The Florida Senate

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Committee on Regulated Industries — Senator Dennis L. Jones, D.C., Chair

EVALUATE THE IMPLEMENTATION OF THE SMOKING BAN

SUMMARY

This report examines the implementation of ch. 2003-398, L.O.F., which implemented the constitutional amendment banning tobacco smoking in enclosed indoor workplaces. This report reviews the implementation of the smoking ban by the Department of Business and Professional Regulation (DBPR) and the Department of Health (DOH), which are the two agencies that are primarily responsible for its enforcement. This report reviews these departments' rules and proposed rules and discusses the implementation issues and concerns that have become apparent during rulemaking and enforcement of the ban. This report also examines the affect the smoking ban has had on various interested parties and activities in the state.

The report recommends that the Legislature amend the smoking ban in s. 386.204, F.S., to clarify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person to smoke in the workplace. The Legislature should also clarify that, as used in the act, the term "person" has the same meaning as in the rule of statutory construction in s. 1.01, F.S. The Legislature should also delay the implementation of the triennial renewal reports required by s. 561.695(6), F.S., by one year in order to permit affected stand-alone bars to adjust the recordkeeping and reporting requirements in the yet to be adopted rules of the DBPR. The Legislature should also clarify that local law enforcement officers have jurisdiction to enforce the smoking prohibition.

The DBPR is in the process of adopting rules needed for the implementation of the smoking ban. This rulemaking process may resolve several other implementation issues. Because these implementation issues may be resolved during the rulemaking process, the Legislature should delay taking additional action until the department has completed rulemaking.

BACKGROUND

The Constitutional Amendment

On November 5, 2002, the voters of Florida adopted constitutional Amendment 6 to prohibit tobacco smoking in enclosed indoor workplaces. Codified as art. X, section 20 of the Florida Constitution, the amendment 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. The amendment directs the Legislature to implement the "amendment in a manner consistent with its broad purpose and stated terms." It provides that the Legislature may enact legislation more restrictive of tobacco smoking than that provided in the State Constitution.

Florida's Clean Indoor Air Act

The Legislature implemented Amendment 6 by enacting ch. 2003-398, L.O.F., effective July 1, 2003, which amended pt. II of ch. 386, F.S., and created a new s. 561.695, F.S., of the Beverage Law. Part II of ch. 386, F.S., constitutes the Florida Clean Indoor Air Act (the "act"). The act, as amended, implements the constitutional amendment's prohibition. The act adopts and implements the amendment's definitions and adopts the amendment's exceptions.[1]

Section 386.2045(5), F.S., provides an exception for tobacco smoking to the extent that tobacco smoking is an integral part of a smoking cessation program approved by the DOH, or medical or scientific research conducted in the program. Section 386.2045(6), F.S., permits the designation of a smoking room in an in-

[1] See the applicable definitions in s. 386.203(8), F.S., and the act's exceptions in s. 386.2045, F.S.

transit lounge in a customs area of an airport. Section 386.205, F.S., provides requirements for the designation and restrictions for these designated smoking rooms.

Section 386.203(5), F.S., defines the term "enclosed indoor workplace" to provide that the term does not include any facility owned or leased by a membership association, including veteran's groups, that is used exclusively for non-commercial activities performed by the members and guests of the association.

Sections 386.207 and 386.2125, F.S., provide for enforcement, including rulemaking authority, of the act by the DOH and the DBPR within each department's specific areas of regulatory authority. Section 386.207(3), F.S., provides penalties for violations of the act by proprietors or persons in charge of an enclosed indoor workplace. The applicable penalties for violations by designated stand-alone bars are set forth in s. 561.695(8), F.S.

Stand-Alone Bar Provisions

Section 561.695, F.S., implements the exception for stand-alone bars. The constitutional amendment established three requirements for stand-alone bars. First, a stand-alone bar must be "devoted during any time of operation predominantly or totally to serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof, for consumption on the licensed premises." Second, the serving of food, if any, must be "merely incidental" to the consumption of any alcoholic beverages. Third, the business must not be "located within, and does not share any common entryway or common indoor area with, any other enclosed indoor workplace including any business for which the sale of food or any other product or service is more than an incidental source of gross revenue."

