

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 Transportation

BILL: CS/SB 430

INTRODUCER: Commerce and Tourism Committee and Senator Rodriguez

SUBJECT: Petroleum Fuel Measuring Devices

DATE: March 16, 2021

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|-----------|------------------|
| 1. | <u>McMillan</u> | <u>McKay</u> | <u>CM</u> | Fav/CS |
| 2. | <u>Price</u> | <u>Vickers</u> | <u>TR</u> | Favorable |
| 3. | _____ | _____ | <u>RC</u> | _____ |

I. Summary:

CS/SB 430 preempts regulation of petroleum fuel measuring devices to the State and the Department of Agriculture and Consumer Services (department) and eliminates the department's authority to impose penalties for violations of petroleum fuel measuring device rules unless an owner or operator of a petroleum fuel measuring device has failed to install a security device or measure.

The bill takes effect July 1, 2021.

II. Present Situation:

The Department of Agriculture and Consumer Services

Generally

The Department of Agriculture and Consumer Services (department) has broad duties under s. 525.07, F.S., including safeguarding the public from deceptive business practices, supporting Florida's agricultural economy, and protecting the environment.¹ Nineteen divisions and offices within the department support its mission.² The Division of Consumer Services inspects all measuring devices used in selling or distributing fuel at retail gas pumps and ensures the use of security mechanisms on gas pumps that help to prevent the use of skimmers.³ This division also

¹ Florida Department of Agriculture and Consumer Services, *About Us*, available at <https://www.freshfromflorida.com/About-Us/> (last visited Mar. 12, 2021).

² Florida Department of Agriculture and Consumer Services, *Divisions & Offices*, available at <https://www.freshfromflorida.com/Divisions-Offices/> (last visited Mar. 12, 2021).

³ See s. 525.07, F.S.; Florida Department of Agriculture and Consumer Services, *Petroleum Inspection*, available at <https://www.freshfromflorida.com/Business-Services/Petroleum-Inspection> (last visited Mar. 12, 2021).

provides consumer education regarding a variety of scams and frauds that target Florida residents, including identity theft and credit card fraud.⁴

Petroleum Inspection and Enforcement

The department conducts routine inspections of petroleum distribution systems and analyzes samples of petroleum⁵ products.⁶ These inspections include regular testing of gasoline, alternative fuels,⁷ kerosene, diesel, fuel oil, antifreeze products, and brake fluid.⁸ Petroleum fuel must be labeled accurately,⁹ and any mislabeled product must be placed under a stop-sale order with the device or storage tanks of that product sealed until a release order is issued.¹⁰

The department is also required to inspect all measuring devices used in selling or distributing petroleum fuel at wholesale and retail.¹¹ The department may put a sticker on each petroleum measuring device that has been inspected by the department, and at that point, the device owner is responsible for its proper use and maintenance.¹² Each individual who owns or manages a petroleum measuring device must ensure that the device is measuring properly based upon the tolerances¹³ defined by the department.¹⁴

Additionally, s. 525.07(10), F.S., requires each individual who owns or manages a petroleum measuring device to affix or install a security measure to restrict the unauthorized access of customer payment card information.¹⁵ Individuals must remedy any inadequate security measure within five days of receiving a written notice of noncompliance from the department.¹⁶ After the fifth day of noncompliance, further use of the retail petroleum measuring device may be prohibited by the department, and a repeat violation found on the same device is cause for the

⁴ See, e.g., Florida Department of Agriculture and Consumer Services, *Scams and Fraud*, available at <https://www.freshfromflorida.com/Consumer-Resources/Scams-and-Fraud> (last visited Mar. 12, 2021).

⁵ Petroleum fuels include gasoline, kerosene (except when used as aviation fuel), diesel fuel, benzene, other like products of petroleum under whatever name designated, or an alternative fuel used for illuminating, heating, cooking, or power purposes, sold, offered, or exposed for sale in Florida. See s. 525.01(b), F.S.

