

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 Committee on Health Policy

BILL: CS/CS/SB 500

INTRODUCER: Community Affairs Committee; Regulated Industries Committee; and Senator Clemens and others

SUBJECT: Massage Establishments

DATE: April 8, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kraemer</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Anderson</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/CS</u>
3.	<u>McElheney</u>	<u>Stovall</u>	<u>HP</u>	<u>Pre-meeting</u>
4.	_____	_____	<u>AP</u>	_____
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/CS/SB 500 strengthens the regulation of massage establishments. The bill requires the denial of a massage establishment license when an applicant has been arrested, is awaiting final disposition, or has been convicted, of certain offenses listed in s. 435.04(2), F.S., or a similar law in another jurisdiction. The bill provides that denial of a license or a disciplinary action may be based on advertising to induce or engage a client in sexual activity.

The bill creates s. 480.0475, F.S., to prohibit the operation of massage establishments between the hours of midnight and 5 a.m., with certain exemptions based on location of the facility or the type of supervision over those persons performing massages. This section also prohibits the use of a massage establishment as a principal domicile in areas that are not zoned for residential use by local ordinance. A first violation of these provisions is a misdemeanor of the first degree and a subsequent violation is a felony of the third degree.

Certain massage establishments that violate the bill’s provisions pertaining to hours of operation or residential use or the identification provisions currently required of persons practicing

massage in a massage establishment can be declared nuisances that may be abated or enjoined pursuant to Florida law.

The bill expands the definition of ‘Board-approved massage school’ to include a college or university that is eligible to participate in the Florida Resident Access Grant Program.

The bill provides an October 1, 2013 effective date.

The bill amends sections 480.033, 480.043, 480.046, 480.047, 480.052, and 823.05, Florida Statutes. The bill creates section 480.0475, Florida Statutes.

II. Present Situation:

Massage Practice Act

Chapter 480, F.S., the “Massage Practice Act,” (Act) regulates the practice of massage. “Massage” is defined as the manipulation of the soft tissues of the human body with the hand, foot, arm, or elbow, whether or not such manipulation is aided by hydrotherapy, including colonic irrigation, or thermal therapy; any electrical or mechanical device; or the application to the human body of a chemical or herbal preparation.¹

A person must apply to the Board of Massage Therapy (Board) within the Department of Health (DOH) for approval to practice massage or to operate a massage establishment.² A massage therapist is a person licensed to administer massages for compensation,³ and a massage establishment is a site or premises, or portion thereof, wherein a massage therapist practices massage.⁴

Section 480.046(1), F.S., specifies numerous grounds for disciplinary action by the Board,⁵ including the following acts that are grounds for denial of a license or disciplinary action:

- Attempting to procure a license by bribery or fraudulent misrepresentation;
- Having a license to practice massage denied, revoked, suspended, or otherwise acted against by the licensing authority of another state, territory, or country;
- Being convicted, found guilty or entering a plea of nolo contendere, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of massage or to the ability to practice massage;
- False, deceptive, or misleading advertising;
- Aiding, assisting, procuring, or advising any unlicensed person to practice massage in violation of the act or a rule of the DOH or the Board;
- Making deceptive, untrue, or fraudulent representations in the practice of massage;

¹Section 480.033(3), F.S.

²See ss. 480.041 and 480.043, F.S.

³Section 480.033(4), F.S.

⁴Section 480.033(7), F.S.

⁵Section 480.046, F.S.

- Being unable to practice massage with reasonable skill and safety because of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material, or due to any mental or physical condition;
- Gross or repeated malpractice or the failure to practice massage with that level of care, skill, and treatment which is recognized by a reasonably prudent massage therapist as being acceptable under similar conditions and circumstances;
- Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that she or he is not competent to perform;
- Delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, experience, or licensure to perform;
- Violating a lawful order of the Board or the DOH previously entered in a disciplinary hearing, or failing to comply with a lawfully issued subpoena of the DOH;
- Refusing to permit the DOH to inspect the business premises of the licensee during regular business hours;
- Failing to keep the equipment and premises of the massage establishment in a clean and sanitary condition;
- Practicing massage at a site, location, or place which is not duly licensed as a massage establishment, excepting certain services permitted by Board rule, at the residence or office of a client, at a sports event, at a convention, or at a trade show; or
- Violating any provision of the act, ch. 456, F.S., regarding Health Professions and Occupations, or any rules adopted pursuant to the provisions.

