

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	15 Y, 2 N	Brascomb	Kramer

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 is inconsistent with state law if the:

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

Where the doctrine of state preemption applies, it precludes a local government from exercising authority in the particular subject area preempted. Florida's firearm preemption law expressly preempts all regulation of firearms and ammunition, including:

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

Other than limited authority for a county to require certain criminal background checks, counties, cities, other subdivisions, and agencies may not 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. Under s. 790.33, F.S., 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.

HB 1409 clarifies that unwritten policies are subject to the statutory 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 s. 790.33, F.S., if after filing the complaint, the defendant voluntarily changes the regulation, regardless of whether there is court action.

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

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The United States Constitution protects the right to bear arms, stating that “the right of the people to keep and bear Arms shall not be infringed.”¹ The Florida Constitution more specifically guarantees the right of the people to keep and bear arms in self-defense.² Generally, Florida law authorizes a person to own, possess, and lawfully use firearms and other weapons³ 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.⁴

Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. A local government enactment is inconsistent with state law if the:

- Legislature has preempted a particular subject area; or
- Local enactment conflicts with a state statute. Where the doctrine of state preemption applies, it precludes a local government from exercising authority in that particular area.⁵

Whether conflict exists often hinges on the question of whether the local action “frustrates the purpose” of the state law. Historically, the types of local action that frustrate the purpose of state law generally include those which:

- Provide for more stringent regulation than state statute (if the statute expressly forbids a more stringent regulation);
- Provide a more stringent penalty than that allowed by state statute;
- Prohibit behavior otherwise allowed by state statute;
- Allow behavior otherwise prohibited by state statute; or
- Provide for a different method for doing a particular act than the method proscribed by state statute.⁶

Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.⁷ Express preemption of a field by the Legislature must be accomplished by clear language stating that intent.⁸ Implied preemption occurs when a court determines that a law is preemptive even in the absence of an express preemption clause.⁹

Firearm Preemption

Florida’s firearm preemption law, originally passed in 1987, expressly preempts all regulation of firearms and ammunition, including:

¹ 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.”)

² Art. 1, s. 8, Fla. Const.

³ 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.

⁴ S. 790.25, F.S.

⁵ 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/> (Apr. 9, 2021).

⁶ *Id.*

⁷ 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).

⁸ *Mulligan*, 934 So. 2d at 1243.

⁹ Public Health Law Center, *Preemption*, Mitchell Hamline School of Law, <https://www.publichealthlawcenter.org/topics/preemption-public-health> (last visited Apr. 9, 2021).

- Purchase;
- Sale;
- Transfer;
- Taxation;
- Manufacture;
- Ownership;
- Possession;
- Storage; and
- Transportation.¹⁰

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 of access, but such restrictions do not apply to holders of concealed weapons permits.¹¹ 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 invalid.¹²

To ensure that local officials abide by the state’s preemption law, the Legislature has provided for civil fines, recovery of litigation costs and fees, and potential removal from office for those who violate the preemption law.¹³

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, or “rules,”¹⁴ requires strict adherence to the statutory process laid out in chapter 120, F.S.¹⁵

Counties and municipalities are not subject to statutory rulemaking when adopting and enforcing ordinances, regulations, or other statements of enforceable policy.¹⁶ Counties are authorized to adopt ordinances and regulations necessary to exercise their powers.¹⁷ 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.¹⁸

Local government policy may neither amend nor conflict with general law, particularly where the subject matter has been preempted to the state. In 2016, the Fourth District Court of Appeal held that 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, was unenforceable, and supported continuation of a lawsuit to recover damages and other relief under s. 790.33, F.S.¹⁹

Effect of Proposed Changes

HB 1409 amends s. 790.33, F.S., to clarify that unwritten policies are subject to statutory 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

¹⁰ S. 790.33, F.S.

¹¹ Art. VIII, s. 5(b), Fla. Const.

¹² S. 790.33, F.S.

¹³ *Id.*

¹⁴ 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.

¹⁵ See ss. 120.54, 120.541, and 120.56, F.S. Agencies have no discretion whether to comply with the statutory rulemaking process. S. 120.54(1)(a), F.S.

¹⁶ S. 120.52(1), F.S.

¹⁷ 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.

¹⁸ S. 166.021(3), F.S. See Art. VIII, s. 2, Fla. Const.

¹⁹ *Dougan v. Bradshaw*, 198 So. 3d 878 (Fla. 4th DCA 2016).

considered a prevailing plaintiff under s. 790.33, F.S., if after filing the complaint, the defendant voluntarily changes the regulation, regardless of whether there is 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.

The bill has an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 790.33, F.S., relating to 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 plaintiff 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 and costs, as well as 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES