

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 727 Accessibility of Places of Public Accommodation

SPONSOR(S): Government Operations & Technology Appropriations Subcommittee, Careers & Competition Subcommittee, Leek and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1398

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Careers & Competition Subcommittee	14 Y, 0 N, As CS	Brackett	Anstead
2) Government Operations & Technology Appropriations Subcommittee	14 Y, 0 N, As CS	Helpling	Topp
3) Commerce Committee			

SUMMARY ANALYSIS

The United States Congress enacted the Americans with Disabilities Act (ADA) in 1990 prohibiting discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. One of the goals of the ADA is to guarantee that individuals with disabilities are offered full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations offered by a place of public accommodation.

Individuals with disabilities may sue places of public accommodation including private businesses for alleged violations of the ADA. 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. However, the ADA grants a court discretion to award attorney's fees to the prevailing party.

The bill:

- Creates a certification type for ADA experts.
- Requires the Department of Business and Professional Regulation (DBPR) to establish certification requirements and regulation for ADA experts.
- Allows ADA experts to determine if the businesses are compliant with the ADA.
- Allows businesses to hire ADA experts and file ADA expert reports with DBPR.
- Requires DBPR to establish a public website with a registry of remediation plans, certifications of conformity, and ADA experts.
- Requires courts to consider remediation plans to determine if a plaintiff filed a claim in good faith and whether the plaintiff is entitled to attorney's fees in lawsuits involving alleged violations of the ADA.

The bill provides an appropriation to DBPR of \$160,000 (\$155,000 in nonrecurring and \$5,000 in recurring funds) from the Professional Regulation Trust Fund to implement the bill. In the private sector, licensed design and construction professionals currently performing ADA consultant services may be required to pay an additional fee for certification. See *Fiscal Analysis and Economic Impact Statement*.

The bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Americans with Disabilities Act

In 1990, the United States Congress (Congress) enacted the Americans with Disabilities Act (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 is currently made up of five chapters:

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

Title III of the ADA

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 hall, 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 Mar. 17, 2017).

² 42 U.S.C. § 12102 (2017).

³ 42 U.S.C. § 12181 (2017).

In order to prohibit discrimination in public places, the 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

In 1993, the Legislature enacted the Florida Americans with Disabilities Accessibility Implementation Act (Act) to incorporate the accessibility requirements of the ADA. The Act incorporated the ADA's Standards for Accessible Design into state law and maintained existing standards thought to be more stringent.⁵ The goal 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. Enforcement of the Act is the responsibility of local governments and code enforcement agencies.⁶

Florida's state construction standards and codes are currently housed within the 5th edition of the Florida Building Code (Code). The Code is established by Part IV of ch. 553, F.S., also known as the "Florida Building Codes Act (Act)." The purpose and intent of the Act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code. The Code must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction.

It is the intent of the Legislature that local governments have the power to inspect all buildings, structures, and facilities within their jurisdictions in protection of the public's health, safety, and welfare. The jurisdiction of local code enforcement officials does not include bringing existing buildings into compliance with the Florida Accessibility Code or federal standards.

Compliance with the Code creates a presumption of compliance with Title III of the ADA.⁷ However, the 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 Code does not apply to existing buildings that may not be in compliance with the ADA.⁸

Title III ADA lawsuits

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

1. File a complaint with the Disability Rights Section of the DOJ. 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.⁹
2. File suit as a plaintiff against the public place in court.
 - Unlike other civil rights statutes, Title III of the ADA does not require a plaintiff to give notice to the public place before filing suit.¹⁰

⁴ Department of Justice, *2010 ADA Standards for Accessible Design*, https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards_prt.pdf (last visited on Mar. 24, 2017).

⁵ Florida Building Commission, *Florida Building Code Accessibility* (5th ed. 2014) http://codes.iccsafe.org/app/book/content/2014_Florida/Accessibility%20Code/Preface.html (last visited on Mar. 24, 2017).

⁶ s. 553.502, & 553.513, F.S.

