

**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.)

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: SB 1438

INTRODUCER: Senators Yarborough and Perry

SUBJECT: Protection of Children

DATE: March 20, 2023

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 1438 prohibits a person from *knowingly* admitting a child to an adult live performance. In broad, general terms, an adult live performance is a presentation that depicts or simulates nudity, sexual conduct, or specific sexual activities. The penalty for violating this prohibition is a first degree misdemeanor which is punishable by imprisonment that does not exceed 1 year and a fine that does not exceed \$1,000.

If a person who knowingly admits a child to an adult live performance has a license to operate a public lodging establishment or a public food service or has a beverage license, he or she is subject to having that license suspended or revoked and being fined. The fine for a first violation is \$5,000 and the fine for a second or subsequent violation is \$10,000.

The bill takes effect upon becoming law.

**II. Present Situation:**

**The Division of Hotels and Restaurants (Section 1)**

***Lodging and Food Establishments***

The Division of Hotels and Restaurants, within the Department of Business and Professional Regulation, is responsible for inspecting and regulating public lodging and public food service establishments to safeguard the public health, safety, and welfare.<sup>1</sup> In order to fulfill its responsibilities of inspecting and enforcing the pertinent provisions of law, the division is granted the right of entry and access to those establishments at any reasonable time.<sup>2</sup>

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<sup>1</sup> Section 509.032(1), F.S.

<sup>2</sup> Section 509.032(2)(b), F.S.

### ***Licensure***

Each public lodging and food service establishment operating in the state is required to obtain a license from the division before operating. The license must be conspicuously displayed in the office or lobby of the establishment.<sup>3</sup>

### ***Penalties***

If a public lodging or food service establishment operates in violation of chapter 509, F.S., or the rules of the division, it is subject to:

- Fines not to exceed \$1,000 per offense;
- Mandatory completion of a remedial program; and
- Suspension, revocation, or refusal of a license issued under chapter 509.<sup>4</sup>

A license may not be suspended for more than 12 months and at the end of the suspension, the establishment may apply for its license to be reinstated or renewed.<sup>5</sup>

### ***Grounds for Fining, Suspending, or Revoking a License***

The division is authorized to fine, suspend, or revoke the license of a public lodging establishment or public food service if:

- A person with a direct financial interest in the establishment has, within the preceding 5 years, been adjudicated guilty or forfeited a bond when charged with soliciting for prostitution, pandering, letting premises for prostitution, keeping a disorderly place, illegally dealing in controlled substances, or any other crime reflecting on professional character.
- The establishment has been deemed an imminent danger to the public health and safety by the division or a local health authority for failure to meet sanitation standards or the premises have been determined to be unsafe or unfit for human occupancy.<sup>6</sup>

### ***Beverage Law (Section 2)***

The Division of Alcoholic Beverages and Tobacco within the Department of Business and Professional Regulation is responsible for supervising the conduct, management, and operation of the manufacturing, packaging, distribution, and sale of all alcoholic beverages in the state. The division is also responsible for enforcing the provisions of the Beverage Law, the tobacco law, and the corresponding rules and regulations.<sup>7</sup>

### ***Licensure Qualifications***

Licenses are issued by the division to people who are of good moral character and at least 21 years old. Similarly, corporate licenses are issued to corporations whose officers are of good moral character and at least 21 years of age.<sup>8</sup>

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<sup>3</sup> Section 509.241(1) and (2), F.S.

<sup>4</sup> Section 509.261(1), F.S.

<sup>5</sup> Section 509.261(5)(a), F.S.

<sup>6</sup> Section 509.261(6)(a) and (b), F.S.

<sup>7</sup> Section 561.02, F.S.

<sup>8</sup> Section 561.15(1), F.S.

