

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1409 Preemption of Firearms and Ammunition Regulation

**SPONSOR(S):** Byrd and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1884

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	10 Y, 6 N	Brascomb	Jones
2) Local Administration & Veterans Affairs Subcommittee	10 Y, 5 N	Miller	Miller
3) Judiciary Committee			

### SUMMARY ANALYSIS

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 the:

- Legislature has preempted a particular subject area; or
- Local enactment conflicts with a state statute.

The doctrine of state preemption precludes a local government from exercising authority in the particular subject preempted. Subject to the State Constitution, Florida's firearm preemption law expressly preempts to the state all regulation of firearms and ammunition, including:

- Purchase;
- Sale;
- Transfer;
- Taxation;
- Manufacture;
- Ownership;
- Possession;
- Storage; and
- Transportation.

Other than a limited authority for counties to require certain criminal background checks, no county or municipal ordinance or any administrative rule or regulation adopted by any local government or state agency may enact, enforce, or promulgate any laws concerning firearms or ammunition; such laws are null and void. To ensure that local officials abide by the state's preemption requirements, the law provides for civil fines, recovery of litigation costs and fees, and potential removal from office for those who violate the preemption law.

The bill clarifies that unwritten policies are subject to provisions allowing for recovery of damages if such policies violate firearm preemption provisions. Further, the bill provides that a plaintiff challenging a local government regulation concerning firearms may be considered a prevailing plaintiff for the purposes of recovering certain damages and attorney fees if, after filing the complaint, the defendant voluntarily changes the regulation regardless of whether there is further court action. Under the applicable statute, a prevailing plaintiff is entitled to:

- Reasonable attorney fees and costs, including a contingency fee multiplier, as authorized by law; and
- Actual damages incurred, but not more than \$100,000.

The bill does not appear to have a fiscal impact on state government; but may have a fiscal impact on local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

The United States Constitution protects the right to keep and bear arms, stating that “the right of the people to keep and bear Arms shall not be infringed.”<sup>1</sup> The U.S. Supreme Court has ruled the Second Amendment guarantees the right of the individual to possess and carry weapons in case of confrontation.<sup>2</sup> That guarantee applies to both the federal government and the states.<sup>3</sup>

The Florida Constitution more specifically guarantees the right of the people to keep and bear arms in self-defense.<sup>4</sup> Generally, Florida law authorizes a person to own, possess, and lawfully use firearms and other weapons<sup>5</sup> without a license if:

- The person is not statutorily prohibited from possessing a firearm or weapon, and
- Such ownership, possession, or use occurs in a lawful manner and location.<sup>6</sup>

#### Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law.<sup>7</sup> A local government enactment may be inconsistent with state law if the:

- Legislature has preempted a particular subject area; or
- Local enactment conflicts with a state statute.

State preemption precludes a local government from exercising authority in the particular subject preempted.<sup>8</sup>

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.<sup>9</sup> Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.<sup>10</sup> In cases where the Legislature expressly or specifically preempts an area, the legislative intent is clear.<sup>11</sup> In cases determining the validity of ordinances enacted in the face of state preemption, such ordinances are found null and void.<sup>12</sup>

#### *Firearm Preemption*

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<sup>1</sup> Amend. II, U.S. Const. (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”)

<sup>2</sup> *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The Court expressly found the Second Amendment is a guarantee of the right preexisting in each individual and not a grant of right. See *id.* at 570 U.S. 592, 128 S.Ct. 2797.

<sup>3</sup> *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791, 130 S.Ct. 3020, 3050, 177 L.Ed.2d 894 (2010).

<sup>4</sup> Art. 1, s. 8, Fla. Const.

<sup>5</sup> A weapon is a knife, metallic knuckles, slugshot, billie club, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife. S. 790.001(13), F.S.

<sup>6</sup> S. 790.25, F.S.

<sup>7</sup> See art. VIII, ss. 1(f), 1(g), 2(b), Fla. Const.

<sup>8</sup> James R. Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009), <https://www.floridabar.org/the-florida-bar-journal/the-effectiveness-of-home-rule-a-preemption-and-conflict-analysis/> (Mar. 15, 2021).

<sup>9</sup> 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).

<sup>10</sup> *Mulligan*, 934 So. 2d at 1243.

