

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 Appropriations Subcommittee on General Government

BILL: SB 1398

INTRODUCER: Senators Stewart and Baxley

SUBJECT: Accessibility of Places of Public Accommodation

DATE: April 17, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	Favorable
2.	<u>Davis</u>	<u>Betta</u>	<u>AGG</u>	Pre-meeting
3.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 1398 creates a voluntary certification process for experts who advise places of public accommodation regarding compliance with the federal Americans with Disabilities Act (ADA).

Certified experts may inspect places of public accommodation to determine if barriers to access are present in the facility within the meaning of the ADA and the applicable regulations. Under the bill, the Department of Business and Professional Regulation (DBPR) must establish requirements to qualify experts for certification. An owner of a place of public accommodation may request an inspection by a DBPR-certified expert but is not required to use a DBPR-certified expert for such inspection.

The certified expert must provide the owner with a certification that the place of accommodation conforms to the ADA requirements. This certification is valid for three years after the date of issuance. If a place of public accommodation does not conform to ADA requirements, the bill provides a process for the owner to voluntarily submit a remediation plan to the DBPR. The remediation plan is valid for 10 years after submission. The DBPR is required to develop and maintain on its public website an electronic registry of certifications and remediation plans.

The bill requires the courts of this state to consider remediation plans filed with the DBPR to determine whether an ADA claim was filed in good faith and to evaluate the appropriateness of any award of attorney's fees.

The DBPR will incur new costs of \$158,695 for Fiscal Year 2017-2018. *See* Section V. Fiscal Impact Statement.

The effective date of the bill is July 1, 2017.

II. Present Situation:

The Americans with Disabilities Act

In 1990, the United States Congress (Congress) enacted the ADA. The purpose of the ADA is to prevent discrimination against individuals with disabilities in all areas of life, including jobs, schools, transportation, and all private and public areas that are open to the general public.¹

An individual is considered disabled for the purposes of the ADA if the individual has:

- A physical or mental impairment that substantially limits one or more major life activities including but not limited to:
 - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- A record of such impairment; or
- Being regarded as having such an impairment.²

The ADA consists of five titles:

- I-Employment;
- II-Public Entities;
- III-Public Accommodation;
- IV-Telecommunications; and
- V-Miscellaneous Provisions

Places of Public Accommodation

Title III of the ADA prohibits places of public accommodation (public places) from discriminating against individuals with disabilities. Places of public accommodation include:

- Most places of lodging such as an inn, motel, or hotel;
- Restaurants, bars, and other establishments serving food or drink;
- Movie theatres, stadiums, concert halls, and other places of entertainment;
- Sales or rental establishments, such as bakeries, grocery stores, clothing stores, etc.;
- Service establishments, such as banks, barber shops, beauty shops, gas stations, office of an accountant or lawyer, pharmacy, insurance offices, hospitals, etc.;
- A terminal, depot, or other station used for specified public transportation;
- A museum, library, gallery, or other place of public display or collection;
- A park, zoo, amusement park, or other place of recreation;
- Places of education, such as a nursery, elementary, secondary, undergraduate, or postgraduate private school, etc.;
- A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.³

¹ ADA.gov National Network, https://www.ada.gov/ada_intro.htm (last visited on March 28, 2017).

² 42 U.S.C. § 12102 (2017).

³ 42 U.S.C. § 12131 (2017).

In order to prohibit discrimination in public places, the United States Department of Justice (DOJ) publishes standards for minimum requirements for newly designed, constructed, or altered public places. The standards ensure public places are readily accessible and usable by individuals with disabilities. The current standards are the 2010 ADA Standards for Accessible Design.⁴

Accessibility Requirements in Florida

The Florida Building Code (building code) is established by part IV of ch. 553, F.S., also known as the “Florida Building Codes Act.” The purpose and intent of the Florida Building Codes Act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code.⁵

In 1993, the Legislature enacted the Florida Americans with Disabilities Accessibility Implementation Act (Florida ADA) to incorporate the accessibility requirements of the ADA.⁶ The intent of the Florida ADA is to ensure the state’s construction standards and codes receive and maintain certification by the DOJ as equivalent to federal standards for accessibility of buildings, structures, and facilities.⁷ Enforcement of the Florida ADA is the responsibility of local governments and code enforcement agencies.⁸ Federal ADA regulations are incorporated into the Florida Accessibility Code for Building Construction (Florida’s ADA code), as adopted by the Florida Building Commission.⁹ Florida’s ADA code is also incorporated into the building code.¹⁰

