

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: SPB 7012

INTRODUCER: Innovation, Industry and Technology Committee

SUBJECT: Vaping

DATE: February 5, 2019 REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Oxamendi</u>	<u>Imhof</u>	<u>IT</u>	<u>IT Submitted as Comm. Bill/Fav</u>

I. Summary:

SPB 7012 implements Amendment 9 to the Florida Constitution, which was approved by the voters of Florida on November 6, 2018, 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.

The bill permits the use of vapor-generating electronic devices in the enclosed indoor workplace of “vapor-generating device retailer” or “retail vape shop”, which is defined as “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.” The bill also permits vaping at the same locations currently authorized to permit tobacco smoking, i.e., private residences whenever not being used for certain commercial purposes, stand-alone bars, designated rooms in hotels and other public lodging establishments, retail tobacco shops, facilities owned or leased by a membership association, smoking cessation programs, medical or scientific research, and customs smoking rooms in airport in-transit lounges.

The bill amends the state’s preemption of tobacco smoking regulation in s. 386.209, F.S., to adopt and implement the grant of authority to local governments by Amendment 9 to adopt more restrictive local ordinances on the use of vapor-generating electronic devices.

The effective date of the bill is July 1, 2019.

II. Present Situation:

The Florida Clean Indoor Air Act (act), part II of ch. 386, F.S., regulates tobacco smoking in Florida. The legislative purpose of the act is to protect people 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 Florida Constitution, to prohibit tobacco smoking in enclosed indoor workplaces.

Codified as s. 20, Art. X, Florida Constitution, the section 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 occurring at any given time.”

The term “work” is defined by the section 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 section 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.

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

¹ Section 386.202, F.S.

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

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 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 Clean Indoor Air Act

The Legislature implemented the tobacco smoking ban by enacting ch. 2003-398, L.O.F., effective July 1, 2003, which amended pt. II of ch. 386, F.S., and created s. 561.695, F.S., of the Beverage Law. Part II of ch. 386, F.S., is known as the Florida Clean Indoor Air Act (act).

The act 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. An “enclosed indoor workplace” is:

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, jalousies, doors, or the like. A place is “predominantly” bounded by physical barriers during any time when both of the following conditions exist:

- (a) It is more than 50 percent covered from above by a physical barrier that excludes rain, and
- (b) More than 50 percent of the combined surface area of its sides is covered by closed physical barriers. In calculating the percentage of side surface area covered by closed physical barriers, all solid surfaces that block air flow, except railings, must be considered as closed physical barriers. This section applies to all such enclosed indoor workplaces and enclosed parts thereof without regard to whether work is occurring at any given time.
- (c) 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 person or persons are engaged in work as defined in [s. 386.203(12), F.S.]³

The act adopts and implements the amendment's definitions and adopts the constitution's exceptions for private residences whenever not being used for certain commercial purposes;⁴ stand-alone bars;⁵ designated smoking rooms in hotels and other public lodging establishments;⁶ and retail tobacco shops, including businesses that manufacture, import, or distribute tobacco products and tobacco loose leaf dealers.⁷

The act permits tobacco smoking in any facility owned or leased by and used exclusively for noncommercial activities performed by the members and guests of a membership association,⁸ including social gatherings, meetings, dining, and dances, if no person or persons are engaged in work. It also permits tobacco smoking in an enclosed indoor workplace, to the extent that tobacco smoking is an integral part of a smoking cessation program approved by the department, or medical or scientific research conducted therein, provided each room in which tobacco smoking is permitted must comply with specified signage requirements.⁹

A customs smoking room in an airport in-transit lounge under the authority and control of the Bureau of Customs and Border Protection of the United States Department of Homeland Security may also permit tobacco smoking, provided it complies with ventilation and work restrictions specified in s. 386.205.¹⁰

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 licensed by the Division of Hotels and Restaurants or the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation.¹¹ 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.. A person who violates the smoking prohibition commits a noncriminal violation and is subject to a fine in the

³ Section 386.203(5), F.S.

⁴ Section 386.2045(1), F.S. *See also* definition of the term "private residence" in s. 386.203(1), F.S.

⁵ Section 386.2045(4), F.S. *See also* definition of the term "stand-alone bar" in s. 386.203(11), F.S.

