

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 Judiciary Committee

BILL: SB 1530

INTRODUCER: Senator Bennett

SUBJECT: Access to Dwelling Units

DATE: March 10, 2008

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	Pre-meeting
2.			CJ	
3.				
4.				
5.				
6.				

I. Summary:

This bill amends the Florida Residential Landlord and Tenant Act to require landlords to maintain a written record including the names of all direct employees of the landlord who have access to the dwelling unit, as well as the dates and times that any employee of the landlord has entered a dwelling unit. The written record is subject to inspection by a unit owner¹ upon his or her request.

In addition, the bill requires landlords to obtain criminal histories of any employees of the landlord who have access to the dwelling unit. A landlord must preclude any employee who has been convicted of a felony in this state from accessing the dwelling unit unless the unit owner consents in writing to the access, or the landlord supervises the employee during the access.

Finally, a criminal penalty is created for those landlords who fail to obtain criminal histories of employees or allow employees with felony convictions to access a dwelling unit without consent of the unit owner or without supervision of the landlord.

This bill substantially amends section 83.53, Florida Statutes. The bill creates section 83.531, Florida Statutes.

¹ It appears that the intent of the bill is to keep tenants apprised of who has accessed their dwelling units. Because “unit owner” denotes actual ownership (i.e., a condominium association), the Legislature may wish to substitute the term “tenant” for “unit owner” to accomplish this purpose.

II. Present Situation:

Florida Residential Landlord and Tenant Act

The Florida Residential Landlord and Tenant Act (the act) governs the conduct of tenants and landlords in relation to residential lease agreements.² The act does not apply to:

- Residency or detention in a public or private facility (when detention is incidental to medical, geriatric, educational, counseling, religious, or similar services);
- Occupancy under a contract of sale;
- Transient occupancy in a hotel, condominium, motel, rooming house, or similar public lodging;
- Occupancy by a holder of a proprietary lease in a cooperative apartment; and
- Occupancy by an owner of a condominium unit.³

Landlord's Access to Dwelling Units

Under the act, landlords are allowed to enter dwelling units as necessary to inspect the premises or make necessary or agreed repairs, decorations, alterations, or improvements.⁴ Additionally, landlords are allowed access to supply agreed services or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workers, or contractors.⁵ A landlord's access to a unit is permissible at anytime in order to preserve or protect the premises.⁶ However, a landlord must provide a tenant with reasonable notice if the purpose of accessing the unit is merely for repairs.⁷ Finally, a landlord may enter a dwelling unit when necessary under the following circumstances:

- With consent of the tenant;
- In case of emergency;
- When the tenant unreasonably withholds consent; or
- If the tenant is absent from the premises for a period equal to one-half the time for periodic rental payments. However, if rent is current and the tenant notifies the landlord of an intended absence, then the landlord may only enter with the consent of the tenant or for the protection or preservation of the premises.⁸

Current law mandates that a landlord must not abuse the right of access, nor use it to harass a tenant.⁹

² Part II of ch. 83, F.S, expressly applies to the rental of a "dwelling unit," which is defined as a structure or part of a structure rented for use as a home, residence, or sleeping place. It also includes mobile homes rented by a tenant. *See* s. 83.43(2), F.S.

³ Section 83.42, F.S.

⁴ Section 83.53(1), F.S.

⁵ *Id.*

⁶ Section 83.53(2), F.S.

⁷ *Id.* "Reasonable notice" under the statute is at least 12 hours prior to entry, with repairs to be completed between the hours of 7:30 a.m. and 8:00 p.m. *Id.*

⁸ Section 83.53(2)(a)-(d), F.S.

⁹ Section 83.53(3), F.S.

Landlord's Duty to Protect Tenants From Third Parties

Although a landlord has a duty to exercise reasonable care to maintain a leased premises in a reasonably safe condition, generally there is no duty to protect a tenant from criminal attacks by third persons.¹⁰ In order to acquire such a duty, a tenant must allege and prove that the landlord had actual or constructive knowledge of prior similar acts committed on the premises.¹¹

Negligent Hiring by Landlords

In Florida, a landlord may be liable for its negligence in hiring an employee who may be dangerous to others.¹² An employer is liable for negligent hiring when the employer was in some way responsible for bringing a third person into contact with an employee whom the employer knew or should have known was predisposed to commit a wrong if given the opportunity.¹³ For example, if an employer provides an employee with the "indicia of authority" to enter into the living quarters of others, the employer has the responsibility of first making some inquiry with respect to whether it is safe to facilitate the employee's access.¹⁴