Compliance with the building code creates a presumption of compliance with Title III of the ADA.¹¹ However, the building code only applies to new construction, new alteration, buildings where the original construction or any former renovation or alteration was in violation of the permit, or buildings being converted from residential to non-residential or mixed use. The building code does not apply to existing buildings that may not be in compliance with the ADA.¹²

Title III ADA lawsuits

If an individual with a disability who believes a public place is in violation of Title III of the ADA, the individual may:

⁴ United States Department of Justice, *2010 ADA Standards for Accessible Design*, https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards_prt.pdf (last visited on Mar. 28, 2017).

⁵ The current edition of the code is the Florida Building Code, 5th Edition (2014), available at: https://www.floridabuilding.org/bc/bc_default.aspx (last visited March 28, 2017).

⁶ Ch. 93-183, Laws of Fla., codified as part II of ch. 553, F.S.

⁷ Section 553.502, F.S.

⁸ Section 553.513, F.S.

⁹ *See* s. 553.503, F.S. The federal ADA regulations are at 28 C.F.R. parts 35 and 36 and 49 C.F.R. part 37.

¹⁰ Section 553.73(1)(a), F.S.

¹¹ Florida Building Commission, Preface, *Florida Building Code Accessibility*, 5th Edition (2014), at: <http://floridabuilding2.iccsafe.org/app/book/toc/2014/Florida/Accessibility%20Code/index.html> (last visited on March 28, 2017).

¹² Section 553.507, F.S.

- File a complaint with the Disability Rights Section of the DOJ, and the DOJ may enter into mediation with the public place to resolve any complaints.
- File suit in court against the public place for a violation of Title III of the ADA, or
- File suit as a plaintiff against the public place in court.¹³

Title III of the ADA does not require a plaintiff to give notice to the public place before filing suit.¹⁴

A public place is considered to be discriminating against an individual with a disability if the public place fails to make reasonable modifications under the Standards for Accessible Design, unless the modifications would fundamentally alter the nature of the public place.¹⁵

In order for a plaintiff to prevail against a defendant in such lawsuit, the plaintiff must prove three elements:

1. The plaintiff is considered disabled under the ADA;
2. The defendant owns, leases, or operates a place of public accommodation; and
3. The defendant discriminated against the plaintiff.¹⁶

If a plaintiff prevails in a Title III ADA claim, the plaintiff is entitled to injunctive relief, but is not entitled to damages for past discriminations.¹⁷ However, the ADA grants a court discretion to award attorney's fees to the prevailing party.¹⁸ The U.S. District Court for the Southern District of Florida has previously indicated that a prevailing plaintiff in an ADA claim is "ordinarily awarded attorney's fees in all but special circumstances."¹⁹ However, a prevailing defendant is not entitled to attorney's fees unless the court finds that the plaintiff's claim was brought or litigated in bad faith, i.e., the claim was frivolous, groundless, unreasonable, or the claim became frivolous, groundless, or unreasonable.²⁰

Since 2013, the number of Title III ADA suits filed in federal court has risen by 138 percent. In 2016, Florida ranked second in the nation with 1,663 Title III ADA lawsuits; there were 816 such lawsuits in 2013.²¹ Some of the increase is attributed to serial plaintiffs who file multiple lawsuits, also known as "ADA testers." One Florida resident is reported to have filed more than

¹³ ADA.gov, *How to file an ADA complaint with the US Department of Justice*, https://www.ada.gov/filing_complaint.htm#5 (last visited Mar. 20, 2017).

¹⁴ *Ass'n of Disabled Ams. v. Neptune Designs, Inc.*, 469 F. 3d, 1357, 1360 (11th Cir. 2006).

¹⁵ *Alumni, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1303 (S.D. Fla. 2013).

¹⁶ *Norkunas v. Seahorse NB, LLC*, 444 Fed. Appx. 412, 416 (11th Cir. 2011).

¹⁷ *Id.*

¹⁸ 42 U.S.C. s. 12205; *See also, Ass'n of Disabled Ams. v. Neptune Designs, Inc.*, 469 F. 3d, 1359, 1360 (11th Cir. 2006).

¹⁹ *Goodman v. Tatton Enters*, 2012 U.S. Dist. Lexis 189060 79-80 (S.D. Fla. 2012).

