

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 Regulated Industries

BILL: SB 332

INTRODUCER: Senator Perry

SUBJECT: Unlicensed Contracting

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Sharon _____	Imhof _____	RI _____	Pre-meeting _____
2.	_____	_____	ACJ _____	_____
3.	_____	_____	AP _____	_____

I. Summary:

SB 332 increases the criminal penalties when an unlicensed person:

- Engages in the business or acts in the capacity of a contractor; or
- Advertises themselves or a business organization as available to engage in the business or act in the capacity of a contractor.

For such violations, the bill creates a tiered penalty structure, increasing in severity with the contract amount. If the contract amount is:

- Less than \$1,000, the penalty is a first degree misdemeanor.¹
- \$1,000 or more, but less than \$20,000, the penalty is a third degree felony.²
- \$20,000 or more, but less than \$200,000, the penalty is a second degree felony.³
- \$200,000 or more, the penalty is a first degree felony.⁴

The bill is effective October 1, 2021.

¹ Section 775.082, F.S., provides that a misdemeanor of the first degree is punishable by a term of imprisonment not exceeding one year. Section 775.083, F.S., provides that a misdemeanor of the first degree is punishable by a fine not to exceed \$1,000.

² Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not exceeding five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed \$5,000.

³ Section 775.082, F.S., provides that a felony of the second degree is punishable by a term of imprisonment not exceeding 15 years. Section 775.083, F.S., provides that a felony of the second degree is punishable by a fine not to exceed \$10,000.

⁴ Section 775.082, F.S., provides that a felony of the first degree is punishable by a term of imprisonment not exceeding 30 years. Section 775.083, F.S., provides that a felony of the first degree is punishable by a fine not to exceed \$10,000.

II. Present Situation:

Regulation of Construction Activities and Exemptions

The Legislature regulates the construction industry “in the interest of the public health, safety, and welfare,”⁵ and has enacted ch. 489, F.S., to address requirements for construction contracting, electrical and alarm system contracting, and septic tank contracting.⁶

More than 20 categories of persons are exempt from the contractor licensing requirements of ch. 489, F.S., including but not limited to:

- Contractors in work on bridges, roads, streets, highways, or railroads, and other services defined by the board and the Florida Department of Transportation;
- Employees of licensed contractors, if acting within the scope of the contractor’s license, with that licensee’s knowledge;
- Certain employees of federal, state, or local governments or districts (excluding school and university boards), under limited circumstances;
- Certain public utilities, on construction, maintenance, and development work by employees;
- Property owners, when acting as their own contractor and providing “direct, onsite supervision” of all work not performed by licensed contractors on one-family or two-family residences, farm outbuildings, or commercial buildings at a cost not exceeding \$75,000;
- Work undertaken on federal property or when federal law supersedes part I of ch. 489, F.S.;
- Work falling under the so-called handyman exemption, meaning it is of a “casual, minor, or inconsequential nature,” and the total contract price for all labor, materials, and all other items is less than \$2,500, subject to certain exceptions;
- Registered architects and engineers acting within their licensed practice, including those exempt from such licensing, but not acting as a contractor unless licensed under ch. 489, F.S.
- Work on one-, two-, or three-family residences constructed or rehabilitated by Habitat for Humanity, International, Inc., or a local affiliate, subject to certain requirements;
- Certain disaster recovery mitigation or other organizations repairing or replacing a one-family, two-family or three-family residence impacted by a disaster, subject to certain requirements; and
- Employees of an apartment community or apartment community management company who make minor repairs to existing electric water heaters, electric heating, ventilating, and air-conditioning systems, subject to certain requirements.⁷

Local Licensure Exemption in s. 489.117(4)(d), F.S.

Section 489.117(4)(d), F.S., commonly referred to as the “Jim Walter” exemption, was enacted in 1993⁸ and allows unlicensed persons to perform contracting services for the construction, remodeling, repair, or improvement of single-family residences and townhouses⁹ without obtaining a local license. The person must be under the supervision of a certified or registered general, building, or residential contractor, and the work may not be work that requires licensure

⁵ See s. 489.101, F.S.

