

VI. Technical Deficiencies:

None.

VII. Related Issues:

There is no definition for “public park” in ch. 386, F.S., so it may not be clear exactly which areas are subject to the bill’s optional prohibition on smoking.

The short title of part II of ch. 386, F.S., which is entitled the “Florida Clean Indoor Air Act,” should be amended to remove the term “indoor” since the bill expands the scope of the act to regulate smoking beyond indoor areas, such as public parks.

VIII. Statutes Affected:

This bill substantially amends section 386.206 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.