²⁰ *Id.*

²¹ *See Minh Vu, Kristina M. Launey, and Susan Ryan, ADA Title III Lawsuits Increase by 37 Percent in 2016*, The Seyfarth ADA Title III News & Insights Blog, January 29, 2017, at: <http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/> (last visited on March 29, 2017); and *Minh Vu, Kristina M. Launey, and Susan Ryan, ADA Title III Lawsuits Continue to Rise: 8% Increase in 2015*, The Seyfarth ADA Title III News & Insights Blog, January 15, 2016, at: <http://www.adatitleiii.com/2016/01/ada-title-iii-lawsuits-continue-to-rise-8-increase-in-2015/> (last visited on March 29, 2017).

1,000 separate ADA lawsuits against Florida businesses, which is approximately 20 percent of all of the ADA compliance lawsuits filed in Florida since 2012.²²

Although the Florida ADA does not provide a cause of action for violations, federal ADA compliance lawsuits may be filed in either federal or state courts; state courts have concurrent jurisdiction over ADA claims.²³

California's Attempt to Curb Title III ADA Claims

In 2003, California, in which over 2,400 Title III ADA lawsuits with filed in 2016,²⁴ created the voluntary Certified Access Specialist program (CASp) to meet the public's need for qualified individuals to inspect buildings and sites for compliance with accessibility standards including those in the ADA. If a California business chooses to hire a CASp-certified person to assess ADA compliance, the CASp will issue a report listing any improvements that need to be made in order to become compliant with federal and state accessibility laws, or state that the business meets applicable standards.²⁵ Participation in the CASp may offer the property owner "qualified defendant" status in a construction-related accessibility lawsuit if the owner received an inspection of the existing facility, received a report from a CASp, and has a compliance schedule in place before a construction-related accessibility claim is filed. Benefits for a "qualified defendant" include reduced statutory damages.²⁶

Florida Department of Business & Professional Regulation

Section 20.165, F.S., establishes the organizational structure of the DBPR, which has 12 divisions:

- Administration;
- Alcoholic Beverages and Tobacco;
- Certified Public Accounting;
- Drugs, Devices, and Cosmetics;
- Florida Condominiums, Timeshares, and Mobile Homes;
- Hotels and Restaurants;
- Pari-mutuel Wagering;
- Professions;
- Real Estate;
- Regulation;
- Service Operations; and
- Technology.

²² Katie Lagrone and Matthew Apthorp, *Crippled Florida Businesses seek help over serial Americans with Disabilities Act suers*, ABC Action News Tampa Bay, November 21, 2016, at: <http://www.abcactionnews.com/longform/crippled-florida-businesses-seek-help-over-serial-americans-with-disabilities-act-suers>, (last visited on March 29, 2017).

²³ See *Hapgood v. City of Warren*, 127 F.S.3d 490 (6th Cir. 1997).

²⁴ See Minh Vu, Kristina M. Launey, and Susan Ryan, *ADA Title III Lawsuits Continue to Rise: 8% Increase in 2015*, The Seyfarth ADA Title III News & Insights Blog, January 15, 2016, at: <http://www.adatitleiii.com/2016/01/ada-title-iii-lawsuits-continue-to-rise-8-increase-in-2015/> (last visited on March 29, 2017).

²⁵ See Division of the State Architect, Voluntary Certified Access Program, <http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx> (last visited on Mar. 24, 2017).

²⁶ *Id.*

Fifteen boards and programs exist within the Division of Professions, two boards are within the Division of Real Estate,²⁷ and one board exists in the Division of Certified Public Accounting.²⁸ Section 20.165(4)(a), F.S., establishes the following boards and programs which are noted with the implementing statutes:

- Board of Architecture and Interior Design, part I of ch. 481, F.S.;
- Florida Board of Auctioneers, part VI of ch. 468, F.S.;
- Barbers' Board, ch. 476, F.S.;
- Florida Building Code Administrators and Inspectors Board, part XII of ch. 468, F.S.;
- Construction Industry Licensing Board, part I of ch. 489, F.S.;
- Board of Cosmetology, ch. 477, F.S.;
- Electrical Contractors' Licensing Board, part II of ch. 489, F.S.;
- Board of Employee Leasing Companies, part XI of ch. 468, F.S.;
- Board of Landscape Architecture, part II of ch. 481, F.S.;
- Board of Pilot Commissioners, ch. 310, F.S.;
- Board of Professional Engineers, ch. 471, F.S.;
- Board of Professional Geologists, ch. 492, F.S.;
- Board of Veterinary Medicine, ch. 474, F.S.;
- Home Inspection Services Licensing Program, part XV of ch. 468, F.S.; and
- Mold-related Services Licensing Program, part XVI of ch. 468, F.S.

