

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 Innovation, Industry, and Technology

BILL: CS/SB 498

INTRODUCER: Commerce and Tourism Committee and Senator Baxley

SUBJECT: Consumer Protection

DATE: January 17, 2020 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------------|----------------|-----------|--------------------|
| 1. | <u>Harmsen</u> | <u>McKay</u> | <u>CM</u> | <u>Fav/CS</u> |
| 2. | <u>Kraemer</u> | <u>Imhof</u> | <u>IT</u> | <u>Pre-meeting</u> |
| 3. | _____ | _____ | <u>RC</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 498 requires an unlicensed vendor to perform his or her work duties within a specific timeframe after the unlicensed vendor receives payment for the services. The bill also creates a rebuttable presumption that an unlicensed vendor does not have just cause to fail to comply with their duties, refund their payment, or continue their work for any 14-day period.

An unlicensed vendor who violates this provision commits a crime punishable as, depending on the total money received for the services and any prior offenses, a first degree misdemeanor or a felony.

The Revenue Estimating Conference has not yet assessed the fiscal impact for this bill. To the extent that the felony and misdemeanor penalties created in the bill result in persons being convicted, the bill may result in an indeterminate fiscal impact on prisons.

Additionally, the bill requires solicitors, salespersons, and agents who conduct door-to-door sales of consumer goods or services that will be delivered more than three days after the sale to obtain a home solicitation permit from a county clerk of the circuit court.

The bill takes effect on July 1, 2020.

II. Present Situation:

Florida consumers experienced growing numbers of contractor theft and unlicensed contractor fraud in the wake of recent hurricanes Irma and Michael.¹ However, victims met difficulty prosecuting the perpetrators because theft requires proof that the defendant had the intent to commit the crime at the time of, or prior to, the taking.² Especially in cases where a contract exists, it is difficult to prove criminal intent at the time the contract was signed.³ Florida courts have also found that a partial performance of a contract negates criminal intent.⁴

In 2019, the Legislature updated the construction contracting theft statute⁵ to remove the requirement that a construction contractor have intent to defraud the owner to be convicted of such theft.⁶ This change only applies to actors who are, or were acting as, a licensed construction contractor.

An unlicensed person may perform work that falls under the scope of construction contracting if the work is casual, minor, or inconsequential in nature, and the aggregate contract price for all labor and materials is less than \$1,000, subject to certain requirements. This is generally called the “handyman exception.” The “handyman exception” was enacted in 1979, and the contractual amount of \$1,000 has not been updated since.⁷

Unlicensed Activity

Several Florida agencies protect consumers from unlicensed activity. The Department of Business and Professional Regulation (DBPR) regulates several professions, including contractors and many of the construction trades. The DBPR regulates the unlicensed practice of those professions as well.⁸ According to the DBPR, unlicensed activity occurs most commonly

¹ See, e.g., Insurance Journal, *10 Arrests Made in Florida Unlicensed Contractor, Workers' Comp Fraud Sting* (Jun. 19, 2019), <https://www.insurancejournal.com/news/southeast/2019/06/19/529814.htm> (last visited Jan. 16, 2020); and Cape Coral Police Department, *Unlicensed Contractors and Scams* (Nov. 7, 2018), <https://www.capecops.com/newsroom/2018/11/7/unlicensed-contractors-and-scams> (last visited Jan. 16, 2020); and see Florida Dept. of Financial Services, *CFO Jimmy Patronis Announces Arrest of Fake Contractor for Stealing Over \$116,000 from Hurricane Irma Victims* (Mar. 1, 2019), <https://www.myfloridacfo.com/sitePages/newsroom/pressRelease.aspx?id=5206> (last visited Jan. 16, 2020).

² See *Stramaglia v. State*, 603 So. 2d 536, 537-38 (Fla. 4th DCA 1992) and *Frazier v. State*, 114 So. 3d 461 (Fla. 2nd DCA 2013). Florida recognizes two types of intent crimes: specific intent and general intent crimes. A specific intent crime requires the offender to intend to accomplish a precise, prohibited act. A general intent crime requires the offender to intend to do something unlawful, but the offender does not need to intend the precise harm or result that occurs. See Black's Law Dictionary 47, 559 and 560 (6th ed. 1995). Unless an offender confesses his or her intent, intent must be inferred. See generally, David Crump, *What Does Intent Mean*, 38 HOFSTRA L.R. 1059, <https://scholarlycommons.law.hofstra.edu/hlr/vol38/iss4/2/> (last visited Jan. 16, 2020).

³ See *Adams v. State*, 443 So. 2d 1003 (Fla. 2^d DCA 1983).

⁴ See *Yerrick v. State*, 979 So. 2d 1228 (Fla. 4th DCA 2008).

⁵ Section 489.126(2), F.S.

⁶ Section 19, ch. 2019-167, Laws of Fla. See also, Sasha Jones, *New Florida Law Protects You Against Contractor Fraud* (Jul. 11, 2019), <https://www.nbcmiami.com/news/local/New-Florida-Law-Protects-You-Against-Contractor-Fraud-512600391.html> (last visited Jan. 10, 2020).

⁷ Section 489.103(9), F.S. The exemption does not apply if the construction, repair, remodeling, or improvement is part of a larger operation, regardless of whether the work is undertaken by the same or a different contractor.

⁸ Florida Dept. of Business and Professional Regulation, *Department Overview*, <http://www.myfloridalicense.com/DBPR/about-us/departments-overview/> (last visited Jan. 16, 2020).

in the construction and electrical trades.⁹ In fiscal year 2017-2018, the DBPR received 3,043 complaints of unlicensed construction contractor and electrical contractor activity, and filed 664 administrative cases to address those complaints.¹⁰ The number of complaints of such unlicensed activity and the DBPR's response to them increased in fiscal year 2018-2019, when the DBPR received 3,198 such complaints and filed 1,175 administrative cases.¹¹

The Department of Agriculture and Consumer Services serves as the consumer complaint clearinghouse for issues that arise about businesses whether regulated or not.¹²

Additionally the Florida Office of the Attorney General's Consumer Protection Division prosecutes deceptive and unfair trade practices under the Florida Deceptive and Unfair Trade Practices Act (ch. 501, F.S.).¹³ Since 2011, that division has resolved 558 investigations and recovered over \$10 billion for Florida consumers.¹⁴

Construction Contracting Fraud and Theft

A construction contractor is a person who undertakes a job or submits a bid to construct, repair, alter, remodel, add to, demolish, subtract from, or improve any building or structure for others, and whose job scope is substantially similar to one of 17 specified scopes of work.¹⁵ A construction contractor must be licensed by the DBPR's Construction Industry Licensing Board (board) or certified by the county in which he or she wishes to work.¹⁶ In most circumstances, a construction contractor must subcontract all electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air-conditioning work, unless the construction contractor holds a state certificate or registration in the appropriate trade category.¹⁷

A subcontractor who does not have a state certificate or registration may work under the supervision of a licensed or certified construction contractor, but only if:

- The work of the subcontractor falls within the scope of the construction contractor's license; and

⁹ Florida Dept. of Business and Professional Regulation, *2017-2018 Unlicensed Activity Annual Report* at 4, available at <http://www.myfloridalicense.com/dbpr/reg/documents/ULA%20Annual%20Report%20FY2017-18.pdf> (last visited Jan. 16, 2020).

¹⁰ *Id.* at 28.

¹¹ Florida Dept. of Business and Professional Regulation, *2018-2019 Unlicensed Activity Annual Report* at 29 (on file with Senate Committee on Innovation, Industry, and Technology).

¹² Florida Dept. of Agriculture and Consumer Services, *Division of Consumer Services*, <https://www.fdacs.gov/Divisions-Offices/Consumer-Services> (last visited Jan. 16, 2020) and <https://www.fdacs.gov/Contact-Us/File-a-Complaint> (last visited Jan. 16, 2020).

¹³ Florida Office of the Attorney General, *Consumer Protection Division*, <http://www.myfloridalegal.com/pages.nsf/Main/18A7753257FE439085256CC9004EC4F7> (last visited Jan. 16, 2020).

¹⁴ *Id.*

¹⁵ See ss. 489.105(3)(a) through (q), F.S. The specified scopes of work are identified as general contractor, building contractor, residential contractor, sheet metal contractor, roofing contractor, Class A, B, and C air-conditioning contractor, mechanical contractor, commercial pool/spa contractor, residential pool/spa contractor, swimming pool servicing contractor, plumbing contractor, underground utility and excavation contractor, solar contractor, pollutant storage systems contractor, and specialty contractor.

¹⁶ Sections 489.107(1), 489.113(1), and 489.117(1)(b), F.S.

¹⁷ Section 489.113(3), F.S. Various exceptions for general, building, residential, and solar contractors are set forth in ss. 489.113(3)(a) through (g), F.S.

- The subcontractor is not engaged in construction work that would require specified contractor licensing (i.e., licensure as an electrical contractor,¹⁸ a septic tank contractor,¹⁹ a sheet metal contractor, roofing contractor, Class A, B, or C air-conditioning contractor, mechanical contractor, commercial pool/spa contractor, residential pool/spa contractor, swimming pool servicing contractor, plumbing contractor, underground utility and excavation contractor, or solar contractor.²⁰

Administrative Offenses and Penalties

The board may discipline a construction contractor's certification or registration²¹ if he or she is found guilty of certain offenses, including but not limited to:²²

- Committing mismanagement or misconduct in the practice of contracting that causes financial harm to a customer;
- Abandoning a construction project. There is a presumption a construction contractor has abandoned a project after 90 days if the contractor terminates the project without just cause or without proper notification to the owner, or the contractor fails to perform work without just cause for 90 consecutive days;
- Committing fraud or deceit in the practice of contracting; and
- Proceeding on a job without obtaining required building permits and inspections.

In addition to board action, Florida law imposes criminal penalties for prohibited behavior in the construction contracting industry. A person commits a first degree misdemeanor²³ if he or she:

- Falsely holds himself or herself out as a licensee, certificate holder, or registrant;
- Acts or advertises as a construction contractor without being duly registered or certified; or
- Starts or performs work for which a building permit is required without such permit.

If a person commits a subsequent offense, or commits any such offense during a state emergency as declared by the Governor, it is punishable as a third degree felony.²⁴

Criminal Offenses and Penalties

A construction contractor, or a person who acts as a construction contractor, who receives an initial payment of more than 10 percent of the contract price for the project must, unless the payor agreed in writing to a longer period or the contractor has just cause for failing to do so:

- Apply for any necessary permits within 30 days after the payment is made; and
- Start the work within 90 days after all necessary permits are issued.

¹⁸ See Part II, of ch. 489, F.S., relating to Electrical and Alarm System Contracting,

¹⁹ See Part III of ch. 489, F.S., relating to Septic Tank Contracting.

²⁰ Section 489.113(2), F.S. See also s. 489.113(3), F.S., relating to subcontracting.

²¹ See as. 489.105(8) and (10), F.S.

²² Section 489.129(1), F.S. The board may place a contractor on probation, reprimand him or her, and revoke, suspend, or deny the issuance or renewal of a contractor's certificate or registration. The board may also require the contractor to provide financial restitution to a consumer for financial harm he or she caused, require the contractor to perform continuing education, or to pay costs related to the investigation and prosecution.

²³ Section 489.127, F.S. See *infra* note 28 for the penalties that may be imposed.

²⁴ Section 489.127(2)(b) and (c), F.S. See *infra* notes 24-26 and 27-29 for possible penalties that may be imposed.

A construction contractor is deemed not to have just cause for a failure to apply for permits, perform work, or refund monies paid, if the payor has made a written demand and given the contractor 30 days to perform.²⁵

Section 489.126, F.S., sets the dollar thresholds for the offense severity at the following levels:

| Total Money Received | Offense Level |
|----------------------------|--------------------------|
| ≥ \$200,000 | First Degree Felony |
| ≥\$20,000, but < \$200,000 | Second Degree Felony |
| ≥ \$1,000, but < \$20,000 | Third Degree Felony |
| < \$1,000 | First Degree Misdemeanor |

Theft

Section 812.014, F.S., provides that a person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to (temporarily or permanently):

- Deprive the other person of a right to the property or a benefit thereof; or
- Appropriate the property to his or her own use or to the use of any person not entitled to its use.

The penalties for theft crimes depend on the value of the property taken, classified as follows:

| Offense | Property Value | Offense Level |
|--------------------|---|------------------------------------|
| Grand Theft | ≥ \$100,000 | First Degree Felony ²⁶ |
| | ≥ \$20,000, but < \$100,000 | Second Degree Felony ²⁷ |
| | ≥ \$750, but < \$20,000 | Third Degree Felony ²⁸ |
| | ≥ \$100, but < \$750 if taken from a dwelling or unenclosed curtilage ²⁹ of a dwelling | Third Degree Felony |

²⁵ See s. 489.126, F.S.

²⁶ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

²⁷ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

²⁸ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

²⁹ “Unenclosed curtilage of a dwelling” means the unenclosed land or grounds, or any outbuildings, directly and intimately adjacent to and connected with the dwelling and necessary, convenient, and habitually used in connection with that dwelling. Section 810.09(1)(b), F.S.

| Offense | Property Value | Offense Level |
|--------------------|----------------------|---|
| Petit Theft | ≥ \$100, but < \$750 | First Degree Misdemeanor ³⁰ |
| | < \$100 | Second Degree Misdemeanor ³¹ |

However, as discussed above, it has been difficult for prosecutors to apply the theft statute to theft that results from an individual’s failure to perform contracted work.³²

Home Solicitation Sales Permits³³

Unless exempted, a person must obtain a home solicitation sales permit (permit) to sell items valued at \$25 or more by solicitation at any location that is not his or her business’s fixed location.³⁴ The seller can apply for a permit at the clerk of the circuit court within the county in which the seller wants to do business.³⁵ A county clerk of the circuit court may deny a home solicitation sales permit if the applicant has been convicted of, or entered a guilty or no contest plea, to a crime involving moral turpitude, fraudulent or dishonest dealing, or the illegal use or sale of a controlled substance, or to any violation of the home solicitation laws.³⁶ The solicitor must display the permit to each prospective buyer before he or she begins a solicitation. A solicitor who attempts to make a sale without a permit commits a first degree misdemeanor. Additionally, the clerk of the circuit court can discipline or revoke the permit for specific violations.

Under current law, all solicitors, salesperson, or agents conducting sales, leases, or rentals of consumer goods by using samples, catalogs, or brochures for delivery of the goods more than three business days after the sale are exempt from home solicitations sales permit requirements.³⁷

III. Effect of Proposed Changes:

Section 1 creates s. 501.0195, F.S., and defines the term “unlicensed vendor,” requires them to perform their duties within specific timeframes, and sets criminal penalties for the failure to meet those requirements.

The bill defines an unlicensed vendor as a person who is not deemed a construction contractor under s. 489.105(3), F.S.³⁸ in Florida who also provides or promises to provide services related to a residential home or the extended parcel of land on which the home is situated. This may

³⁰ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

³¹ A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. Sections 775.082 and 775.083, F.S.

³² See *supra* notes 2-4.

³³ See, sections 501.021-501.055, F.S.

³⁴ Section 501.021, F.S.

³⁵ Section 501.021(2), F.S.

³⁶ Section 501.021(4), F.S.

³⁷ Section 501.022(1)(b)4., F.S.

³⁸ See *infra* note 14 for the construction contractors regulated by the board.

include work on driveways, lawns, trees, gardens, walls, fences, or other vegetation or fixtures located on the land.

An unlicensed vendor who has agreed to perform a job and has accepted any amount of money as an initial payment for the job must perform the following duties:

- Apply for any required work permits within 14 days after receiving the consumer’s initial payment;
- Start the work within 14 days after either receiving an initial payment or within 14 days after all necessary work permits have been issued; and
- Continue the work until completion, with no breaks that are 14 days or longer in duration.

The unlicensed vendor may deviate from the above duties only when the consumer has agreed to a longer timeframe in writing, or when the unlicensed vendor has just cause.