Section 561.695(5), F.S., defines "merely incidental" to limit a stand-alone bar from deriving more than 10 percent of its gross revenue from the sale of food. Section 561.695(5)(b), F.S., prohibits stand-alone bars from serving free food, but a stand-alone bar may serve customary bar snacks without charge.

In order to permit tobacco smoking in its business location, a stand-alone bar must be licensed to serve alcoholic beverages on the premises and receive a designation as a stand-alone bar from the Division of Alcoholic Beverages and Tobacco (DABT or division), within the DBPR. There is no fee for this designation. Every third year after the initial designation, a stand-alone bar that serves food, other than pre-packaged items, must file a procedures report prepared by a Certified Public Accountant with the DABT attesting to the percentage of food sales on or before the annual license renewal.[2] Section 561.695(8), F.S., provides specific penalties for violations by stand-alone bars that range from a warning for a first violation to revocation of the ability to allow smoking on the premises for a fourth violation. Section 561.695(8), F.S., grants the DABT the authority to adopt rules.

METHODOLOGY

Staff reviewed the constitutional amendment, the act, and the rules and proposed rules of the DOH and DBPR. Staff met with representatives from the DBPR and the DOH. Staff also met, or conducted telephone interviews, with representatives for various affected business and other interested parties, including representatives for Smoke-Free For Health, Inc, (Smoke-Free) and the Tri-agency Coalition on Smoking and Health,[3] and representatives for the restaurant, stand-alone bar, airport, and pari-mutuel industries. Staff reviewed current laws and agency rules and proposed rules, and other information sources.

FINDINGS

Department of Business and Professional Regulation

The DBPR has not completed its rulemaking process to implement the act. The DABT and the Division of Hotels and Restaurants are the principal agencies within the DBPR that are responsible for the enforcement of the act. After adopting its initial

[2] Section 561.695(6), F.S.

[3] Smoke Free For Health, Inc. is a coalition of public health organizations that provided the principal funding and services in support of the constitutional amendment to ban smoking in enclosed indoor workplaces. The coalition is composed of American Cancer Society, Florida Division; American Lung Association of Florida, Inc.; and America Heart Association, Florida/Puerto Rico Affiliate. The Tri-agency Coalition on Smoking and Health is a lobbying group composed of the same public health organizations.

emergency rules,[4] the DBPR initiated rulemaking for rules 61A-7.001 through 61A.7.015 on September 29, 2003.[5] These proposed rules pertained to the implementation of the stand-alone bar exception, and established a methodology for determining the percentages of food and alcoholic beverages sold in a purported stand-alone bar, record keeping requirements, penalty guidelines, and investigative and enforcement procedures.

Challenged Rules

Bowling Centers of Florida, Inc., (Bowling Centers), an association representing bowling establishments in Florida, challenged the department's proposed rules 61A-7.003, 61A-7.007, 61A-7.008, and 61A-7.009 as an invalid exercise of delegated legislative authority before the Division of Administrative Hearing (DOAH). On March 26, 2004, the Administrative Law Judge (ALJ) issued a final order granting Bowling Centers' challenge of proposed rules 61A-7.007, 61A-7.008, and 61A-7.009. The Final Order dismissed the challenge of rule 61A-7.003, which in effect upheld the validity of the rule. The decision was appealed to the Second District Court of Appeals, which affirmed the JLA's decision in a *per curiam* opinion.[6]

Proposed rules 61A-7.007 and 61A-7.008, respectively, provided the formula for determining the percentage of gross food and alcohol sales in proportion to total gross revenue during any consecutive six-month period. Proposed rule 61A-7.009 defined the term "predominantly or totally" as requiring a greater percentage of alcoholic beverages sales than food sales. The department's invalidated rule did not consider revenue from the sale of other services or merchandise. The ALJ rejected the DBPR's method for determining whether a stand-alone bar was "predominantly or totally" dedicated to the serving of alcoholic beverages because the rule was inconsistent with the requirements of the act.