Pursuant to s. 480.046(2), F.S., licensure may also be denied, or certain penalties imposed, against licensees found guilty of violating any of the provisions of s. 480.046(1) and s. 456.072(1), F.S. The penalties include:

- Refusal to certify, or to certify with restrictions, an application for a license.
- Suspension or permanent revocation of a license.
- Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.
- Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the Board, or the DOH if there is no board, must impose a fine of \$10,000 per count or offense.
- Issuance of a reprimand or letter of concern.
- Placement of the licensee on probation for a period of time and subject to such conditions as the Board, or the DOH when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.
- Corrective action.

- Imposition of an administrative fine in accordance with s. 381.0261, F.S., for violations regarding patient rights.
- Refund of fees billed and collected from the patient or a third party on behalf of the patient.
- Requirement that the practitioner undergo remedial education.

The Board also has the power to revoke or suspend the license of a massage establishment or deny subsequent licensure if the license was obtained by fraud or misrepresentation or the licensee was found guilty of fraud, deceit, gross negligence, incompetency, or misconduct in the operation of the establishment.⁶

Disciplinary proceedings shall be conducted pursuant to the provisions of ch. 120, F.S., the Administrative Procedure Act.⁷

Sexual misconduct in the practice of massage therapy is prohibited, and is defined as violation of the massage therapist-patient relationship through which the massage therapist uses that relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient.⁸

Violations of the law or rules associated with practices of massage therapists and massage establishments are investigated by the DOH.⁹ Sexual activity by any person or persons in any massage establishment is also prohibited.¹⁰

In an attempt to address human trafficking, the 2012 Legislature enacted ch. 2012-97, Laws of Florida, requiring employees and persons performing massages in a massage establishment to present a valid government identification upon request by a DOH investigator or a law enforcement officer and requiring the person operating the massage establishment to ensure that the identification is available. A person who violates this provision, faces criminal prosecution with increasing penalties for subsequent violation.

Nuisances

Section 823.01, F.S., provides that all nuisances that tend to annoy the community, injure the health of the citizens in general, or corrupt the public morals are second degree misdemeanors punishable by up to 60 days in jail and a fine not exceeding \$500, and that a violation of s. 823.10, F.S., regarding certain places where controlled substances are illegally kept, sold, or used, is a third degree felony punishable by a term of imprisonment not to exceeding 5 years and a fine not exceeding \$5,000.

⁶Section 480.046(3), F.S.

⁷Section 480.046(4), F.S.

⁸Section 480.0485, F.S. Section 456.063, F.S., which applies to all licensed health care practitioners, prohibits violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession.

⁹Section 480.039, F.S.

¹⁰See Rule 64B7-26.010, F.A.C., which provides a definition of sexual activity.

Section 60.05, F.S., provides that when a nuisance defined in s. 823.05, F.S., exists, the Attorney General, state attorney, city attorney, county attorney, or any citizen of the county may sue in the name of the state to enjoin the nuisance, the person or persons maintaining it, and the owner or agent of the building or ground on which the nuisance exists. In accordance with s. 60.06, F.S., the court shall enter orders to abate the nuisance, and has the authority to enforce injunctions by contempt.

Florida Human Trafficking

Labor trafficking is the most prevalent type of human trafficking that occurs in Florida. The largest number of trafficking victims identified in Florida between 2004 and 2010 involved persons exploited for forced labor, and debt servitude is often the preferred means of coercion. The two sectors of Florida's economy where forced labor appears most prevalent are the agricultural sector and the tourism and hospitality industries. Massage establishments have been noted as sites where trafficking occurs.¹¹

III. Effect of Proposed Changes:

Section 1 amends s. 480.033, F.S., to revise the definition of the term "Board-approved massage school" to include a college or university that is eligible to participate in the William L. Boyd, IV, Florida Resident Access Grant Program.

