

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 Commerce and Tourism

BILL: SB 498

INTRODUCER: Senator Baxley

SUBJECT: Consumer Protection

DATE: December 9, 2019

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Harmsen | McKay | CM | Pre-meeting |
| 2. | | | IT | |
| 3. | | | RC | |

I. Summary:

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 Criminal Justice Impact Conference has not yet determined the fiscal impact for this bill. To the extent that the felonies and misdemeanor created in the bill results in persons being convicted, the bill may result in a positive 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

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 Dec. 9, 2019); 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 Dec. 9, 2019); and see

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 contractor theft statute⁵ to remove the requirement that a 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 contractor.

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 therefore regulates the unlicensed practice of those professions as well.⁷ According to the DBPR, unlicensed activity occurs most commonly in the construction and electrical trades.⁸ In fiscal year 2017-2018, the DBPR received 2,461 construction industry complaints, and took action on 1,551 of the cases.⁹

The Department of Agriculture and Consumer Services serves as the consumer complaint clearinghouse for issues that arise from workers who operate in an unregulated profession.¹⁰

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

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 Dec. 9, 2019).

² See *Stramaglia v. State*, 603 So. 2d 536, 537-38 (Fla. 4th DCA 1992) and *Frazier v. State*, 114 So. 3d 461 (Fla. Dist. Ct. App. 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 Dec. 9, 2019).

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

⁴ See *Yerrick v. State*, 970 So. 2d 1288 (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 Dec. 9, 2019).

⁷ Florida Dept. of Business and Professional Regulation, *Department Overview*,

<http://www.myfloridalicense.com/DBPR/about-us/department-overview/> (last visited Dec. 9, 2019).

⁸ 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 Dec. 9, 2019).

⁹ *Id.* at 28.

¹⁰ Florida Dept. of Agriculture and Consumer Services, *Division of Consumer Services*, <https://www.fdacs.gov/Divisions-Offices/Consumer-Services> (last visited Dec. 9, 2019).

Practices Act (ch. 501, F.S.).¹¹ Since 2011, the Division has resolved 558 investigations and recovered over \$10 billion for Florida consumers.¹²

Contractor Fraud and Theft

A 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.¹³ A contractor must be licensed by the Department of Business and Professional Regulation's Construction Industry Licensing Board (Board) or certified by the county in which he or she wishes to work.¹⁴ A subcontractor who does not have a state certificate or registration may work under a licensed or certified contractor if the subcontractor's work falls within the scope of the contractor's license.¹⁵

Administrative Offenses and Penalties

The Board may discipline¹⁶ a contractor's certification or registration if he or she is found guilty of any of the following offenses:¹⁷

- 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 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 contracting industry. A person commits a first degree misdemeanor if he or she:¹⁸

- Falsely holds himself or herself out as a licensee, certificate holder, or registrant,
- Acts or advertises as a 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.¹⁹

¹¹ Florida Office of the Attorney General, *Consumer Protection Division*, <http://www.myfloridalegal.com/pages.nsf/Main/18A7753257FE439085256CC9004EC4F7> (last visited Dec. 9, 2019).

¹² *Id.*

¹³ *See*, s. 489.105(3), F.S.

¹⁴ Sections 489.107(1), 489.113(1), and 489.117(1)(b), F.S.

¹⁵ Section 489.113(2), F.S.

¹⁶ The Board may place a contractor on probation, reprimand him or her, revoke or suspend the contractor's certificate or registration, or deny the renewal of a 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.

¹⁷ Section 489.129(1), F.S.

¹⁸ Section 489.127, F.S.

¹⁹ Section 489.127(2)(b) and (c), F.S.

Criminal Offenses and Penalties

A contractor, or a person who acts as a 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.

A contractor is deemed to lack just cause for a failure to perform his or her duties if the payor has made a written demand and given the contractor 30 days to perform.

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 and are classified as follows:

| | Property Value | Offense Level |
|--------------------|-----------------------------|------------------------------------|
| Grand Theft | ≥ \$100,000 | First Degree Felony ²⁰ |
| | ≥ \$20,000, but < \$100,000 | Second Degree Felony ²¹ |
| | ≥ \$750, but < \$20,000 | Third Degree Felony ²² |

²⁰ 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.

²¹ 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.

²² 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.

| | | |
|-------------|---|---|
| | ≥ \$100, but < \$750 if taken from a dwelling or unenclosed curtilage ²³ of a dwelling | Third Degree Felony |
| Petit Theft | ≥ \$100, but < \$750 | First Degree Misdemeanor ²⁴ |
| | < \$100 | Second Degree Misdemeanor ²⁵ |

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.²⁶

Home Solicitation Sales Permits²⁷

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.²⁸ 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. 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. 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.

III. Effect of Proposed Changes:

Section 1 creates s. 501.0195, F.S., which provides a definition for an 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 licensed as a contractor in Florida who also provides or promises to provide services related to a residential home and the extended parcel of land on which the home is situated. This may 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;

²³ “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.
²⁴ 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.
²⁵ 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.
²⁶ See, notes 2-4 *supra*.
²⁷ See sections 501.021-501.055, F.S.
²⁸ Section 501.021, F.S.

- 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 that an unlicensed vendor’s deviation from the above duties, or failure to refund payment within 14 days, is a violation of this law. 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:

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

Section 2 amends s. 501.022, F.S., to require solicitors, salesperson, 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 a new criminal penalty, 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 ultimately capture professionals who are licensed in some capacity by the state of Florida.

It is unclear whether an unlicensed contractor is excluded from the definition of an unlicensed vendor. Therefore, an unlicensed contractor may be subject to penalty under both this law and contractor theft (s. 489.126(2), F.S.).

The bill defines an unlicensed vendor as a person who provides or promises to provide services related to a residential home *and* the extended parcel of land. This may be interpreted to require the person to offer services for both the home and land to be prosecuted under this section.

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.

Section 501.0195(3)(b) provides that there is a presumption that an unlicensed vendor does not have just cause if [he or she] “fails to continue the work for any 14-day period after the date all necessary permits for work, if any, are issued.” This is repetitive of the presumption that an unlicensed vendor lacks just cause if he or she “fails to comply with paragraph (a)” on lines 45-47, also within paragraph (3)(b) of the bill because subparagraph (3)(a)3. provides that an unlicensed vendor must “[p]erform the work, without any failure to continue the work for any 14-day period after payment is made or 14 days after the date all necessary permits for work, if any, are issued.” The inclusion of this duty twice in paragraph (3)(b) may be problematic when interpreting the law.

VIII. Statutes Affected:

This bill creates section 501.0195, F.S., and amends section 501.022 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.