Proposed rule 61A-7.003 prescribes 25 types of alcoholic beverage licensed premises that cannot be designated as a stand-alone bar because the licensees are dedicated predominantly to activities other than the service of alcoholic beverages. These licenses include special restaurant licenses (SRX),[7] special bowling licenses (SBX),[8] special golf clubs licenses,[9] and special dog or horse track, and Jai Alai fronton licenses.[10] Bowling Centers also challenged this rule because it argued that there was no consistent correlation, with the exception of the SRX license, between the special licenses and the qualifications for a stand-alone bar designation. The ALJ upheld proposed rule 61A-7.003 because these special licenses are issued according to the nature of the businesses, which business natures are inconsistent with a stand-alone bar designation.

Rules Not Challenged

Proposed rule 61A-7.001 defines terms used in the act and proposed rules. These definitions incorporate the definitions in the act. The rule defines the term "customary bar snacks," as provided in s. 561.695(3), F.S., to mean "popcorn and any ready to eat food item, commercially prepared and packaged off the premises, served without additions or preparations, that is not a potentially hazardous food."[11]

Proposed rule 61A-7.002 establishes the criteria for a stand-alone bar designation. The rule provides that the premises must meet the definition of stand-alone bar in s. 386.203(11), F.S., and requires that the licensee submit a "notice of election" to the division. The

[4] *See* Emergency Rule 61AER03-1 as noticed in Florida Administrative Weekly, Volume 29, no. 26, June 27, 2003.

[5] Proposed Rules 61A-7.001 through 61A.7.015 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

[6] *Bowling Centers Association v. Dept. of Business and Professional Regulation*, No. 2D04-1789 (Fla. 2nd DCA), per curiam opinion filed on December 3, 2004.

[7] Section 561.20(2)(a)4., F.S., is an exception for restaurants to the limit on the number of alcoholic beverages licenses that may be issued in a county that permit the sale of beer, wine, and liquor. It requires that a restaurant maintain food sales of at least 51% of its gross revenue.

[8] Section 561.20(2)(c), F.S. To qualify for this special license a bowling establishment must have at least twelve lanes. This license does not limit the gross amount of alcoholic beverage sales.

[9] Section 561.20(7)(b), F.S., pertaining to a special alcoholic beverage license for golf clubs. This license does not limit the percentage of gross sales of alcoholic beverage.

[10] Section 565.02(5), F.S., provides that a caterer at a facility may obtain a license to sell liquor at a racetrack or Jai Alai fronton. The alcoholic beverages are allowed to be served only ten days before to ten days after approved racing or Jai Alai dates. This license does not limit the percentage of gross sales of alcoholic beverage.

[11] Proposed rule 61A-7.001(1) as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

proposed rule establishes two classifications for the stand-alone bar designation. The classifications are "stand-alone smoking (ss)," in which the stand-alone bar's food service is limited to nonperishable snack food items, and "stand-alone smoking with food (ssf)," in which the stand-alone bar's on-premises food service is limited to ten percent of its gross revenue.

The department's rules also set forth record keeping and reporting requirements. Proposed rule 61A-7.004 requires an annual certification that no more than 10 percent of total gross revenue is derived from the sale of food for consumption on the licensed premises. Proposed rule 61A-7.005[12] establishes the requirements for the triennial renewal reports required by s. 561.695(6), F.S. Proposed rule 61A-7.005 requires that the report must provide the actual percentage of food sales for consumption on the premises for the preceding 36-month period from the renewal date, the actual annual percentage for each of the three years, the year total, and the total gross sales revenue from food consumption for each year and the total during that period.

The proposed rule does not require that a CPA attest, in the agreed upon procedures report, that the establishment has maintained all of the records required by the rule, nor must the CPA attest to the accuracy and completeness of the records used to make the report. The Florida Institute of Certified Public Accountants (FICPA) has expressed the concerns relating to whether the CPA may violate professional standards of conduct if he or she fails to report fraud or other malfeasance that may be observed by the CPA in the process of preparing the report. According to FICPA, the division's rules are not sufficiently clear regarding what specific records a stand-alone bar is required to maintain under the rules, and the steps or procedures that a CPA must take to address any apparent lack of internal controls that can result in unreliable records. FICPA further asserts that the determination of a stand-alone bar's compliance with the requirements of the act is a function that should more appropriately be performed by the department's own inspectors and auditors.

[12] Proposed rule 61A-7.005 as noticed in Florida Administrative Weekly, Volume 29, No. 41, October 10, 2003.