⁷ Florida Building Commission, *Florida Building Code Accessibility* (5th ed. 2014) http://codes.iccsafe.org/app/book/content/2014_Florida/Accessibility%20Code/Preface.html (last visited on Mar. 25, 2017).

⁸ s. 553.507, F.S.

⁹ 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).

¹⁰ *Ass'n of Disabled Ams. v. Neptune Designs, Inc.*, 469 F. 3d, 1357, 1360 (11th Cir. 2006).

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.¹¹

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.¹²

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.¹³ However, the ADA grants a court discretion to award attorney's fees to the prevailing party.¹⁴

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."¹⁵ However, a prevailing defendant is not entitled to attorney's fees unless the court finds the plaintiff's claim was brought or litigated in bad faith, i.e. the claim was frivolous, groundless, unreasonable, or the claim became frivolous, ground less, or unreasonable.

Since 2013, the number of Title III ADA suits filed in federal court has risen by 138 percent. Last year Florida ranked second in the nation for Title III ADA suits with 1,663, which is a 103 percent increase from the 816 lawsuits filed in 2013.¹⁶

News reports indicate that suits are brought by serial plaintiffs who file multiple suits in exchange for a portion of attorney's fees award by a court or reached in a settlement. News reports also claim that serial plaintiffs never visit the public place they are claiming discriminated against them, despite this being a requirement in order to prevail in a Title III ADA lawsuit, and that some defense attorneys will recommend quick settlements instead of spending the costs associated with going to trial because of the possibility of being liable for the plaintiff's attorney fees and costs.¹⁷ According to Florida news reports one Florida resident has filed between 500-1000 separate ADA lawsuits.¹⁸

However, others have indicated that "the only people who enforce the ADA are these few plaintiffs and their attorneys," that there is "zero enforcement" of previous settlement agreements for ADA violations and therefore businesses never actually come into compliance.¹⁹

¹¹ *Alumni, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1303 (S.D. Fla. 2013).

¹² *Alumni, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290, 1303 (S.D. Fla. 2013).

¹³ *Norkunas v. Seahorse NB, LLC*, 444 Fed. Appx. 412, 416 (11th Cir. 2011).

¹⁴ *Ass'n of Disabled Ams. v. Neptune Designs, Inc.*, 469 F. 3d, 1359, 1360 (11th Cir. 2006).

¹⁵ *Goodman v. Tatton Enters.*, 2012 U.S. Dist. Lexis 189060 79-80 (S.D. Fla. 2012).

¹⁶ See Minh Vu, Kristina M. Launey, & Susan Ryan, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, ADA Title III News & Insights <http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/> (last visited on Mar. 22, 2017) & See Minh Vu, Kristina M. Launey, & Susan Ryan, *ADA Title III Lawsuits Continue to Rise: 8% Increase in 2015*, ADA Title III News & Insights <http://www.adatitleiii.com/2016/01/ada-title-iii-lawsuits-continue-to-rise-8-increase-in-2015/> (last visited on Mar. 24, 2017)

¹⁷ Ken Barnes, *The ADA Lawsuit Contagion Sweeping U.S. States*, Forbes <https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states/#8c4fc8534ee6> (last visited on Mar. 25, 2017) & Anderson Cooper, Katherine Davis, & Sam Hornblower, *What's a "Drive-By Lawsuit"?* CBS 60 minutes, <http://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/> (last visited on Mar. 25, 2017).

¹⁸ Mandy Miles, *Judge dismisses two ADA lawsuits; no fees awarded to Cohen*, Florida Keys News <http://keysnews.com/node/71599> (last visited on Mar. 22, 2017), Katie Lagrone & Matthew Apthorp, *Crippled Florida Businesses seek help over serial Americans with Disabilities Act suers*, ABC Action News Tampa Bay, <http://www.abcactionnews.com/longform/crippled-florida-businesses-seek-help-over-serial-americans-with-disabilities-act-suers>, (last visited on Mar. 25, 2017).

¹⁹ Amy Shipley and John Maines, *South Florida Leads Nation in Controversial Disability Lawsuits*, Sun Sentinel, January 11, 2014, http://articles.sun-sentinel.com/2014-01-11/news/fl-disability-lawsuits-strike-sf-20140112_1_plaintiffs-attorneys-lawsuits

Attempts to Curb Title III ADA Claims

As a result of the rise of Title III ADA claims there have been attempts at the national and state level to reduce the number of claims.