<sup>11</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

<sup>12</sup> See, e.g., *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

Florida's firearm preemption law, originally passed in 1987,<sup>13</sup> expressly preempts all regulation of firearms and ammunition, including:

- Purchase;
- Sale;
- Transfer;
- Taxation;
- Manufacture;
- Ownership;
- Possession;
- Storage; and
- Transportation.<sup>14</sup>

Counties may require a criminal history check and a three to five day waiting period for any firearm sale occurring in the county, when the sale occurs on property where the public has a right to access, but such restrictions do not apply to holders of concealed weapons permits.<sup>15</sup> Other than that limited authority, no county or municipal ordinance or any administrative rule or regulation adopted by any local government or state agency may enact, enforce, or promulgate any laws concerning firearms or ammunition. Any such laws enacted by these entities are null and void.<sup>16</sup>

With respect to firearms, express preemption allows Floridians to be aware of the firearm laws and not unintentionally commit an illegal act when crossing a county or city boundary. To ensure that local officials abide by the state's preemption, the Legislature has provided for civil fines, recovery of litigation costs and fees, and potential removal from office for those who violate such preemption law.<sup>17</sup>

#### Articulation of Local Government Policy

The Legislature often authorizes state agencies to adopt policies implementing and enforcing the statutes placed under their respective jurisdictions. Adopting such enforceable policies, defined as "rules,"<sup>18</sup> requires strict adherence to statutory process, resulting in each enforceable policy being articulated as a published rule.<sup>19</sup>

Counties and municipalities are not subject to statutory rulemaking when adopting and enforcing ordinances, regulations, or other statements of enforceable policy.<sup>20</sup> Counties are authorized to adopt ordinances and regulations necessary to exercise their powers.<sup>21</sup> Municipalities may adopt ordinances on any subject on which the Legislature may act except for matters prohibited by the Florida Constitution, such as subjects preempted to the state or inconsistent with general law.<sup>22</sup>

Local government policy may neither amend nor conflict with general law, particularly where the subject matter has been preempted to the state. An unwritten policy adopted by a sheriff, purportedly based on a local court administrative order, not to return an individual's firearms taken as part of a warrantless safety check that resulted in no criminal investigation or charges, was not supported by statute, found unenforceable, and supported continuation of a lawsuit brought to recover damages and other relief under s. 790.33, F.S.<sup>23</sup>

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<sup>13</sup> Ch. 87-23, Laws of Fla.

<sup>14</sup> S. 790.33, F.S.

<sup>15</sup> Art. VIII, s. 5(b), Fla.Const.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms, with certain limited exceptions. See s. 120.52(16), F.S.

<sup>19</sup> See *passim* ss. 120.54, 120.541, 120.56, F.S. Agencies have no discretion whether to comply with the statutory rulemaking process. S. 120.54(1)(a), F.S.

<sup>20</sup> S. 120.52(1), F.S.

<sup>21</sup> Charter and non-charter counties are authorized to adopt ordinances that are not inconsistent with general law. Art. VIII, ss. 1(f), 1(g), Fla. Const. See ss. 125.01(1)(t), (1)(w), F.S.

<sup>22</sup> S. 166.021(3), F.S. See Art. VIII, s. 2, Fla. Const.

<sup>23</sup> *Dougan v. Bradshaw*, 198 So.3d 878 (Fla. 4th DCA 2016).

## Effect of Proposed Changes

The bill clarifies that unwritten policies are subject to provisions allowing for recovery of damages if such policies violate firearm preemption provisions. The bill provides that a party challenging a local government regulation concerning firearms may be considered a prevailing plaintiff for the purposes of recovering certain damages and attorneys fees if, after filing the complaint, the defendant voluntarily changes the regulation, regardless of whether there is further court action. Under s. 790.33, F.S., a prevailing plaintiff is entitled to:

- Reasonable attorney fees and costs in accordance with the laws of this state, including a contingency fee multiplier, as authorized by law; and
- Actual damages incurred, but not more than \$100,000.

### B. SECTION DIRECTORY:

**Section 1:** Amends s. 790.33, F.S., relating to the field of regulation of firearms and ammunition preempted.

**Section 2:** Provides an effective date of July 1, 2021.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

The bill may have an indeterminate fiscal impact on local governments. By allowing a party challenging a local government policy concerning firearms to be considered a prevailing plaintiff under certain circumstances, the bill allows a prevailing plaintiff to recover reasonable attorney fees, costs, and actual damages not exceeding \$100,000.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

#### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have

to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Determining the nature of the unwritten policies covered by the bill may be difficult. Unwritten policies may include oral instructions given within a law enforcement agency.<sup>24</sup>

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Not applicable.

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<sup>24</sup> See *Dougan v. Bradshaw*, *supra* n. 23.