In civil actions premised upon the death or injury of a third person as a result of intentional conduct of an employee, the employer is presumed not to have been negligent in hiring the employee if, prior to hiring, the employer conducted a background check on the employee which revealed no information that would cause an employer to conclude that the employee was unfit for work.¹⁵ Pursuant to statute, the background investigation must include:

- A criminal background check obtained from the Department of Law Enforcement (FDLE);¹⁶
- Reasonable efforts to contact references and former employers;
- A job application form that includes questions requesting detailed information regarding previous criminal convictions;
- A written authorization allowing a check of the applicant's driver's license record if relevant to the work to be performed; or
- An interview of the prospective employee.¹⁷

If the employer elects not to conduct an investigation prior to hiring, there is no presumption that the employer failed to use reasonable care in hiring an employee.¹⁸

¹⁰ See *Paterson v. Deeb*, 472 So. 2d 1210, 1214 (Fla. 1st DCA 1985); *Menendez v. The Palms West Condominium Ass'n, Inc.*, 736 So. 2d 58, 61 (Fla. 1st DCA 1999).

¹¹ *Menendez*, 736 So. 2d at 61.

¹² *Phillips v. Edwin P. Stimpson Co.*, 588 So. 2d 1071, 1073 (Fla. 4th DCA 1991).

¹³ *Brown v. Zaveri*, 164 F. Supp. 2d 1354, 1360 (S.D. Fla. 2001).

¹⁴ *Tallahassee Furniture Co., Inc. v. Harrison*, 583 So. 2d 744, 751 (Fla. 1st DCA 1991).

¹⁵ Section 768.096(1), F.S.

¹⁶ The employer must request and obtain from FDLE a check of the information as reported in the Florida Crime Information Center system as of the date of the request. Section 768.096(2), F.S.

¹⁷ Section 768.096(1)(a)-(e)

¹⁸ Section 768.096(3), F.S.

III. Effect of Proposed Changes:

Recordkeeping Requirement for Landlords

The bill requires landlords to maintain a written record documenting each “direct employee” of the landlord who has access to a dwelling unit. Additionally, the written record must detail each time any “direct employee” has entered a dwelling unit for the purposes of repairs, improvements, and other authorized activities delineated in s. 83.53, F.S. The bill does not define “direct employee.” As a result, it could be read to exclude inclusion of contractors or other agents of the landlord from the written record, even if they have accessed a dwelling unit.

The written record will be subject to inspection by the “unit owner” upon his or her request. It appears that the intent of the bill is to keep *tenants* apprised of who has accessed their dwelling units. Because “unit owner” denotes actual ownership (i.e., a condominium association), the Legislature may wish to substitute the term “tenant” for “unit owner” to accomplish this purpose.

Criminal Background Requirement for Landlords

In addition to the recordkeeping requirement, the bill creates s. 83.531, F.S., which provides that landlords must obtain a criminal history from the Department of Law Enforcement of any “employee” who has access to the interior portion of a dwelling unit that is under a rental agreement.¹⁹ Employees of the landlord who have been convicted of a felony in this state are not allowed to access dwelling units unless the tenant consents or the landlord supervises the employee during such access. Under the language of the bill, employees who commit felonies in other states, but have no felony convictions in Florida, will not be subject to restricted access to dwelling units.

Criminal Liability

The bill creates a criminal penalty (second-degree misdemeanor) for a landlord’s failure to obtain criminal histories of employees.²⁰ The criminal penalty also extends to violations of the provision precluding felons from accessing dwelling units without consent of the tenant or without supervision by the landlord.²¹

Civil Liability

The bill could subject a landlord to further civil liability in the event the landlord failed to conduct a background check of an employee, or allowed an employee with a felony conviction access to a dwelling unit. Florida law provides that violations of statutes or ordinances, other than those imposing strict liability, may constitute negligence per se or evidence of negligence.²² For a violation of statute to constitute negligence per se, the injury must be to an individual who

¹⁹ The term “employee” deviates from the prior use of “direct employee” in the bill’s amendatory language of s. 83.53, F.S.

²⁰ Although many landlords may be corporations, the corporation may be held criminally responsible for acts of misfeasance, malfeasance, or nonfeasance. *State ex rel. Losey v. Willard*, 54 So. 2d 183 (Fla. 1951).

²¹ A second-degree misdemeanor is punishable by up to 60 days imprisonment and a \$500 fine. Sections 775.082 and 775.083, F.S.