⁶ See parts I, II, and III, respectively, of ch. 489, F.S.

⁷ See s. 489.103, F.S., for additional exemptions.

⁸ See ch. 93-154, s. 3, and ch. 93-166, s. 12, Laws of Fla. These provisions have been subsequently amended.

⁹ The term “townhouses” was added to the exemption in 2003. See ch. 2003-257, s. 5, Laws of Fla.

in the areas of roofing, sheet metal, air-conditioning, mechanical, pool/spa, plumbing, solar, or underground utility and excavation.¹⁰ The supervising contractor need not have a direct contract with the unlicensed person performing the contracting services.

Florida's Fifth District Court of Appeals has addressed the applicability of this exemption to a local building contractor licensing requirement in a St. Johns County ordinance.¹¹ In this case, the court found that under s. 489.117(4)(d), F.S., the county's ordinance requiring all non-certified contractors to obtain a local license conflicted with state law.¹²

Another example of this exemption's applicability is contained in a 2001 Attorney General Opinion. In this opinion, Florida's Attorney General, Robert A. Butterworth, explained that a county may not enact an ordinance that requires local certification of drywall installers. Mr. Butterworth reasoned that, under the exemption in s. 489.117(4)(d), F.S., "the county may not require certification of persons performing drywall installation on single-family residences when such persons are working under the supervision of a certified or registered general, building, or residential contractor."¹³ Drywall installation fits the local licensing exemption because one does not have to obtain registration or certification under s. 489.105(3)(d)-(o), F.S., to perform this aspect of construction.

Construction Contracting

The Construction Industry Licensing Board (CILB) within the DBPR is responsible for licensing and regulating the construction industry in this state under part I of ch. 489, F.S.¹⁴ The CILB is divided into two divisions with separate jurisdictions:

- Division I comprises the general contractor, building contractor, and residential contractor members of the CILB. Division I has jurisdiction over the regulation of general contractors, building contractors, and residential contractors.
- Division II comprises the roofing contractor, sheet metal contractor, air-conditioning contractor, mechanical contractor, pool contractor, plumbing contractor, and underground utility and excavation contractor members of the CILB. Division II has jurisdiction over the regulation of roofing contractors, sheet metal contractors, class A, B, and C air-conditioning contractors, mechanical contractors, commercial pool/spa contractors, residential pool/spa contractors, swimming pool/spa servicing contractors, plumbing contractors, underground utility and excavation contractors, solar contractors, and pollutant storage systems contractors.¹⁵

The Electrical Contractors' Licensing Board (ECLB) within the DBPR is responsible for licensing and regulating electrical and alarm system contractors in Florida under part II of ch. 489, F.S.¹⁶

¹⁰ Section 489.117(4)(d), F.S.

¹¹ See *Florida Home Builders Ass'n v. St. Johns County*, 914 So.2d 1035 (Fla. 5th DCA 2005).

¹² *Id.* at 1037

¹³ See Op. Att'y. Gen. Fla. 2001-25 (2001), available at

<http://www.myfloridalegal.com/ago.nsf/opinions/4c31d4cae5f162bf85256a1e00532dac> (last visited Mar. 25, 2021).

¹⁴ See s. 489.107, F.S.

¹⁵ Section 489.105(3), F.S.

¹⁶ Section 489.507, F.S.

Master septic tank contractors and septic tank contractors are regulated by the Department of Health under part III of ch. 489, F.S.¹⁷

Construction contractors regulated under part I of ch. 489, F.S., and electrical and alarm contractors regulated under part II of ch. 489, F.S., must satisfactorily complete a licensure examination before being licensed.¹⁸ The CILB and ECLB may deny a license application for any person whom it finds guilty of any of the grounds for discipline set forth in s. 455.227(1), F.S., or set forth in the profession's practice act.¹⁹

A "specialty contractor" is a contractor whose scope of practice is limited to:

- A particular construction category adopted by board rule; and
- A subset of the trade categories for contractors listed in s. 489.105(3)(a) through (p), F.S., such as roofing, air-conditioning, plumbing, etc.²⁰