The Florida State Boxing Commission is assigned to the DBPR for administrative and fiscal accountability purposes only.²⁹ The DBPR also administers the Child Labor Law and Farm Labor Contractor Registration Law pursuant to parts I and III of ch. 450, F.S.

III. Effect of Proposed Changes:

Experts

The bill creates s. 553.5141, F.S., to provide a voluntary certification process for experts who advise places of public accommodation regarding compliance with the ADA. Certified experts may inspect places of public accommodation to determine if barriers to access are present in the facility within the meaning of the ADA and the applicable regulations.

Under the bill, the DBPR must establish requirements for experts to qualify for certification. The bill provides that the experts must have sufficient experience, knowledge, or training to advise places of public accommodation regarding the ADA compliance guidelines applicable to places of public accommodation. The bill does not provide a certification fee.

²⁷ See s. 20.165(4)(b), F.S. Florida Real Estate Appraisal Board, created under part II of ch. 475, F.S., and Florida Real Estate Commission, created under part I of ch. 475, F.S.

²⁸ See s. 20.165(4)(c), F.S., which establishes the Board of Accountancy, created under ch. 473, F.S.

²⁹ Section 548.003(1), F.S.

Owners of Places of Public Accommodation

An owner of a place of public accommodation may request an inspection of a facility by a DBPR-certified expert, but is not required to use a DBPR-certified expert.

If a place of public accommodation conforms to ADA requirements, the certified expert must provide the owner with a certification of conformity, which is valid for three years after the date of issuance. If a place of public accommodation does not conform to ADA requirements, the owner may submit a remediation plan to the DBPR with:

- The date of inspection.
- The name of the certified expert or other person who performed the inspection.
- The specific remedial measures that the place of public accommodation will undertake.
- The anticipated dates each remedial measure will be initiated and completed.

A remediation plan submitted to the DBPR is valid for 10 years after its submission.

The bill requires the DBPR to develop and maintain on its public website an electronic registry of certifications of conformity and remediation plans. In addition, the DBPR is required to adopt rules to administer the certification program.

Court Consideration of Remediation Plans

The bill requires the courts of this state to consider remediation plans filed with the DBPR to determine whether an ADA claim was filed in good faith and to evaluate the appropriateness of any award of attorney's fees.

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:

The bill does not specify fees for certification as an expert or registration of remediation plans.

Since certificates of conformity are only valid for three years, owners of public places may have to pay for inspections every three years in order to prove they are compliant with the Title III of the ADA.

C. Government Sector Impact:

According to the DBPR, there will be a moderate workload impact associated with the implementation of the new certification program; however, based on an estimated certification population of approximately 350 to 500 certifications there is no sustained full-time equivalent (FTE) position impact.³⁰

The computer application used by the Florida Building Commission (commission) is called the Building Code Information System (BCIS). The DBPR anticipates the electronic registry created by the bill will be housed in the BCIS. The computer vendor for the commission estimates costs of \$83,000 for contract services to modify the system for the electronic registry remediation plans and \$70,000 for contracted services related to the registration of experts. The DBPR also anticipates additional software licensing and maintenance costs for the administration of the new expert certification of \$4,490 non-recurring expenditures and \$1,205 recurring expenditures, resulting in total new costs of \$158,695 for Fiscal Year 2017-2018.³¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

According to the DBPR, a Sunrise Act analysis per s. 11.62, F.S., has not been completed to determine if it is necessary to regulate this activity to protect the public health, safety or welfare.³²

VIII. Statutes Affected:

This bill creates section 553.5141 of the Florida Statutes.

³⁰ See 2017 Agency Legislative Bill Analysis issued by the DBPR for CS/CS/HB 727, dated April 13, 2017 (on file with Senate Appropriations Subcommittee on General Government) at pages 6-7.

³¹ See 2017 Agency Legislative Bill Analysis issued by the DBPR for SB 1398, dated March 7, 2017 (on file with Senate Committee on Regulated Industries) at pages 6-7.

³² *Id.* at page 6.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