⁶ See ch. 525, F.S., Florida Department of Agriculture and Consumer Services, *Petroleum Inspection*, available at <https://www.freshfromflorida.com/Business-Services/Petroleum-Inspection> (last visited Mar. 12, 2021).

⁷ Alternative fuels include methanol, denatured ethanol, E85, and biodiesel. See s. 525.01(c), F.S.

⁸ See ch. 525, F.S., Florida Department of Agriculture and Consumer Services, *Petroleum Inspection*, available at <https://www.freshfromflorida.com/Business-Services/Petroleum-Inspection> (last visited Mar. 12, 2021).

⁹ Petroleum fuel is deemed to be mislabeled if the measuring device is labeled so as to misrepresent the product as to quality, content, or performance, or if the labeling on the measuring device is false or misleading. See s. 525.035(2), F.S.

¹⁰ See s. 525.035, F.S.

¹¹ Section 525.07(1)(a), F.S.

¹² Section 525.07(1)(b), F.S.

¹³ Tolerance refers to the total allowable error in excess or deficiency within a measurement. See s. 525.07(2), F.S.

¹⁴ Section 525.07(3), F.S.

¹⁵ The security measure must include (1) the placement of pressure-sensitive security tape over the panel opening that leads to the scanning device for the retail petroleum fuel measuring device in a manner that will restrict the unauthorized opening of the panel, (2) a device or system that will render the retail petroleum measuring device inoperable if there is an unauthorized opening of the panel, (3) a device or system that encrypts the customer payment card information in the scanning device, or (4) another security measure approved by the department. See s. 525.07(10), F.S.

¹⁶ See s. 525.07(10), F.S.

measuring device to immediately be taken out of service.¹⁷ The department may also seize any skimming device¹⁸ for use as evidence.¹⁹

For violations of ch. 525, F.S., the department has the authority to issue warning letters, impose administrative fines, or revoke or suspend any registration issued by the department.²⁰

Card Skimmers

A card skimmer is an electronic device that is illegally installed inside gas pumps to collect a consumer's credit or debit card information when a card is swiped through the reader.²¹ Criminals sell the consumer's information or use the information to make illegal purchases.²² The department has discovered and removed over 4,860 skimmers since 2015.²³ The use, possession, or sale of a skimmer is punishable as a third-degree felony under Florida law.²⁴

Local Regulations

Currently, local governments are not prohibited from enacting fuel pump security measures that are more restrictive than the rules established by the department. For instance, Lee County requires each fuel pump to be equipped with a visible lock, a system that would render the pump inoperable if it is accessed without a security code, or a device that encrypts customer payment card information.²⁵ Failure to affix an adequate security measure may result in fines of \$250 per gas pump for every day that the appropriate devices are not installed.²⁶ Collier County,²⁷ Charlotte County,²⁸ and the Village of Estero²⁹ also have local fuel pump ordinances.

¹⁷ *Id.*

¹⁸ A skimming device means a self-contained device that is (1) designed to read and store in the device's internal memory information encoded on the computer chip, magnetic strip or stripe, or other storage mechanism of a payment card or from another device that directly reads the information from a payment card; and (2) is incapable of processing the payment card information for the purpose of obtaining, purchasing, or receiving goods, services, money, or anything else of value from a merchant. *See* s. 817.625(1)(b), F.S.

¹⁹ *See* s. 525.07(10)(e), F.S.

²⁰ Section 525.16, F.S., gives the department the authority to issue a warning letter, impose an administrative fine in the Class II category (a fine not to exceed \$5,000), or revoke or suspend any registration issued by the department. Additionally, s. 525.16, F.S., establishes that any person who violates ch. 525, F.S., commits a misdemeanor of the first degree, punishable by a term of imprisonment not exceeding one year and a \$1,000 fine). Under this section, the department may also submit cases for prosecution, and the department may bring an action in circuit court to enjoin the violation of any provision in ch. 525, F.S.

²¹ Florida Department of Agriculture and Consumer Services, *Card Skimmers*, available at <https://www.freshfromflorida.com/Consumer-Resources/Scams-and-Fraud/Card-Skimmers> (last visited Mar. 12, 2021).