For example, specialty swimming pool contractors have limited scopes of work for the construction of pools, spas, hot tubs, and decorative or interactive water displays.²¹ Jurisdiction is dependent on the scope of work and whether Division I or Division II has jurisdiction over such work in accordance with the applicable administrative rule.²²

Certification and Registration of Contractors

Under current law, a "certified contractor" has met competency requirements for a particular trade category and holds a geographically unlimited certificate of competency from the DBPR which allows the contractor to contract in any jurisdiction in the state without being required to fulfill the competency requirements of other jurisdictions.²³

The term "registered contractor" means a contractor who has registered with the DBPR as part of meeting competency requirements for a trade category in a particular jurisdiction, which limits the contractor to contracting only in the jurisdiction for which the registration is issued.²⁴

Fee for Certification and Registration

As provided in s. 489.109, F.S., an applicant for certification as a contractor is required to pay an initial application fee not to exceed \$150, and, if an examination cost is included in the application fee, the combined amount may not exceed \$350. For an applicant for registration as a contractor, the initial application fee may not exceed \$100, and the initial registration fee and the

¹⁷ See ss. 489.551-489.558, F.S.

¹⁸ See ss. 489.113 and 489.516, F.S., respectively.

¹⁹ Section 455.227(2), F.S.

²⁰ Section 489.105(3)(q), F.S.

²¹ See Fla. Admin. Code R. 61G4-15.032 and 61G4-15.040 (2021).

²² See Fla. Admin. Code R. 61G4-15.032 (2021).

²³ Sections 489.105(8) and 489.113(1), F.S.

²⁴ Sections 489.105(10) and 489.117(1)(b), F.S.

renewal fee may not exceed \$200.²⁵ The initial application fee and the renewal fee is \$50 for an application to certify or register a business.²⁶

Fees must be adequate to ensure the continued operation of the CILB, and must be based on the DBPR's estimates of revenue required to implement part I of ch. 489, F.S., and statutory provisions regulating the construction industry.²⁷

All certificate holders and registrants must pay a fee of \$4 to the DBPR at the time of application or renewal, to fund projects relating to the building construction industry or continuing education programs offered to building construction industry workers in Florida, to be selected by the Florida Building Commission.²⁸

Subcontractors

In most circumstances, a contractor must subcontract all electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air-conditioning work unless the contractor holds a state certificate or registration in the appropriate trade category.²⁹

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

- The work of the subcontractor falls within the scope of the contractor's license; and
- The subcontractor is not engaged in construction work that would require specified contractor licensing (i.e., licensure as an electrical contractor,³⁰ a septic tank contractor,³¹ 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).³²

Unlicensed Contractors

A person without a valid certificate or registration, engaged in activities that require licensure under part 1 of ch. 489, F.S., is guilty of unlicensed contracting.³³ The DBPR may impose an administrative fine of up to \$10,000 on anyone found guilty of unlicensed contracting, along with investigative and legal costs for prosecution of the offense.³⁴ A person who is registered but working outside of their registration's geographical scope is guilty of unlicensed contracting,

²⁵ Section 489.109, F.S. Any applicant who seeks certification as a contractor under part I of ch. 489, F.S., by taking a practical examination must pay as an examination fee the actual cost incurred by the DBPR in developing, preparing, administering, scoring, score reporting, and evaluating the examination, if the examination is conducted by the DBPR.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Section 489.109(3), F.S.

²⁹ Section 489.113(3), F.S. Various exceptions for general, building, residential, and solar contractors are set forth in s. 489.113(3)(a) through (g), F.S.

³⁰ See Part II, of ch. 489, F.S., relating to Electrical and Alarm System Contracting.

³¹ See Part III of ch. 489, F.S., relating to Septic Tank Contracting.

³² Section 489.113(2), F.S.

³³ Section 489.13(1), F.S.