However, a license may not be issued to:

- Anyone who has been convicted within the last 5 years of any offense against the beverage laws of this state, the United States, or any other state;
- Anyone convicted within the last 5 years in this state, any other state, or the United States, of soliciting for prostitution, pandering, letting premises for prostitution, or keeping a disorderly place or of any criminal violation of chapter 893, F.S., pertaining to drug abuse prevention and control, or the controlled substance act of any other state or the Federal Government; or
- Anyone who has been convicted in the last 15 years of any felony in this state or any other state; or to a corporation or any of the officers of whom shall have been so convicted.<sup>9</sup>

All licenses issued by the division are issued as annual licenses.<sup>10</sup>

### ***Licensure Revocation and Suspension***

The division is authorized to revoke or suspend the license of any person who:

- Violates any state or federal laws or a municipal or county regulation relating to the hours of sale, service, or consumption of alcoholic beverages, permits disorderly conduct on the premises, or permits violations of any state or federal laws by other persons on the premises.
- Violates any laws of this state or any state or territory of the United States.
- Maintains a nuisance on the licensed premises.
- Maintains premises that are unsanitary or are not approved as sanitary.
- Violates any rule promulgated by the division in accordance with the provisions of chapter 561, F.S., or laws relating to the activities on the premises.
- Has an unqualified person who is holding an interest in the licensee or the licensed business.
- Has a person who is required to be qualified by the division as a condition for the issuance of the license but is not qualified.
- Fails to maintain the licensed premises in an active manner in which the licensed premises are open for the sale of authorized alcoholic beverages during regular business hours for specified times.
- Fails to maintain the premises in an active manner in which the licensed premises are open for business to the public for the retail sale of authorized alcoholic beverages during regular and reasonable business hours for specified times.
- Fails to maintain records of all monthly sales and all monthly purchases of alcoholic beverages and to produce the records for inspection by any division employee within 10 days of written request.
- Fails to comply with a stipulation, consent order, or final order.<sup>11</sup>

### ***Penalties***

If a licensee violates any provisions of the Beverage Law, or its rules, the division may impose a civil penalty that does not exceed \$1,000 for violations that arise from a single transaction. If the licensee does not pay the civil penalty, the license will be suspended for a period of time to be

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<sup>9</sup> Section 561.15(1) and (2), F.S.

<sup>10</sup> Section 561.26, F.S.

<sup>11</sup> Section 561.29(1), F.S.

determined by the division. However, the division may suspend the imposition of a penalty when the division, in its discretion, deems it appropriate.<sup>12</sup>

## **Freedom of Speech and the Protection of Minors**

### ***Background***

Freedom of speech is guaranteed to citizens in the United States Constitution and the State Constitution.<sup>13</sup> As a foundational principle, this prohibits the government from dictating what people “see or read or speak or hear.”<sup>14</sup> However, there are limits to the freedom of speech; it is not absolute. Categories of speech that do not enjoy complete protection include defamation, incitement, obscenity, and pornography involving real children.<sup>15</sup>

Courts have held, as a bedrock principle of the First Amendment, that a government may not prohibit or suppress the expression of an idea simply because an audience finds the idea offensive or disagreeable.<sup>16</sup> When evaluating what constitutes the free speech rights of adults, the U.S. Supreme Court held, “[W]e have made it perfectly clear that ‘[s]exual expression which is indecent but not obscene is protected by the First Amendment.’”<sup>17</sup> Stated slightly differently, this means that some forms of pornography are protected under the Constitution, but obscenity is not.

### ***The Miller Test***

In 1973, the U.S. Supreme Court developed a three-prong test in *Miller v. California*,<sup>18</sup> to define whether speech is obscene. According to the Miller test, speech is determined to be obscene if:

- The average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>19</sup>

The *Miller* test is incorporated into the definition of what is “harmful to minors” in s. 847.001(6), F.S., and “obscenity” in s. 847.001(12), F.S.

### ***The State’s Authority to Protect Minors***

In a 2004 decision, the First District Court of Appeal stated:

It is within the Legislature’s power to determine that certain matter is harmful for all minors. There is no indication that the definition of harmful

<sup>12</sup> Section 561.29(3), F.S.

<sup>13</sup>The United States Constitution states, “Congress shall make no law ... abridging the freedom of speech.” U.S. CONST. amend. I. The State Constitution similarly states “No law shall be passed to restrain or abridge the liberty of speech or of the press.” Fla. Const. art. I, s. 4.