New Proposed Rules

Proposed rule 61A-7.007[13] sets forth the formula for determining the required percentage of gross food sales revenue, and requires that the ten percent food limitation must be demonstrated for any consecutive two-month period. The invalidated earlier rule required a six month period of compliance. Also using a two-month reporting period, proposed rule 61A-7.008 provides the formula for determining the percentage of gross alcohol sales revenue by dividing gross revenue from the sale of alcoholic beverages for consumption on the premises by gross total sales revenue.[14]

Proposed rule 61A-7.009[15] provides the formula to determine whether an establishment is predominantly dedicated to serving alcoholic beverages for consumption on the premises. The rule requires that the division compare the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption on the premises with the following categories of revenue:

- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption on premises;
- the percentage of gross food sales revenue from the sale of food the licensee sells for consumption off premises;
- the percentage of gross alcohol sales revenue from the sale of alcohol the licensee sells for consumption off the premises; and
- the percentage of gross revenue from any source not included in the food and alcohol categories above.

If the percentage of gross revenue derived from sales of alcoholic beverages sold for consumption on premises is greater than that of the gross food sales revenue from any of the above categories, then the licensee would be deemed to be predominantly or totally dedicated to the service of alcoholic beverages.

Proposed rule 61A-7.006[16] requires separately documented records of all purchases of food, all gross

[13] Proposed rule 61A-7.007 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.
[14] Proposed rule 61A-7.008 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.
[15] Proposed rule 61A-7.009 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.
[16] Proposed rule 61A-7.006 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.

retail sales of alcoholic beverages for consumption on the licensed premises, all gross retail sales of alcohol for consumption off the licensed premises, all gross retail sales of food for consumption on the premises, all gross retail sales of food for consumption off the premises, and gross revenue from all other sales. Designated stand-alone bars may use Department of Revenue sales tax returns as an acceptable record of total monthly sales revenue.

Enforcement

Since the smoking ban took effect on July 1, 2003, the department has received a steadily decreasing number of complaints each month. It has levied fines in 24 of the 36 smoking-related administrative cases that the department has processed. Although it is still too early to determine whether the statutory disciplinary scheme for stand-alone bars is sufficient to deter violations, based on staff's discussions with various stake-holders and the department, it appears that there is widespread compliance with the ban.

The Office of Program Policy Analysis and Government Accountability (OPPAGA) recently completed a justification review of the DABT.[17] OPPAGA determined that the department did not investigate all complaints in a reasonable timeframe, and recommended that the DABT shift its resources to districts where timeliness is most problematic. OPPAGA recommended that the DABT investigate all complaints within 45 days. In response, the DABT has revised its smoking complaint policy to require an investigation within 14 days and, if possible, a resolution within 30 days.

A recent DOAH decision has raised concerns regarding whether the DBPR has sufficient authority to sanction the proprietor or other person in charge of an enclosed indoor workplace with a violation of the act if a person other than the proprietor or other person in charge of the location is smoking. In *DBPR v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*,[18] the DBPR attempted to discipline Old Cutler Oyster Co., an alcoholic beverage licensee in Miami, for permitting several patrons to smoke in the licensed premises. The licensee did not hold a stand-alone bar designation under s. 561.695, F.S. The ALJ held that there is no statutory requirement that a proprietor or other person in charge of an enclosed indoor workplace must take any specific action when he or she observes a patron (or other non-employee) smoking in the enclosed indoor workplace. The ALJ also held that, in the context of s. 386.207(3), F.S., the term "person" appears to be limited to an individual human being.[19] *Old Cutler Oyster Co., Inc.*, does not address the issue of whether the division can sanction an alcoholic beverage licensee under the division's disciplinary authority in s. 561.29, F.S. Although the licensee in *Old Cutler Oyster Co., Inc.*, is an alcoholic beverage licensee, the division did not seek to discipline the licensee pursuant to s. 561.29, F.S.

The DOAH decision in *Old Cutler Oyster Co., Inc.*, is also relevant to the DOH's enforcement of the act. It creates uncertainty regarding the extent to which the DOH can sanction proprietors and persons in charge of an enclosed indoor workplace for smoking violations by patrons or other non-employees.

