

- Provides persons adversely affected by violation of the preemption can sue and receive costs and damages.
- Provides exceptions.

This bill substantially amends and reorganizes section 790.33, Florida Statutes.

II. Present Situation:

The Joe Carlucci Uniform Firearms Act

The Joe Carlucci Uniform Firearms Act (Act), as s. 790.33, F.S., is known, became law in 1987.¹ The policy and intent of the Act is stated as follows:

It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.²

The Act accomplished its stated purpose by “occupying the whole field of regulation of firearms and ammunition,” as stated in subsection (1) of the Act:

PREEMPTION.—Except as expressly provided by general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto. Any such existing ordinances are hereby declared null and void.³

Section 790.33, F.S., contains a limited exception for local ordinances governing a three-day handgun purchase waiting period.⁴ Since 1990 there has been a statewide three-day waiting period as set forth in the Constitution of the State of Florida.⁵ The constitutional provision prevails over any local ordinances that may have been enacted. There are statutory exemptions

¹ Chapter 87-23, Laws of Fla.

² Section 790.33(3)(a), F.S.

³ Section 790.33(1), F.S.

⁴ Section 790.33(2), F.S. (1988). Note: At the time of enactment in 1987, the Act provided the exception for a 48-hour waiting period.

⁵ There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, “purchase” means the transfer of money or other valuable consideration to the retailer, and “handgun” means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph. ... This restriction shall not apply to a trade in of another gun. FLA. CONST. art. I, s. 8(b), 8(d).

from the waiting period in the Act. Of these exemptions, two were adopted in s. 790.0655, F.S., as required by the Florida Constitution.⁶ The other exemptions are:

- Individuals who already lawfully own another firearm and who show a sales receipt for another firearm or who are known to own another firearm through a prior purchase from the retail establishment;
- A law enforcement or correctional officer as defined in s. 943.10, F.S.;
- A law enforcement agency as defined in s. 934.02, F.S.;
- Sales or transactions between dealers or between distributors or between dealers and distributors who have current federal firearms licenses; or
- Any individual who has been threatened or whose family has been threatened with death or bodily injury, provided the individual may lawfully possess a firearm and provided such threat has been duly reported to local law enforcement.⁷

Since these specific exemptions were not included in the constitutional amendment, and because the Carlucci Act's exemptions pre-date the amendment to the Florida Constitution, they are essentially null and void.

Despite the provisions of the 1987 Joe Carlucci Act and a Florida appellate court opinion upholding the Act,⁸ local governments have enacted or considered enacting ordinances that required trigger locks, prohibited concealed carry permit holders from lawfully carrying their firearms on municipal or county property, required special use permits to certain sporting goods stores, and banned recreational shooting.

Discharge of a Firearm

A 2005 Florida Attorney General opinion concluded that a county ordinance prohibiting the discharge of a firearm in proximity to persons or property when such discharge endangers the health, welfare, and safety of the citizens of such county would be preempted by s. 790.33, F.S.⁹ Under s. 790.15, F.S., it is a crime to knowingly discharge a firearm in any public place or on or over roads. This prohibition does not apply to a person lawfully defending life or property or performing official duties requiring the discharge of a firearm, or to a person discharging a firearm on public roads or properties expressly approved for hunting by the Fish and Wildlife Conservation Commission or Division of Forestry. The backyard of a home is not a "public place" within meaning of the statute; thus, a juvenile could not be adjudicated delinquent based on his discharging a revolver into the ground in his friend's fenced backyard.¹⁰

⁶ The exemptions apply to persons who hold a valid concealed weapons permit at the time of the purchase or who are trading in another handgun. s. 790.0655(2)(a)-(b), F.S.; FLA. CONST. art. I, s. 8(b), 8(d).

⁷ Section 790.33(2)(d)2.-6., F.S.

⁸ *National Rifle Association v. City of South Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002).

⁹ Op. Att'y Gen. Fla. 2005-40 (2005).

¹⁰ *C.C. v. State*, 701 So. 2d 423 (Fla. 4th DCA 1997).