Additionally, the bill creates a rebuttable presumption that an unlicensed vendor does not have just cause to deviate from the above duties, or fail to refund payment within 14 days. It is the unlicensed vendor’s burden to rebut this presumption and to plead and prove any just cause for the violation.

An unlicensed vendor who violates this section may be subject to the following penalties, based on the total amount of money received for the services to be performed on a home or its surrounding parcel:

| Total Money Received | Offense Level |
|---------------------------|--------------------------|
| ≥ \$50,000 | First Degree Felony |
| ≥ \$5,000 but < \$50,000 | Second Degree Felony |
| ≥ \$300 but < \$5,000,000 | Third Degree Felony |
| < \$300 | First Degree Misdemeanor |

A person who is not licensed as a construction contractor who performs work on a home or its surrounding parcel may be subject to the above penalties as well as similar penalties imposed by s. 489.126(2), F.S., which applies to “any person performing or contracting or promising to perform contracting work” without regard to the licensure of the person.

Section 2 amends s. 501.022, F.S., to require solicitors, salespersons, and agents to conduct a sale, lease, or rental of consumer goods or services by sample, catalog, or brochure for future delivery to obtain a home solicitation sales permit from the pertinent county’s clerk of the circuit court before they begin their door-to-door sales. This type of solicitor is currently exempt from the permitting requirement.

Section 3 provides an effective date of July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Homeowners who use unlicensed vendors for services and repairs to their property may be less susceptible to theft of their payments and more timely performance of their repairs as a result of the criminal penalties implemented by this bill.

Solicitors who conduct door-to-door sales, leases, or rentals of consumer goods or services by sample, catalog, or brochure for future delivery will be required to obtain a permit to perform their work. This will increase the cost to do business as such a solicitor. Consumers targeted by such solicitors may be less subject to unscrupulous sales as a result of the permitting process.

C. Government Sector Impact:

The bill creates new criminal penalties, which may increase the need for prison beds if the number of successful prosecutions increases.

County clerks of circuit courts may see an increase in permit processing for certain door-to-door solicitors.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill's definition of an unlicensed vendor is relatively broad and may inadvertently capture professionals who are licensed in some capacity by the state of Florida. For example, licensed electrical contractors, alarm system contractors, and septic tank contractors who may perform work on a home or its surrounding property are not construction contractors described in s. 489.105(3), F.S., in part I of ch. 489, F.S., as referenced on line 31 of the bill. Those contractors are licensed under parts II and III of ch. 489, F.S., but appear to fall within the definition of "unlicensed vendor" despite such licensing. Consideration of an amendment to paragraph (2)(b) may be needed to exclude contractors regulated by other provisions in ch. 489, F.S.

Paragraph (3)(a) of the bill addresses action that is to occur after the date all "necessary" permits are issued. The term "necessary" may be subject to interpretation; substitution of the term "required" may be appropriate to establish a more objective standard.

As written, the bill appears to require all unlicensed vendors to refund their payment within 14 days after receiving it, whether or not they have otherwise complied with their duty outlined in the bill to perform work in a timely fashion. See lines 47-48. Consideration of an amendment to paragraph (3)(b) may be needed to clarify that the just cause presumption rests on failure of the unlicensed vendor to:

- Within 14 days of payment, apply for any required permits, timely start the work, and perform the work without suspending work for any period longer than 14 days (as required by paragraph (3)(a)); or
- Refund payment within 14 days after receiving payment if required permits have not been applied for by the vendor, no work has been performed by the vendor, or work has been suspended by the vendor for longer than 14 days in any period.

Such an amendment would eliminate duplicative references in paragraphs (3)(a) and (3)(b) (lines 41-43 and 48-50), related to failure by the vendor to continue the work without suspension for a 14-day period, which may create confusion for those seeking to rely on or rebut the just cause presumption.

VIII. Statutes Affected:

This bill amends section 501.022 of the Florida Statutes.

This bill creates section 501.0195 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on December 10, 2019:

The CS clarifies that an unlicensed vendor is an individual who is not deemed a construction contractor in Florida who also provides or promises to provide services related to a residential home *or* the extended parcel of land on which the home is situated.

- B. **Amendments:**

None.