Department of Health

During the first year of the act, the DOH received and processed 781 smoking related complaints. According to the DOH, the number of monthly smoking related complaints and inquires has been decreasing since the act's effective date on July 1, 2003.

The DOH has the primary enforcement responsibility for the act's exceptions for smoking cessation programs, and medical and scientific research.[20] On August 16, 2004, the DOH adopted the rules implementing the act.[21] The DOH's rules establish procedures to be followed by the department when responding to and investigating complaints from the public,[22] procedures for on-site inspection of enclosed indoor workplaces,[23] and procedures for responding to

[17] *Justification Review, Division of Alcoholic Beverages and Tobacco Should Improve Primary Functions and Accountability System*, Report No. 04-56, August 2004, OPPAGA, Florida Legislature

[18] *See* Recommended Order in *Dept. Business and Professional Regulation v. Old Cutler Oyster Co., Inc., d/b/a Old Cutler Oyster Co.*, DOAH Case No. 2003-071145, Recommended Order issued September 24, 2004.

[19] The Recommended Order does not reference the rule of statutory construction in s. 1.01, F.S., which provides that, where the context permits, the term person "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations."

[20] *See* exception to the act in s. 386.2045(5), F.S.

[21] Chapter 64E-25, F.A.C.

[22] Rule 64E-25.001, F.A.C.

[23] Rule 64E-25.002, F.A.C.

complaints.[24] The DOH rules establish minimum standards for assessing fines.[25] The rules also establish minimum standards for designation as a smoking cessation program.[26]

The DOH's rules require that the DOH respond to each complaint by sending a letter of non-compliance. The proprietor or other person in charge that receives the complaint must respond within 21 days of receiving the letter.[27] If the person fails to timely respond to the letter, the department makes a request for the local county health department to send an inspector to the location. The department also makes an on-site inspection request if there is a second complaint for a location.

Implementation of the Exceptions

Stand-Alone Bars

The extent to which the reporting requirements and food service limitations in the act and in s. 561.695, F.S., have affected stand–alone bars remains partially unresolved because the DBPR has not completed the rulemaking process.

A recent study conducted by the University of Florida (UF) to assess the economic impact of the act on Florida's leisure and hospitality industry found no significant negative affect on that industry.[28] The study found a statistically insignificant increase in sales by taverns, night clubs, bars, and liquor stores after the smoking ban took effect. The study also did not find evidence of any migration of dining from restaurants to taverns and bars where smoking is permitted because the sales data used from all eating and drink establishments as a whole could not detect such a migration.

However, the extent to which this study accurately reflects the effect of the smoking ban on these businesses is unclear. A follow-up study is being performed using more extensive data, however, it will be a national study that will analyze the economic effects of smoking bans in several jurisdictions across the United States.

There is no quantifiable evidence indicating the number of stand-alone bars that have had to scale-back or otherwise limit their food service options in response to the ten percent food limitation. Staff has interviewed several proprietors of, and representatives for, stand-alone bars. These persons have either indicated that their pre-implementation food sales were a negligible and unquantified portion of their total revenue, or advised that their food sales were in the range of fourteen to nineteen percent of their total revenue.

Designated Smoking Guest Rooms in Public Lodging Establishments

Before the implementation of the act, public lodging establishments were not barred from designating smoking guest rooms.[29] Section 386.206(1), F.S., requires that any person in charge of an enclosed indoor workplace who was required before the adoption of the amendment to post a sign under s. 386.206, F.S., e.g., a public lodging establishment, to continue to conspicuously post such a sign. Section 386.206(1), F.S., expires on July 1, 2005.[30]

Smoking-Cessation Programs, Medical and Scientific Research

Rule 64E-24.005, F.A.C., establishes requirements for DOH approval of smoking cessation programs that permit tobacco smoking as an integral part of their activities, including designating topics that must be included in the program such as setting goals and a quit smoking date. The rule requires that the smoking cessation program must be conducted in a designated area that satisfies the signage requirements in s. 386.206(4), F.S., requires that the designated area must exhaust tobacco smoke directly to the outside and away from air intake ducts, and requires that the designated area must be maintained under negative pressure relative to the surrounding spaces.