<sup>14</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

<sup>15</sup> *Id.*

<sup>16</sup> *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

<sup>17</sup> *Ashcroft*, 245, quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>18</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>19</sup> *Id.* at 24.

matter will change depending on the age of the minor. ... The Legislature has the responsibility and authority to protect all of our children, even the older ones.<sup>20</sup>

Similarly, and in another 2004 decision, the First District Court of Appeal held:

The state has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from matter that is not obscene by adult standards, but the means must be carefully tailored to achieve that end.<sup>21</sup>

### ***Statutes Protecting Minors from Harmful Material***

Section 847.0138, F.S., provides third degree felony penalties for a person who knew or believed that he or she was transmitting an image that is harmful to minors to someone known by the defendant to be a minor. Similarly, s. 847.0133, F.S. prohibits a person from knowingly selling or distributing any obscene material to a minor. The penalty for violating the statute is a third degree felony.

In ch. 847, the chapter containing obscenity crimes, a minor or child is defined to mean any person, whose identity is known or unknown, who is younger than 18 years of age. “Harmful to minors” is defined to mean any exhibition, or representation depicting nudity, sexual conduct, or sexual excitement that meets the three prongs of the *Miller* test.

### ***Recent Events***

According to a recent administrative complaint filed by the Director of the Division of Alcoholic Beverages and Tobacco, a licensed vendor of alcoholic beverages was alleged to have hosted “A Drag Queen Christmas” on its premises last December. The six count complaint alleges that the show did not provide notice about the sexually explicit nature of the performance but initially stated that all ages were welcome. The division sent a letter to the license holder notifying him that the sexually explicit show would constitute “public nuisances, lewd activity, and disorderly conduct when minors are in attendance” and if the license holder failed to ensure that minors were prohibited from attending the performances, its license would be subject to penalties, including revocation.<sup>22</sup>

The complaint states that the license holder updated its advertising to note that the performances were recommended for audiences 18 years of age and older. However, the license holder’s admission policies permitted minor children to attend if they were accompanied by an adult. The complaint alleges that children younger than 16 years old were knowingly admitted to the show and then details what the performers wore or did not wear and the acts of “sexual conduct, simulated sexual activity, and lewd, vulgar, and indecent displays” that were performed.<sup>23</sup>

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<sup>20</sup> *Simmons v. State*, 886 So. 2d 399, 405 (Fla. 1st DCA 2004).

<sup>21</sup> *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

<sup>22</sup> Administrative Complaint, *Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, Petitioner, v. HRM Owner, LLC, d/b/a Hyatt Regency Miami*, March 14, 2023 (On file with the Senate Committee on Judiciary).

<sup>23</sup> *Id.*

The complaint alleges that the license holder violated six laws<sup>24</sup> of the state by hosting the show and its license should be revoked. The license holder may now request an informal hearing in which there are no disputed issues of material fact or request a formal hearing and dispute the issues alleged in the complaint.

### III. Effect of Proposed Changes:

#### Exposing Children to an Adult Live Performance (Section 3)

The bill defines the term “adult live performance” and establishes a first degree misdemeanor penalty for any person who is found guilty of *knowingly* admitting a child to an adult live performance. A first degree misdemeanor is punishable by imprisonment that does not exceed 1 year and a fine that does not exceed \$1,000. A “child” is defined in ch. 827, the abuse of children chapter, to mean any person under the age of 18 years.

#### *Adult Live Performance Defined*

An “adult live performance” is defined as any show, exhibition, or other presentation that is performed in front of a live audience and in whole or in part, depicts or simulates nudity, sexual conduct, sexual excitement, specific sexual activities as those terms are defined in s. 847.001, F.S., lewd conduct, or the lewd exposure of prosthetic or imitation genitals or breasts.

#### *The Miller Test for Obscenity*

The performance must then meet all three prongs of the obscenity test described in the *Miller* decision, meaning that the performance must:

- Predominantly appeal to a prurient, shameful, or morbid interest;
- Be patently offensive to prevailing standards in the adult community of this state as a whole with respect to what is suitable material or conduct for the age of the child present; and
- Taken as a whole, be without serious literary, artistic, political, or scientific value for the age of the child present.

This language is very similar to the existing definition of what is “harmful to minors” in ch. 847.001, F.S., the chapter dealing with obscenity.

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<sup>24</sup> The statutes that were allegedly violated and listed in the complaint were: Lewd or lascivious exhibition in the presence of a minor less than 16 years of age (s. 800.04(7)(a), F.S.); Operation of any place, structure, building, or conveyance for the purposes of lewdness (s. 796.07(2)(a), F.S.); The unlawful exposing or exhibiting of one’s sexual organs in public or on the private premises of another in a vulgar or indecent manner (s. 800.03, F.S.); Knowingly promoting, conducting, performing, or participating in an obscene show, exhibition, or performance by live persons or a live person before an audience (s. 847.011(4), F.S.); Breach of the peace and disorderly conduct with acts that are of such nature as to corrupt the public morals, or outrage the sense of public decency (s. 877.03, F.S.); and Maintaining a nuisance by erecting or maintaining a structure that tends to annoy the community or injure the health or the community, or becomes manifestly injurious to the morals or manners of the people (s. 823.05(1), F.S.).

### *The Element of Knowledge*

For a violation to occur under this statute, the defendant must *knowingly* admit a child to an adult live performance. “Knowingly” is defined to mean that someone has a general knowledge of, reason to know, or a belief or grounds for belief which warrants the person to further inspect or inquire of both:

- The character and content of any adult live performance described in the section which is reasonably susceptible of examination by the defendant; and
- The age of the child.

In a prosecution conducted under this section, a defendant may not raise ignorance of the child’s age, a child’s misrepresentation of his or her age, or the bona fide, or good faith belief, of a child’s consent as a defense.

This definition of “knowingly” is virtually identical to the use of “knowingly” found in s. 847.012(1), F.S., the statute prohibiting a person from knowingly selling certain images, visual representations, or materials to a minor that depict nudity or sexual content that is harmful to minors. Similarly, s. 847.013, F.S., which prohibits exposing minors to harmful motion pictures, exhibitions, and presentations contains very similar language when defining “knowingly.”

### **License of a Public Lodging Establishment or Public Food Establishment (Section 1)**

#### *Penalties - Fines, Suspension, or Revocation of a License*

The bill authorizes the Division of Hotels and Restaurants to fine, suspend, or revoke the license of a public lodging establishment or public food service establishment if the establishment admits a child to an adult live performance in violation of the newly created statute.

Admitting a child to the performance constitutes an immediate serious danger to the public health, safety, or welfare for the purposes of s. 120.60(6), F.S.,<sup>25</sup> which authorizes emergency suspension, restriction, or limitation of a license.

The division may issue a \$1,000 fine for an establishment’s first violation and may issue a \$10,000 fine for a second or subsequent violation.

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<sup>25</sup> Section 120.60(6), F.S., states: If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances if:

- (a) The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution;
- (b) The agency takes only that action necessary to protect the public interest under the emergency procedure; and
- (c) The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57 shall also be promptly instituted and acted upon.

**Beverage Law License (Section 2)*****Penalties – Revocation, Suspension, of a License; Fines***

In a manner similar to section 1, above, the bill authorizes the Division of Alcoholic Beverages and Tobacco to revoke or suspend the beverage license, or fine the license holder, who is found to maintain a licensed premises that admits a child to an adult live performance in violation of the newly created s. 827.11, F.S.

A violation of this new provision constitutes an immediate, serious danger to the public health, safety, or welfare for purposes of s. 120.60(6), F.S., which allows for the emergency suspension, restriction, or limitation of a license.

The division may issue a \$5,000 fine for a first violation and a \$10,000 fine for a second or subsequent violation.

The bill takes effect upon becoming law.

**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 identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Venues hosting adult live performances may have decreased revenues to the extent that the bill will result in lost revenues from children who would otherwise have attended.



**C. Government Sector Impact:**

The bill may result in additional costs to the criminal justice system in enforcing the criminal penalties authorized by the bill. For the same reasons, the Department of Business and Professional Regulation may incur additional costs in enforcing the provisions of the bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 509.261 and 561.29.

This bill creates s. 827.11 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.