⁶ Section 386.2045(3), F.S. *See also* definition of the term "designated guest smoking room" in s. 386.203(4), F.S.

⁷ Section 386.2045(2), F.S. *See also* definition of the term "retail tobacco shop" in s. 386.203(8), F.S.

⁸ Section 386.203(13), F.S., defines a "membership association" as "a charitable, nonprofit, or veterans' organization that holds a current exemption under s. 501(c)(3), (4), (7), (8), (10), or (19) or s. 501(d) of the Internal Revenue Code."

⁹ Section 386.2045(5), F.S.

¹⁰ Section 386.2045(6), F.S.

¹¹ The applicable penalties for violations by designated stand-alone bars are set forth in s. 561.695(8), F.S.

amount of not more than \$100 for a first violation and not more than \$500 for a subsequent violation.

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 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 s. 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.¹²

If a person fails to comply with the directions on the citation, the person would waive his or her right to contest the citation and an order to show cause may be issued by the court.¹³

Regulation of Tobacco Smoking Preempted to State

Section 386.209, F.S., provides that the act expressly preempts regulation of tobacco smoking to the state and supersedes any municipal or county ordinance on the subject. The state preemption does not apply to local regulation of the use of e-cigarettes.

The state’s preemption of tobacco smoking regulation, s. 386.209, F.S., permits school districts to further restrict smoking by persons on school district property.

Vaping

Health Risks Associated with Secondhand E-Cigarette Vapor

Little is known about the health risks associated with electronic cigarettes (also referred to as “e-cigarettes,” “nicotine dispensing devices,” and “vapor-generating electronic devices”) and the health risks associated with passive (secondhand) exposure to the vapor from e-cigarettes, including the chemicals in the aerosol from e-cigarettes. A recent review of scientific literature found that the majority of scientific studies determined that secondhand exposure to vapor from

¹² Section 386.212(3), F.S.

¹³ Section 386.212(4), F.S.

e-cigarettes may pose a health risk to bystanders.¹⁴ Measurable traces of cancer-causing chemicals, such as formaldehyde and acetaldehyde, have been found in e-cigarette vapor.¹⁵

Florida Law and Nicotine Dispensing Devices

Section 877.112, F.S., provides for the regulation of nicotine dispensing devices and nicotine products, such as electronic cigarettes (e-cigarettes).

The term “nicotine dispensing device”, as defined in s. 877.112(1)(a), F.S., and the term “vapor-generating electronic device” as defined in s. 20, Art. X, Florida Constitution, are substantively identical.

Section 877.112, F.S., extends the current prohibitions related to the sale tobacco products to prohibit the sale, gifting, possession, or use of nicotine dispensing devices and nicotine products to and by persons under 18 years of age.

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, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.¹⁶

A “nicotine product” is any product that contains nicotine, including liquid nicotine intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means. The definition does not include a tobacco product under Florida law, a drug or device under federal law, or a product that contains incidental nicotine.¹⁷

The sale or giving of nicotine products or nicotine dispensing devices to any person under 18 years of age is prohibited and punishable as a second degree misdemeanor, which is punishable by a term of imprisonment not exceeding 60 days and a fine not to exceed \$500. It is a complete defense to a violation if an underage person falsely misrepresented his or her age, the underage person had the appearance to a prudent person to 18 years of age or older, and the person carefully checked, and relied on, the driver license or identification card of the recipient.¹⁸

¹⁴ See Hess, Isabel MR., Lachireddy, K., & Capon, A. *A Systematic Review of the Health Risks From Passive Exposure to Electronic Cigarette Vapor*. 26 PUBLIC HEALTH RES. PRACT. 2 (2016). The study is available at: <http://www.phrp.com.au/issues/april-2016-volume-26-issue-2/a-systematic-review-of-the-health-risks-from-passive-exposure-to-electronic-cigarette-vapour/> (Last visited January 25, 2019).

¹⁵ See Farsalinos, Konstantinos E and Riccardo Polosa. “Safety evaluation and risk assessment of electronic cigarettes as tobacco cigarette substitutes: a systematic review” *Therapeutic advances in drug safety* vol. 5,2 (2014): 67-86. The study is available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4110871/> (Last visited January 25, 2019).

¹⁶ Section 877.112(1)(a), F.S.

¹⁷ Section 877.112(1)(b), F.S.

¹⁸ Section 877.112(5), F.S.