Section 2 amends s. 480.043, F.S., to require the Board to deny a massage establishment license when an applicant has been arrested, is awaiting final disposition, or has been convicted, of certain offenses listed in s. 435.04(2), F.S., or a similar law in another jurisdiction. Section 435.04(2), F.S., includes offenses relating to sexual misconduct, abuse of aged or disabled adults, murder, certain manslaughter offenses, vehicular homicide, certain offenses against minors, kidnapping, false imprisonment, prostitution, lewd and lascivious behavior, indecent exposure, arson, burglary, certain firearms offenses, and certain felony offenses.

Section 3 amends s. 480.046, F.S., to provide that denial of a license or a disciplinary action may be based on advertising to induce or engage (or attempting to induce or engage) a client in sexual activity.

Section 4 amends s. 480.047, F.S., to conform penalties for massage therapy to changes made in the bill.

Section 5 creates s. 480.0475, F.S., to restrict the time of operations for certain massage establishments, by prohibiting operations between midnight and 5 a.m. The bill creates exclusions from the time restrictions for the following massage establishments:

- Located on the premises of an ambulatory surgical center, a hospice, a nursing home, a hospital, a diagnostic-imaging center, a freestanding or hospital-based therapy center, a clinical laboratory, a home health agency, a cardiac catheterization laboratory, a medical

¹¹ Florida Strategic Plan on Human Trafficking. October 2010. Last visited April 7, 2013 available at: http://www.cahr.fsu.edu/sub_category/floridastrategicplanonhumantrafficking.pdf

equipment supplier, an alcohol or chemical dependency treatment center, a physical rehabilitation center, a lithotripsy center, an ambulatory care center, a birth center, or certain licensed nursing home components.¹²

- Located on the premises of a clinic defined in part X of ch. 400, F.S.;
- Located on the premises of a hotel, motel or bed and breakfast as defined in s. 509.242, F.S., or a timeshare property as defined in s. 721.05, F.S.;
- Located on the premises of a public airport as defined in s. 330.27, F.S.;
- Located on the premises of a pari-mutuel facility as defined in s. 550.002, F.S.;
- Located on the premises of an independent postsecondary educational institution licensed and approved by the Commission for Independent Education pursuant to ch. 1005, F.S.;
- In which every massage performed between midnight and 5 a.m. is performed by a massage therapist acting under the prescription of licensed persons such as physicians, physicians' assistants, chiropractic physicians, podiatric physicians, advanced registered nurse practitioners or dentists.

The bill prohibits the use of a massage establishment as a principal domicile unless the establishment is zoned for residential use by local ordinance. The phrase "principal domicile" is not defined, however, a legal domicile in Florida may be evidenced in accordance with s. 222.17, F.S., by a person filing a sworn statement at the office of the Clerk of Circuit Court showing that he or she "resides in and maintains a place of abode in that county which he or she recognizes and intends to maintain as his or her permanent home."

A person convicted of a first degree misdemeanor for violating s. 480.0475, F.S., may be sentenced to up to 1 year in jail and a fine not exceeding \$1,000.¹³ A person may be convicted of a third degree felony for a second or subsequent violation, and may be sentenced to a term of imprisonment not exceeding 5 years and a fine not to exceed \$5,000.¹⁴ More severe consequences result for offenders classified as habitual felony offenders, habitual violent felony offenders, or three-time violent felony offenders.¹⁵

Section 6 amends s. 480.052, F.S., to allow counties or municipalities to waive the restriction on the hours of operation of massage establishments for special local events within their jurisdiction.

Section 7 amends s. 823.05, F.S., to declare that a massage establishment that operates in violation of the restrictions on hours of operation, or that fails to immediately present to an investigator of the DOH or a law enforcement officer, all required government identification for each employee or for any person performing massage in the establishment is a nuisance and may be abated¹⁶ or enjoined pursuant to ss. 60.06 and 60.06, F.S.