²² Federal Trade Commission, *Watch Out for Card Skimming at the Gas Pump* (Aug. 7, 2018), available at <https://www.consumer.ftc.gov/blog/2017/06/avoid-skimmers-pump> (last visited Mar. 12, 2021).

²³ Florida Department of Agriculture and Consumer Services, *FDACS Makes Three Arrests in Gas Pump Skimmer Investigation*, available at <https://www.fdacs.gov/News-Events/Press-Releases/2021-Press-Releases/FDACS-Makes-Three-Arrests-in-Gas-Pump-Skimmer-Investigation> (last visited Mar. 12, 2021).

²⁴ Section 817.625(2)(a), F.S. A third-degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. Sections 775.082, 775.083, and 775.084 F.S.

²⁵ *See* Lee County, Florida Ordinance No. 19-09.

²⁶ *Id.*

²⁷ *See* Collier County, Florida Ordinance No. 18-55.

²⁸ *See* Charlotte County, Florida Ordinance No. 19-026.

²⁹ *See* Village of Estero, Ordinance No. 18-25.

Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment may be inconsistent with state law if (1) the Legislature has preempted a particular subject area or (2) the local enactment conflicts with a state statute. Where state preemption applies, it precludes a local government from exercising authority in that particular area.³⁰

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.³¹ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.³² In cases where the Legislature expressly or specifically preempts an area, Legislative intent is apparent.³³

In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.³⁴ Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive.³⁵ Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and strong public policy reasons exist for finding preemption.³⁶ Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.³⁷

III. Effect of Proposed Changes:

The bill removes the ability for local jurisdictions to create and enforce regulations regarding petroleum fuel measuring devices that are beyond the rules established by the department.

The bill also eliminates the department's authority to impose penalties under s. 525.16, F.S.,³⁸ for violations of petroleum fuel measuring device rules under s. 525.07(10), F.S.,³⁹ unless an owner or operator of a petroleum fuel measuring device has failed to install a security device or measure.

³⁰ See James R. Wolf and Sarah Harley Bolinder, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009), available at <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/> (last visited March 12, 2021)..

³¹ See *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

³² *Mulligan*, 934 So.2d at 1243.

³³ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

³⁴ See, e.g., *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

³⁵ *Phantom of Clearwater, Inc.*, 894 So.2d at 1019.

³⁶ *Id.*

³⁷ *Sarasota Alliance for Fair Elections, Inc.*, 28 So.3d at 886.

³⁸ Section 525.16, F.S., gives the department the authority to issue a warning letter, impose an administrative fine in the Class II category, or revoke or suspend any registration issued by the department. Additionally, s. 525.16, F.S., establishes that any person who violates ch. 525, F.S., commits a misdemeanor of the first degree. Under this section, the department may also submit cases for prosecution, and the department may bring an action in circuit court to enjoin the violation of any provision in ch. 525, F.S.

³⁹ Section 525.07(10), F.S., requires every person who owns or manages a retail petroleum fuel measuring device to install or affix an unaltered security measure to restrict the unauthorized access of customer payment card information.

The bill takes effect July 1, 2021.

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:

The department will be unable to impose monetary administrative penalties against owners and managers of petroleum fuel measuring devices who violate s. 525.07(10), F.S., unless an owner or manager fails to install a security device or measure. Additionally, owners and managers of petroleum fuel measuring devices may be able to install less expensive security measures to restrict the unauthorized access of customer payment card information if they are currently subject to more stringent requirements pursuant to a local ordinance.

C. Government Sector Impact:

The department may experience a reduction in assessed administrative penalties or fines. Because the number of violations triggered by a failure to install a security device or measure is indeterminate, the extent of any reduction is unknown.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 525.07 and 525.16 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.)

CS by Commerce and Tourism on March 2, 2021:

The committee substitute clarifies that the department does not have the authority to impose penalties under s. 525.16, F.S., for violations of petroleum fuel measuring device rules under s. 525.07(10), F.S., unless an owner or operator of a petroleum fuel measuring device has failed to install a security device or measure.

B. Amendments:

None.