²² *Lingle v. Dion*, 776 So. 2d 1073, 1077 (Fla. 4th DCA 2001).

is a member of a class the statute was designed to protect, and the injury must be of a type the statute was intended to prevent.²³

A landlord's duty to protect a tenant can be based on requirements set forth by statute. For example, in *Paterson*, the tenant alleged that the landlord had failed to provide a working lock on the exterior bathroom to her apartment, in violation of s. 83.51, F.S.²⁴ The tenant was raped in the bathroom by an intruder who might not have been able to gain entry had the room been locked.²⁵ The court held that, while the landlord in *Paterson* had no general duty to protect the tenant from a criminal attack by a third person, he did have a specific duty to provide the tenant with a working lock.²⁶ The breach of this duty exposed the landlord to civil liability.

It is likely that a court could determine that tenants are precisely whom the background check requirement of this bill is designed to protect, and that intentional conduct by third parties resulting in harm to tenants is exactly the type of harm addressed by the bill. Thus, it is likely that a court would conclude that any deviation from these requirements is negligence per se, or at least evidence of negligence.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Residential lease agreements are contracts. The Florida Constitution provides in relevant part, "No. . .law impairing the obligation of contracts shall be passed."²⁷ Article I, s. 10 of the United States Constitution provides in relevant part, "No state shall . . . pass any . . . law impairing the obligation of contracts." These provisions empower the courts to strike laws that retroactively burden or alter contractual relations. "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of

²³ *deJesus v. Seaboard Coast Line R. Co.*, 281 So. 2d 198, 201 (Fla. 1973); *Griffith v. Dep't of Health and Rehab. Serv.*, 624 So. 2d 813, 815 (Fla. 4th DCA 1993).

²⁴ *Paterson*, 472 So. 2d at 1213.

²⁵ *Id.*

²⁶ *Id.* at 1217.

²⁷ Art. I, s. 10, Fla. Const.

rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts.”²⁸

In *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979), the court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to improve the harshness of the original rigid application used by the United States Supreme Court. The court set forth several factors²⁹ in balancing whether a state law has in fact operated as a substantial impairment of a contractual relationship. The prohibition against impairment of contract obligations was never intended to carve out the contracting process from legislative supervision, or to preclude the government from protecting the vital interests of the people.³⁰ Accordingly, exceptions to the strict application of the constitutional provision exist when there is an overriding necessity for the state to carry out its police powers.³¹

Under the bill, certain restrictions are placed upon a landlord’s employee’s access to dwelling units. In the event a current lease agreement contains a provision providing employees of the landlord unfettered access to a dwelling unit, or access in excess of the statutory requirements, one could assert that the landlord’s rights under the lease agreement have been unconstitutionally impaired. However, due to the personal protections afforded to tenants by the bill, the likely short timeframe of most residential lease agreements, as well as current state regulation of landlord and tenant relationships, it appears unlikely that the provision would be declared unconstitutional.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Landlords will be required to pay any fees charged by the Florida Department of Law Enforcement for the cost of criminal history searches, which may, in turn, increase residential rental costs. The costs for conducting a state criminal history record check is \$23 for each request submitted. The Florida Apartment Association estimates that approximately 35,000-40,000 criminal background checks would be necessary as a result of the bill.

²⁸ 10A Fla. Jur. 2d *Constitutional Law* s. 414 (2007). The term “impair” is defined as “to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken.” *Id*

²⁹ The factors enumerated by the court are: (a) Whether the law was enacted to deal with a broad, generalized economic or social problem; (b) Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and (c) Whether the effect on the contractual relationships is temporary or whether it is severe, permanent, immediate, and retroactive. *Pomponio*, 378 So. 2d at 779.

³⁰ 10A FLA. JUR 2D *Constitutional Law* § 409 (2007) (citing *Manning v. Travelers Ins. Co.*, 250 So. 2d 872 (Fla. 1971)).

³¹ *Id.* (citing *Park Benziger & Co., Inc. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681 (Fla. 1980)).

C. Government Sector Impact:

The Department of Law Enforcement (FDLE) reports that, while the impact of the bill does not necessitate additional FTE, the bill, in combination with additional background screening bills, could rise to a level requiring additional staffing. Additionally, FDLE reports that it is currently at 70 percent to 75 percent processing capacity on its current database server. A mandate of additional background checks may require the agency to replace the server at an approximate cost of \$12,000.

VI. Technical Deficiencies:

The final subsection in section 2 of the bill (line 37) is improperly numbered.

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.)

None.

B. Amendments:

None.