

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 Community Affairs Committee

BILL: CS/SB 402

INTRODUCER: Committee on Criminal Justice, Senator Negron, and Senator Evers

SUBJECT: Regulation of Firearms and Ammunition

DATE: February 18, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	Wolfgang	Yeatman	CA	Pre-meeting
3.	_____	_____	JU	_____
4.	_____	_____	RC	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

CS/SB 402 expands and clarifies state preemption of the regulation of firearms and ammunition. The bill creates certain exceptions to its application for employers and law enforcement agencies.

The CS creates a third degree felony offense for knowingly and willfully violates provisions of s. 790.33, F.S., which generally prohibits policy-making or enforcement of any firearms rules or regulations in excess of those proscribed by law or the Florida Constitution. The CS also provides for up to a \$5 million fine under certain enumerated circumstances.

The bill further provides for injunctive and declaratory judgments, actual and consequential damages, costs and treble attorney’s fees, with 15 percent interest per annum from the date upon which a civil suit is filed.

This bill substantially amends and reorganizes section 790.33 of the Florida Statutes.

II. Present Situation:

The Joe Carlucci Uniform Firearms Act, as s. 790.33, F.S., is known, became law in 1987. 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.¹

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.²

Section 790.33, F.S., contains a limited exception for local ordinances governing a three-day handgun purchase waiting period.³ Since 1990 there has been a statewide three-day waiting period as set forth in the Constitution of the State of Florida.⁴ The constitutional provision prevails over any local ordinances which may have been enacted. There are statutory exemptions 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.⁵ 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

¹ Section 790.33(3), F.S.

² Section 790.33(1), F.S.

³ 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.

⁴ 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. Art. 1, Sec. 8(b), 8(d), Fla. Const..

⁵ 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), F.S., Art. 1, Sec. 8(b), 8(d), Fla. Const..

- 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.⁶

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 Act⁷, 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.

Criminal or Civil Liability for Official Conduct

Historically, policy-making activities and certain other official government functions have been shielded from even civil liability.⁸ Although this protection does not extend to actions clearly prohibited by the law,⁹ policy-making functions are rarely if ever opened up to civil or criminal sanctions. However, there are a number of statutes that criminalize official action when it arises out of an abuse or wrongful usurpation of authority. These crimes include:

- Official misconduct.¹⁰
- Solicitation of bribes.¹¹
- Extortion.¹²
- Approving or paying commissions on public funds that are collected, and not paid over as required by law.¹³
- Failing to make a sworn report of fees.¹⁴
- Unlawful sale of property by certain state officials.¹⁵
- Speculating in county warrants or certificates.¹⁶
- Failing to keep a record of costs.¹⁷
- Falsifying records.¹⁸
- Withholding records from successor.¹⁹
- Assuming the actions of an office before qualification.²⁰

⁶ Section 790.33(2)(d), F.S.

⁷ *National Rifle Association v. City of South Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002).

⁸ *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1981).

⁹ *Id.*

¹⁰ Section 838.022, F.S.

¹¹ Sections 838.015, 838.016, F.S.

¹² Section 839.11, F.S.

¹³ Section 116.02, F.S.

¹⁴ Section 116.04, F.S.

¹⁵ Section 116.13, F.S.

¹⁶ Section 839.04, F.S. *See also* s. 839.05, F.S.

¹⁷ Section 839.12, F.S.

¹⁸ Section 839.13, F.S.

¹⁹ Section 839.14, F.S.

²⁰ Section 839.18, F.S.

- Failure to execute general²¹ or criminal²² process.
- Misuse of confidential information.²³

III. Effect of Proposed Changes:

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” to include the storage of those items. Although the preemption language relating to zoning ordinances is stricken from subsection (1) of s. 790.33, F.S., on lines 49-55 of the bill, that language is re-inserted on lines 205-210.

The bill enumerates governmental or publicly-funded private entities that are prohibited from regulating or attempting to regulate firearms or ammunition. Those entities are:

- A local government.
- A special district.
- A political subdivision.
- A governmental authority, commission, or board.
- A state governmental agency.
- Any official, agent, employee, or person, whether public or private, who works or contracts with any state or other governmental entity.
- Any entity that serves the public good when such service is provided in whole or in part by any governmental entity or utilizes public support or public funding.
- Any public entity other than those specified in this subsection, including, but not limited to, libraries, convention centers, fairgrounds, parks, and recreational facilities.
- Any body to which authority or jurisdiction is given by any unit or subdivision of any government or that serves the public good in whole or in part with public support, authorization, or funding or that has the authority to establish rules or regulations that apply to the public use of facilities, property, or grounds.

The bill also sets forth the methods by which those entities are prohibited from regulating or attempting to regulate firearms or ammunition as the enactment or enforcement of any:

- ordinance,
- regulation,
- measure,
- directive,
- rule,
- enactment,
- order,
- policy, or
- exercise of proprietary authority, or

²¹ Section 839.14, F.S.

²² Section 839.20, F.S.

²³ Section 839.26, F.S.

- by any other means except as specifically authorized by general law.

To the extent that the listed entities or methods of regulation exceed the parameters of the current preemption language found in s. 790.33(1), F.S., the bill will broaden the reach of the State's preemption of the "whole field of regulation of firearms and ammunition."²⁴

Subsection (2) of s. 790.33, F.S., is stricken by the bill. This is the subsection of the Joe Carlucci Act that requires a three-day waiting period for the purchase of a handgun state-wide. It pre-dates the constitutional amendment and constitutionally-required statutory enactment.²⁵ 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.

The bill addresses deterrence and prevention in a new subsection (4) setting forth potential penalties, both criminal and civil, for the violation of the preemption law.

The bill creates a third degree felony of a knowing and willful violation of s. 790.33, F.S., by any person or entity. A third degree felony is generally punishable by up to 5 years imprisonment and a fine of up to \$5,000.²⁶ The bill provides that a fine of up to \$5 million may be assessed against a governmental entity if the violation is willful and any person with oversight of the offending official, designee, contractee, or employee knew or should have known that the act was a violation.

The bill specifies that the state attorney is responsible for the investigation and prosecution of violations of the preemption law, and provides that he or she may be held accountable under the rules of professional conduct if his or her duties are not carried out. The bill also prohibits the use of public funds, other than for the services of the public defender or conflict counsel, in defense of a criminal prosecution. An exception is made where the defendant is found not guilty at trial or the charges are dismissed.

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.

²⁴ Current preemption language applies "to the exclusion of all existing and future county, city, town, or municipal ordinances or regulations relating thereto." s. 790.33(1), F.S.

²⁵ Art. 1, Sec. 8, Fla. Const.; s. 790.0655, F.S.

²⁶ Sections 775.082, 775.083, F.S.

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.²⁷; or
- 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.

Although the last exception provided, regarding courts and administrative law judges, is somewhat vague, presumably the intent is to convey jurisdiction in cases or controversies arising from the enactment of the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

²⁷ 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.

B. Private Sector Impact:

Among those specifically prohibited from violating the provisions of the bill are: entities or persons who accept public funds through a contractual arrangement; who work with any state or other governmental entity; or any body that serves the public good with public support, authorization, or funding. To the extent that the listed entity or person can be prosecuted for a criminal violation or against whom a civil cause of action may be brought, there is the potential for the levying of in excess of \$5 million in fines, fees, costs and damages.

C. Government Sector Impact:

Governmental entities that violate the prohibitions in the bill face in excess of \$5 million in fines, fees, costs and damages.

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 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.