California, the leader in Title III ADA lawsuits with over 2,400 filed in 2016,²⁰ has made multiple attempts in 2003, 2008, 2012, and 2015 to curb the rising number of lawsuits by:

- In 2003, creating the Certified Access Specialist program (CASp). California designed the program to meet the public's need for qualified individuals to inspect buildings and sites for compliance with accessibility standards including the ADA.
 - If a California business chooses to hire a CASp, then 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 the report will state that the business meets applicable standards.²¹
- In 2008, enacting legislation giving businesses Qualified Defendant status if the business obtains certification under CASp. Qualified Defendant Status allows a defendant to ask for a stay if a plaintiff files an accessibility lawsuit.
- In 2012, enacting legislation providing that a commercial property owner or lessor must disclose to any renter or lessor whether the property has received an inspection from a CASp, and if so, whether the property meets applicable standards.²²
- In 2015, enacting legislation to curb lawsuits from "high-frequency litigants," which are defined as people who have filed 10 or more ADA complaints within a 12 month period. For such litigants, the bill requires certain disclosure and procedural steps, including a statement on why the litigant was present at the defendant's business, and adds a "supplemental" filing fee of \$1,000 per lawsuit.²³

Federal Attempts to Curb ADA Lawsuits

There have been attempts at the national level to curb ADA claims. Bills were introduced in the United States House of Representatives from 2009 to 2016 that required plaintiffs to notify businesses of an alleged violation before filing a claim. The bills provided businesses a grace period to fix any violations, and barred plaintiffs from filing claims against businesses that came into compliance during the grace period.²⁴

Currently two more bills have been introduced in the United States House of Representatives to address the issue. Both bills provide that prior to filing a claim a plaintiff must provide written notice of the alleged ADA violation to the defendant. Both bills also provide that the defendant has a grace period to come into compliance, and if the defendant comes into compliance then the plaintiff is prevented from filing a claim.²⁵

²⁰ See Minh Vu, Kristina M. Launey, & Susan Ryan, *ADA Title III Lawsuits Continue to Rise: 8% Increase in 2015*, ADA Title III News & Insights <http://www.adatitleiii.com/2016/01/ada-title-iii-lawsuits-continue-to-rise-8-increase-in-2015/> (last visited on Mar. 24, 2017)

²¹ 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).

²² Sutter County Development Services, *CASp Handout*, <https://www.co.sutter.ca.us/contents/pdf/cs/bis/CASp%20Handout.pdf> (last visited on Mar. 24, 2017).

²³ ADA Defense Law, California AB 1521 now law: Strongest measure yet to curb ADA abuse, <https://adadefense.net/2016/01/07/california-curb-ada-abuse-ab-1521/> (last visited on Mar. 24, 2017).

²⁴ ACCESS, H.R. 241, 114th Congress (2015), ADA Education and Reform Act of 2015, H.R. 3765, 114th Congress (2016), COMPLI Act, H.R. 4719, 114th Congress (2016), ACCESS, H.R. 994, 113th Congress (2013), ACCESS H.R. 3356, 112th Congress (2011), ADA Notification Act, H.R. 881 ADA Notification Act, H.R. 2397, 111th Congress (2009)

²⁵ ADA Lawsuit Clarification Act of 2017, H.R. 1493, 115th Cong. (2017) & ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2017).