Airports and Customs Area Smoking Rooms

Based on staff's survey of airport managers, the affect of the smoking ban has varied from airport to airport.

[24] Rule 64E-25.003, F.A.C.
[25] Rule 64E-25.004, F.A.C.
[26] Rule 64E-25.005, F.A.C.
[27] *See* rule 64E-25.003(2)(c), F.A.C.
[28] *The Economic Impact of Florida's Smoke-Free Workplace Law*, Bureau of Economic and Business Research, Warrington College of Business Administration, University of Florida, June 25, 2004.
[29] See pt. II of ch. 386, F.S., (2002), which provided for the designation of smoking areas in public places and did not prohibit the designation of a smoking are in a public lodging establishment.
[30] Section 386.206(5), F.S.

Most of the airport managers that responded to staff's survey reported minimal decreases in sales for the business locations affected by the ban. However, some airports noted significant revenue decreases.

None of the state's airport managers reported any difficulty in enforcing the ban. Some airports have constructed physical improvements and provided outdoor facilities to accommodate customers who wish to smoke. To date no airport facility in Florida has utilized the exception for smoking rooms in the airport's the customs area. Furthermore, no airport has utilized the retail tobacco shop exception to create a smoking area its patrons.

Memberships Associations

According to the DBPR, there are 1,253 alcoholic beverages licensed membership associations, and 169 of the 1,283 complaints that it had received as of mid-August 2004 related to membership associations. Two of the complaints led to administrative cases that resulted in the issuance of fines.

If the membership association does not have an alcoholic beverage license, the DOH has the primary enforcement responsibility. There are several issues relevant to the exception for membership associations that remain unclear and my adversely affect the ability of certain membership associations to utilize the smoking exception for their facilities.

The act does not provide an exception for the performance of "essential services" inside membership association facilities. Consequently a membership association that may initially qualify for the exception, may lose the right to claim the exception if an essential service is performed in the facility, e.g., plumbing.

Questions have been raised regarding whether a membership association may occasionally lease their facility to a member or non-member for special events or activities, e.g., parties, antique shows, etc. The DOH initially proposed a rule that required that members have certain voting rights and rights to hold association offices.[31] This rule was subsequently not adopted by the department. The DOH's initial rule also defined the term "guest" to mean "a person who is not a member, who participates, at the invitation of a member, in a membership association's noncommercial activity that is not otherwise open to the public."[32] The department did not adopt this rule.

Several implementation issues have been identified regarding the conduct of bingo games by membership associations. In practice, many of these organizations do not conduct the games in their principal facility or association headquarters. Instead, they lease property specifically for the conduct of bingo games. In addition to the conduct of the games, association members may also staff concession services when such services are available at the bingo facility. The bingo games are open to the general public, which the membership associations consider to be their guests. According to a bingo representative, there are approximately 125 bingo facilities in Florida that are available for membership associations to lease for the conduct of bingo games. Staff has also been advised that smoking during bingo games is a common practice. The extent of smoking at bingo games appears to be a minimal problem at this time.

At issue is whether the conditions under which membership associations lease bingo facilities qualifies the facility for the smoking exception for facilities owned or leased by a membership association. Although the exception permits a membership association to lease its facility, the exception also limits the types of activities that may be performed in the facility to noncommercial activities, including social gatherings, meetings, dining, and dances.[33] DBPR's proposed rule 61A-7.001 defines the term "non-commercial activity" to include bingo within the meaning of social gatherings and would permit membership associations to pay their members for services conducted in furtherance of noncommercial activities, including bingo.[34]

Impact on Other Businesses and Interests

The Division of Hotels and Restaurants (DH&R) within the DBPR enforces the act in restaurants. If the restaurant has an alcoholic beverage license, which the vast majority do, the DH&R refers a smoking complaint to the DABT. As of October 2004, the DH&R has not initiated any administrative action against a restaurant. However, several administrative

[31] See proposed rule 64E25.006(1) as noticed in FAW, vol. 29, No. 40, October 3, 2003.

[32] See proposed rule 64E25.006(2) as noticed in FAW, vol. 29, No. 40, October 3, 2003.

[33] *See* s. 386.203(5), F.S.

[34] See discussion above regarding unchallenged rules of the DBPR.

actions have been initiated by the DABT against restaurants.