³⁴ Section 489.13(3), F.S.

however, for a first offense will only be issued a notice of noncompliance.³⁵ A portion of the fines collected are used to maintain the DBPR's unlicensed contractor website and also to fund the Florida Homeowners' Construction Recovery Fund.³⁶

Current law prohibits an unlicensed person from:

- Falsely holding themselves or a business organization out as a licensee, certificate holder, or registrant;
- Falsely impersonating a certificate holder or registrant;
- Presenting another person's registration or certificate as their own;
- Knowingly giving false or forged evidence to the board or a board member;
- Using or attempting to use a suspended or revoked certificate or registration;
- Engaging in or advertising themselves or a business organization as available to engage in contracting;
- Operating a contracting business organization 60 days after the termination of its only qualifying agent, without designating another primary qualifying agent;
- Commencing or performing work without a required building permit; or
- Willfully or deliberately disregarding or violating any municipal or county ordinance relating to unlicensed contractors.³⁷

Section 489.127(2), F.S., provides that an unlicensed person who violates any of the above provisions commits a:

- First degree misdemeanor for a first conviction.
- Third degree felony for a second or subsequent conviction.
- Third degree felony if a person commits a violation during a state of emergency declared by executive order of the Governor.³⁸

In addition to the criminal penalties set forth in s. 489.127, F.S., the CILB is empowered to take any of the following actions against a certificate holder or registrant, engaged in certain acts, including the uncertified and unregistered practice of contracting:

- Place the individual on probation or reprimand;
- Revoke, suspend, or deny issuance or renewal of a certificate or registration;
- Require financial restitution, not to exceed \$10,000 per violation, to a consumer harmed financially;

³⁵ Section 489.131(2), F.S.

It is the intent of the Legislature that a local jurisdiction agency charged with enforcing regulatory laws shall issue a notice of noncompliance as its first response to a minor violation of a regulatory law in any instance in which it is reasonable to assume that the violator was unaware of such a law or unclear as to how to comply with it. A violation of a regulatory law is a "minor violation" if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. . . . A notice of noncompliance should not be accompanied with a fine or other disciplinary penalty. It should identify the specific ordinance that is being violated, provide information on how to comply with the ordinance, and specify a reasonable time for the violator to comply with the ordinance.

³⁶ Section 489.131(4)(c). The Florida Homeowners' Construction Recovery Fund was established to compensate someone who contracted for the construction or improvement of their residence and was awarded a final judgment granting restitution by the CILB on grounds involving an act of misconduct by a licensed contractor.

³⁷ Section 489.127(1), F.S.

³⁸ See *supra* at n. 1 and n. 2.

- Require continuing education; or
- Assess costs associated with investigation and prosecution.³⁹

III. Effect of Proposed Changes:

The bill amends s. 489.127, F.S., to increase the criminal penalties when an unlicensed person violates the provisions of s. 489.127(1)(f), by:

- Engaging in the business or acting in the capacity of a contractor; or
- Advertising themselves or a business organization as available to engage in the business or act in the capacity of a contractor.

For such violations, the bill creates a tiered penalty structure, increasing in severity with the contract amount. If the contract amount is:

- Less than \$1,000, the penalty remains a first degree misdemeanor.⁴⁰
- \$1,000 or more, but less than \$20,000, the penalty is a third degree felony.⁴¹
- \$20,000 or more, but less than \$200,000, the penalty is a second degree felony.⁴²
- \$200,000 or more, the penalty is a first degree felony.⁴³

The criminal penalties for all other unlicensed contracting activities are not affected by this bill.

The bill reenacts s. 489.13(7), F.S., to incorporate the changes made to s. 489.127, F.S.

The bill is effective October 1, 2021.

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.

³⁹ See s. 489.129(1) F.S.

⁴⁰ See *supra* at n. 1.

⁴¹ See *supra* at n. 2.

⁴² See *supra* at n. 3.

⁴³ See *supra* at n. 4.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Unlicensed persons who engage in contracting activity will be subject to imposition of the terms of imprisonment and the fines for such activity described in the bill.

C. Government Sector Impact:

The government sector impact of the bill has not yet been reviewed by the Criminal Justice Impact Conference within the Office of Economic and Demographic Research. The impact is indeterminate and will depend on the number of persons who have a term of imprisonment imposed.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The term “contract amount” is not defined in ch. 489, F.S., but is defined in s. 713.01, F.S. The sponsor may wish to consider an amendment to define the term “contract price” as having the same meaning as in s. 713.01, F.S.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 489.127 and 489.13.

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.