Immunity for Official Conduct

The general rule under the common law is that legislators enjoy absolute immunity from liability for performance of legislative acts.¹¹ Absolute immunity for legislators has historically been recognized as a “venerable tradition” that has withstood the development of the law since pre-colonial days.¹² Courts have upheld absolute immunity for legislators at all levels of lawmaking, including federal, state, and local government levels.¹³ The courts’ reasoning behind such holdings is that when legislators hold legislative powers, they use them for the public good, and are exempt from liability for mistaken use of their legislative powers.¹⁴ Furthermore, courts fear that allowing personal liability could distort legislative discretion, undermine the public good by interfering with the rights of the people to representation, tax the time and energy of frequently part-time citizen legislators, and deter service in local government.¹⁵

When unlawful ordinances have been enacted, the freedom from personal liability does not make the legislative product itself valid.¹⁶ In such instances, affected citizens have been able to challenge the validity of such ordinances by suing to have them declared invalid or have a court enjoin enforcement.¹⁷

Courts have found that legislators may be subject to personal liability when they lack discretion.¹⁸ Such situations typically exist when legislators are subject to an affirmative duty, such as when a law or court order has directed them to levy a tax. Such acts are labeled “ministerial,” as opposed to “legislative,” acts.¹⁹ Arguably, an express and clear preemption would remove discretion from local government officials seeking to engage in lawmaking in the preempted field.

III. Effect of Proposed Changes:

CS/CS/SB 402 expands and clarifies state preemption of the regulation of firearms and ammunition. In the process, s. 790.33, F.S., is also reorganized.

The bill expands “the whole field of regulation of firearms and ammunition” (including administrative regulations or rules adopted by local or state governments) to include the storage of those items. The preemption language relating to zoning ordinances is stricken from subsection (1) of s. 790.33, F.S., on lines 47-54 of the bill, and relocated to lines 172-78.

¹¹ See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

¹² *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998). For additional examples of where absolute immunity of legislative acts has been recognized, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Hough v. Amato*, 269 So. 2d 537 (Fla. 1st DCA 1972); *Jones v. Loving*, 55 Miss. 109 (1877); *Ross v. Gonzales*, 29 S.W.2d 437 (Tex. Ct. App. 1930).

¹³ *Bogan*, 523 U.S. 44.

¹⁴ *Id.* at 50-51 (citing *Jones*, 55 Miss. 109).

¹⁵ *Id.* at 52.

¹⁶ *Tenney*, 341 U.S. at 379.

¹⁷ See, e.g., *Bogan*, 523 U.S. 44; *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Tenney*, 341 U.S. 367.

¹⁸ *Bogan*, 523 U.S. at 51-52.

¹⁹ See *id.*

Subsection (2) of s. 790.33, F.S., is stricken by the bill. This is the subsection of the Joe Carlucci Act that allows a county the option to adopt a waiting period, not exceeding three days, for the purchase of a handgun. It pre-dates the constitutional amendment and constitutionally required statutory enactment.²⁰ Eliminating this subsection of the Act merely clarifies the current state of the law regarding the three-day waiting period, which is found in the Florida Constitution and s. 790.0655, F.S.

The bill retains the policy and intent language from the original Act, currently found in subsection (3) of s. 790.33, F.S. It also adds language setting forth the 2011 Legislature's intent to deter and prevent the knowing violation of the preemption law.

Any person who knowingly and willfully enacts or enforces any local ordinance or administrative rule or regulation commits a noncriminal violation (punishable by a fine between \$5,000-\$100,000). The fine would be levied against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred. The elected or appointed local government official or officials or administrative agency head is personally liable for the payment of all fines, costs, and fees assessed by the court for the noncriminal violation.

The state attorney in the appropriate jurisdiction shall investigate complaints of noncriminal violations of this section and, if the state attorney determines that probable cause of a violation exists, shall prosecute violators in the circuit court where the complaint arose. Any state attorney who fails to execute his or her duties under this section may be held accountable under the appropriate Florida rules of professional conduct.²¹

Except as required by article I, section 16 of the State Constitution or the Sixth Amendment to the United States Constitution, public funds may not be used to defend the unlawful conduct of any person charged with a knowing and willful violation of this section. The bill does not specify whether an official may be reimbursed for costs if he or she is found to be not guilty of the charge.