Other than anecdotal evidence regarding specific restaurants, there is no evidence that the smoking ban has had a generally adverse affect on the restaurant industry. The recent UF study found no significant negative affect in the leisure and hospitality industry.[35] Not all restaurants have been affected by the smoking ban equally. The extent to which a restaurant may be adversely affected by the smoking ban is often dependent on the restaurant's business concept. Representatives for the restaurant industry contend that the inability to permit smoking may place restaurants at a competitive disadvantage relative to a stand-alone bar that serves food and can permit its patrons to smoke.

The service of food and/or alcoholic beverages is not limited to establishments that may be strictly construed as a restaurant or bar. Pool halls and bowling establishments may also serve alcoholic beverages and/or provide food service. Whether an alcoholic beverage licensed pool hall or bowling establishment may permit indoor smoking is dependent on the meaning of the term "predominantly or totally dedicated to the serving alcoholic beverages, intoxicating beverages, or intoxicating liquors, or any combination thereof" in the definition of stand-alone bar.[36] The proposed DBPR rules regarding the method for determining whether an establishment is predominantly dedicated to the serving of alcoholic beverages attempts to resolve this uncertainty.[37] The DBPR's proposed rule 61A-7.003 prohibits the holder of a special bowling alcoholic beverage license from being designated as a stand-alone bar because the premises is dedicated predominately to activities other than the service of alcohol, but bowling establishments with a quota alcoholic beverage license issued under s. 561.20, F.S., are not disqualified under the proposed rule.

According to the DBPR, the department has received only two smoking complaints on pari-mutuel facilities. None has resulted in an administrative action, fine, or other penalty. The DOH has also received regular complaints regarding smoking at Alcoholics Anonymous (AA) meetings. According to the DOH, tobacco smoking is a common activity at many AA meetings. The meetings are usually held in commercial spaces, typically store fronts, and are staffed by unpaid volunteers who run the meetings, and keep the keys to the facility. The DOH interprets the act to prohibit smoking at AA meetings.

According to the Commissioner of Film and Entertainment, there is no evidence that the smoking ban has dissuaded the start of any film or entertainment production in Florida, caused any production to leave the state, or otherwise negatively affected film production in the state to any quantifiable extent.

Interagency Cooperation

The DOH and the DBPR have conducted regular meetings to coordinate their enforcement activities and assure consistent interpretations of the act. The departments have also consulted with the Department of Agriculture and Consumer Services, whose jurisdictional responsibilities include truck-stops and grocery stores, and with the State Fire Marshal during the rule development process.

According to the DBPR, certain unidentified local law enforcement agencies have expressed a reluctance to enforce the smoking ban by issuing the non-criminal citation authorized by s. 386.208, F.S., because they believe that the act does not grant local law enforcement officers sufficient jurisdiction to enforce the prohibition. Staff has researched this issue and could not find sufficient legal authority to support this concern.

RECOMMENDATIONS

Staff recommends that the Legislature take action to clarify the following concerns in the implementation of the indoor tobacco smoking ban:

The act should be amended to clarify that local law enforcement officers have jurisdiction to enforce the smoking prohibition in s. 386.204, F.S.

The smoking prohibition in s. 386.204, F.S., should be amended to clarify that a proprietor or other person in charge of an enclosed indoor workplace may not permit another person, including patrons and employees, to smoke in the workplace.

The act should be amended to clarify that, as used in the act, the term "person" has the same meaning as in the rule of statutory construction in s. 1.01, F.S.

[35] Bureau of Economic and Business Research, *Supra* at n. 28.
[36] Section 386.203(11), F.S.
[37] *See* proposed rule 61A-7.006 as noticed in Florida Administrative Weekly, Volume 30, No. 19, May 7, 2004.

The Legislature should delay the implementation of the triennial renewal reports required by s. 561.695(6), F.S., by one year in order to permit affected stand-alone bars to adjust the recordkeeping and reporting requirements in the yet to be adopted rules of the Department of Business and Professional Regulation.

The Legislature should delay taking additional action on the implementation issues that are being addressed in the proposed rules of the DBPR until the department has completed the rulemaking process because the department and interested parties may resolve these implementation issues.