It is a noncriminal violation for persons under 18 years of age to possess, purchase, or misrepresent their age or military service to obtain nicotine products or nicotine dispensing devices.¹⁹ The penalty for a violation is 16 hours of community service or a \$25 fine for a first violation, and attendance at a school-approved anti-tobacco and nicotine program, if available. A second violation within 12 weeks of the first violation requires a \$25 fine. A third violation within 12 weeks of the first violation requires the suspension or revocation of the person's driver license, as provided in s. 322.056, F.S.²⁰

III. Effect of Proposed Changes:

The bill amends part II of ch. 386, F.S., to add the use vapor-generating electronic devices or vaping to the current prohibition against tobacco smoking in enclosed indoor workplaces.

Definitions

As provided in s. 20, Art. X, Florida Constitution, by Amendment 9, the bill permits the use of vapor-generating electronic devices in the enclosed indoor workplace of "vapor-generating device retailer" or "retail vape shop", which is defined as "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."

The bill amends s. 386.203, F.S., to adopt and implement the definition for "vapor-generating electronic device" provided in s. 20, Art. X, Florida Constitution, by Amendment 9.

The bill clarifies that the definition for a "vapor-generating electronic device retailer" also applies to a "retail vape shop."

The bill also defines the terms "vape" or "vaping" as "to inhale or exhale vapor produced by a vapor-generating electronic device or to possess a vapor-generating electronic device while that device is actively employing an electronic, a chemical, or a mechanical means designed to produce vapor or aerosol from a nicotine product or any other substance."

"Vapor" is defined by the bill to mean "aerosolized or vaporized nicotine or other aerosolized or vaporized substance produced by a vapor-generating electronic device or exhaled by the person using such a device."

Exempted Locations

The bill permits vaping at the same locations currently authorized to permit tobacco smoking, i.e., private residences whenever not being used for certain commercial purposes, stand-alone bars, designated rooms in hotels and other public lodging establishments, retail tobacco shops, facilities owned or leased by a membership association, and customs smoking rooms in airport in-transit lounges.

¹⁹ Sections 877.112(6) and (7), F.S.

²⁰ Section 877.112(8), F.S.

The bill amends s. 561.695, F.S., relating to the tobacco smoking exception for stand-alone bars, to permit the use of vapor-generating devices or “vaping” at these authorized locations.

Penalties

The bill also applies the existing civil penalties in s. 386.207, F.S., to violations of the vaping prohibition by the proprietors or persons in charge of an enclosed indoor workplace licensed by the Division of Hotels and Restaurants or the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation.

Section 386.208, F.S., is reenacted by the bill to incorporate the existing noncriminal fines applicable to persons who violate the smoking or vaping prohibition.

Preemption

The bill amends the state’s preemption of tobacco smoking regulation in s. 386.209, F.S., to adopt and implement the authority for local governments under Amendment 9 to adopt more restrictive local ordinances on the use of vapor-generating electronic devices.

Effective Date

The effective date of the bill is July 1, 2019.

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:

On November 6, 2018, the voters of Florida approved Amendment 9 to the State Constitution, to ban the use of vapor-generating electronic devices, such as electronic cigarettes (e-cigarettes), in enclosed indoor workplaces in the same manner as the prohibition against tobacco smoking in enclosed indoor workplaces. Section 20, Art. X, Florida Constitution, as amended by Amendment 9, 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 implementation and enforcement. The Legislature may enact legislation more restrictive of tobacco smoking or vaping than that provided in the State Constitution.

Section 20, Art. X, Florida Constitution, prohibits tobacco smoking and vaping in an enclosed indoor workplace. The constitutional prohibition 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, vapor-generating electronic device retailers (vape shops), designated smoking guest rooms at hotels and other public lodging establishments, and stand-alone bars.

SPB 1012 and s. 386.204, F.S., permit tobacco smoking and vaping in the locations authorized under s. 20, Art. X, Florida Constitution, and also permit tobacco smoking and vaping in facilities owned or leased by a membership association, smoking cessation programs, medical or scientific research, and customs smoking rooms in airport in-transit lounges.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 386.202, 386.204, 386.2045, 386.205, 386.206, 386.207, 386.209, 386.211, 386.212, 386.2125, and 561.695.

This bill reenacts section 386.208 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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