Additionally, the bill provides that a knowing and willful violation of the preemption law shall be grounds for the immediate termination of employment or contract or removal from office by the Governor.

Civil actions are also provided for in the bill. A person or organization whose membership is adversely affected by an alleged violation of the preemption law may seek declaratory and injunctive relief. The bill also provides for the assessment of actual and consequential damages.

²⁰ FLA. CONST. art. I, s. 8; s. 790.0655, F.S.

²¹ The Florida Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted to the Florida Bar. The Bar regulates the profession and recommends disciplinary action for attorneys who violate the Rules Regulating the Florida Bar. The Florida Supreme Court must actually impose the discipline on attorneys, which can range from an admonishment to disbarment. The Florida Bar, *Reporter's Handbook*, available at <http://www.floridabar.org/DIVCOM/PI/RHandbook01.nsf/1119bd38ae090a748525676f0053b606/30ceba8bab2146be852568bd00539b14!OpenDocument#I.%20OVERVIEW> (last visited Mar. 31, 2011).

The court is required to award a prevailing plaintiff's attorney fees at three times the federal district court rates as well as related costs. Additionally, the bill provides that 15 percent interest per annum shall accrue on the fees, costs, and damages awarded the plaintiff, retroactive to the date the suit is filed. Payment may be secured by the seizure of vehicles used by elected officeholders or officials in the appropriate jurisdiction if the fees, costs, and damages are not paid within 72 hours of the court's ruling having been filed. It is presumed that the term "appropriate municipality" means the jurisdiction wherein the violation occurred.

In subsection (5) of s. 790.33, F.S., as created by the bill, a provision excepting certain zoning ordinances in the original Carlucci Act has been relocated and other exceptions to the prohibitions are set forth in the bill. Specifically, the bill does not prohibit:

- Law enforcement agencies from enacting and enforcing firearm-related regulations within their agencies;
- The entities listed in paragraphs (2)(a)-(i) from regulating or prohibiting employees from carrying firearms or ammunition during the course of their official duties, except as provided in s. 790.251, F.S.;²²
- A court or administrative law judge from resolving a case or issuing an order or opinion on any matter within the court or judge's jurisdiction;
- The Fish and Wildlife Conservation Commission from regulating the use of firearms or ammunition as a method of taking wildlife and regulating the shooting ranges managed by the commission.

The bill provides that it 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.

²² Section 790.251, F.S., is entitled "Protection of the right to keep and bear arms in motor vehicles for self-defense and other lawful purposes; prohibited acts; duty of public and private employers; immunity from liability; enforcement.— (1) SHORT TITLE.—This section may be cited as the 'Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008.'" See specifically s. 790.251(4), F.S., for the acts of public or private employers that are prohibited.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Government officials that violate the prohibitions in the bill face fines and immediate discharge. Creating significant penalties on government officials for making policy decisions or carrying out invalid regulations or ordinances may deter public service.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS by Community Affairs on March 21, 2011:**

- Clarifies that the field of firearms and ammunition is preempted by the State Constitution as well as general law.
- Adds storage of firearms/ammunition to the list of categories preempted.
- Clarifies that rules and administrative regulations are preempted.
- Penalizes knowing and willful violation of the state's preemption of this field (\$5,000-\$100,000).
- Requires the state attorney to prosecute these violations and provides that if the state attorney fails to prosecute these violations they can be held accountable under the rules of professional conduct.
- Prohibits public funds from being used to defend a violation of this section.
- Penalizes a knowing violation of this section (immediate termination of employment).
- Provides persons adversely affected by violation of the preemption can sue and receive costs and damages
- Provides exceptions.

CS by Criminal Justice on February 8, 2011:

- Inserts acknowledgement of the Florida Constitution's explicit authority in the regulation of firearms. This is a technical amendment that brings s. 790.33, F.S., which became law in 1987, into conformity with current law.
- Deletes a provision in the bill that specified accounts into which fines assessed in a criminal case would be deposited.
- Clarifies and specifies both the interest rate on money damages, fees and costs, as well as what property may be seized to secure payment of same.

B. Amendments:

None.