Section 8 provides an October 1, 2013, effective date.

¹²Section 408.07(24), F.S.

¹³See ss. 775.082 and 775.083, F.S.

¹⁴*Id.*

¹⁵See s. 775.084, F.S.

¹⁶Abated is defined as eliminated or put an end to (Black's Law Dictionary (9th ed. 2009)).

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.

B. Private Sector Impact:

CS/CS/SB 500 will limit the operating hours of massage establishments that are not otherwise excluded from the time restriction between midnight and 5 a.m. Since the use of a massage establishment as a principal domicile is no longer permitted unless the location of the establishment is zoned for residential use by local ordinance, operators will be required to discontinue any existing use and monitor their locations for compliance by its employees in the future unless the establishment is located in a zoning classification that includes residential use.

C. Government Sector Impact:

The DOH will incur non-recurring costs for rulemaking which current budget authority is adequate to absorb. The DOH and Board may also experience a recurring increase in workload associated with additional complaints, investigations and prosecution due to non-compliance of the new requirements of this legislation. The impact is indeterminate at this time, but may require additional resources.¹⁷

The Criminal Justice Impact Conference has not yet determined the impact of the bill. The Department of Corrections anticipates that the impact of the bill will be insignificant on the prison population and minimal on the community supervision population.¹⁸

¹⁷ The DOH Bill Analysis for HB7005, dated January 25, 2013, on file with the Senate Health Policy Committee

¹⁸ See 2013 Legislative Analysis for SB 500, Office of Legislative Affairs, Florida Department of Corrections, January 31, 2013

VI. Technical Deficiencies:

Lines 45-49 pertain to massage establishments. It is unlikely that a business would have committed an offense in s. 435.04 (2), F.S. It might be more appropriate to tie the grounds for license denial to the principals of the applicant as follows: An application shall be denied upon a finding that an owner, officer, director, or managing employee of an applicant has been convicted of, regardless of adjudication, an offense in s. 435.04(2), F.S., or a similar law of another jurisdiction.

Lines 57-58: The criminal violation is ambiguous. As it is written, the first phase prohibits advertising to attempt to induce. It might be clearer to prohibit “Advertising with the intent to induce a client to engage in sexual activity, or to engage or attempt to engage a client in sexual activity.”

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/CS by Community Affairs on April 2, 2013:

The committee substitute adds that an independent postsecondary educational institution licensed and approved by the Commission for Independent Education pursuant to chapter 1005 may operate between midnight and 5 a.m. Also, adds that a college or university that is eligible to participate in the William L. Boyd, IV, Florida Resident Access Grant Program may be a ‘Board-approved massage school’.

CS by Regulated Industries on March 14, 2013:

The committee substitute requires the Board to deny a massage establishment license upon a finding that an applicant has been arrested, is awaiting final disposition, or has been convicted of offenses listed in s. 435.04(2), F.S., or a similar law in another jurisdiction, which include offenses relating to sexual misconduct, abuse of aged or disabled adults, murder, certain manslaughter offenses, vehicular homicide, certain offenses against minors, kidnapping, false imprisonment, prostitution, lewd and lascivious behavior, indecent exposure, arson, burglary, certain firearms offenses, and certain felony offenses.

The committee substitute provides that denial of a license or a disciplinary action may be based upon the act of advertising to induce or attempt to induce a client to engage in sexual activity, or to engage or attempt to engage a client in sexual activity.

The committee substitute revises the restriction on hours of operation for massage establishments to the range of midnight to 5 a.m. It exempts from the restriction on hours of operation those massage establishments located on the premises of a clinic defined in part X of ch. 400, F.S., a timeshare property defined in s. 721.05, F.S., a public airport

defined in s. 330.27, F.S., or a pari-mutuel facility defined in s. 550.002, F.S. It clarifies the exemption for massages performed pursuant to prescriptions of certain licensees.

The committee substitute amends s. 480.052, F.S., to allow counties and municipalities to waive the restriction on hours of operation of massage establishments for special local events within their jurisdiction. It amends the title to conform to the provisions of the bill.

B. Amendments:

None.