Department of Business & Professional Regulation

DBPR licenses and regulates businesses and professionals in Florida. DBPR currently regulates more than a million businesses and professionals including almost half a million professionals through nineteen different boards and programs.²⁶ DBPR includes separate divisions and various professional boards that are responsible for carrying out DBPR's mission to license efficiently and regulate fairly. Section 20.165, F.S., establishes the organizational structure of DBPR. There are 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.²⁷

Chapter 455, F.S., applies to the regulation of professions constituting "any activity, occupation, profession, or vocation regulated by the department in the Divisions of Certified Public Accounting, Professions, Real Estate, and Regulation."²⁸

The regulation of professions is limited by law, to be undertaken "only for the preservation of the health, safety, and welfare of the public under the police powers of the state." Regulation is required when:

- The potential for harming or endangering public health, safety, and welfare is recognizable and outweighs any anticompetitive impact that may result;
- The public is not effectively protected by other state statutes, local ordinances, federal legislation, or other means; and
- Less restrictive means of regulation are not available.²⁹

However, "neither the department nor any board may create a regulation that has an unreasonable effect on job creation or job retention," or a regulation that unreasonably restricts the ability of those who desire to engage in a profession or occupation to find employment.³⁰

When a person is authorized to engage in a profession or occupation in Florida, DBPR issues a "permit, registration, certificate, or license" to the licensee. The Division of Professions (Professions) licenses and regulates more than 434,000 professionals through the following professional boards and programs:

- Board of Architecture and Interior Design,
- Asbestos Licensing Unit,
- Athlete Agents,
- Board of Auctioneers,
- Barbers' Board,
- Building Code Administrators and Inspectors Board,
- Regulatory Council of Community Association Managers,
- Construction Industry Licensing Board,

²⁶ See Business & Professions Subcommittee, *Regulatory Profiles: 2017*, (Jun. 30, 2016).

²⁷ s. 20.165, F.S.

²⁸ See s. 455.01(6), F.S.

²⁹ s. 455.201(2), F.S.

³⁰ s. 455.201(4)(b), F.S.

- Board of Cosmetology,
- Electrical Contractors' Licensing Board,
- Board of Employee Leasing Companies,
- Home Inspectors,
- Board of Landscape Architecture,
- Mold-Related Services,
- Board of Pilot Commissioners,
- Board of Professional Geologists,
- Talent Agencies,
- Board of Veterinary Medicine, and
- Florida Board of Professional Engineers³¹

The Division of Regulation (Regulations) is the enforcement authority for any professional boards and programs housed within Professions. To ensure compliance with applicable laws and rules by those professions and related businesses, Regulations investigates complaints, utilizes compliance mechanisms, and performs inspections.

Florida's Sunrise Act

A proposal for new regulation of a profession must meet the requirements of s. 11.62, F.S., the Sunrise Act. In general, the act states that regulation should not occur unless it is:

- Necessary to protect the public health, safety, or welfare from significant and discernible harm or damage;
- Exercised only to the extent necessary to prevent the harm; and
- Limited so as not to unnecessarily restrict entry into the practice of the profession or adversely affect public access to the professional services.

In determining whether to regulate a profession or occupation, the act requires the Legislature to consider the following:

- Whether the unregulated practice of the profession or occupation will substantially harm or endanger the public health, safety, or welfare, and whether the potential for harm is recognizable and not remote;
- Whether the practice of the profession or occupation requires specialized skill or training and whether that skill or training is readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability;
- Whether the regulation will have an unreasonable effect on job creation or job retention in the state or will place unreasonable restrictions on the ability of individuals who seek to practice or who are practicing a given profession or occupation to find employment;
- Whether the public is or can be effectively protected by other means; and
- Whether the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, will be favorable.

The act requires proponents of legislation proposing new regulation to provide the following information, upon request, to document the need for regulation:

- The number of individuals or businesses that would be subject to the regulation;
- The name of each association that represents members of the profession or occupation, together with a copy of its codes of ethics or conduct;
- Documentation of the nature and extent of the harm to the public caused by the unregulated practice of the profession or occupation, including a description of any complaints that have been lodged against persons who have practiced the profession or occupation in this state during the preceding three years;

³¹ DBPR, *Division of Professions*, <http://www.myfloridalicense.com/dbpr/pro/index.html> (last visited Mar. 24, 2017).

- A list of states that regulate the profession or occupation, and the dates of enactment of each law providing for such regulation and a copy of each law;
- A list and description of state and federal laws that have been enacted to protect the public with respect to the profession or occupation and a statement of the reasons why these laws have not proven adequate to protect the public;
- A description of the voluntary efforts made by members of the profession or occupation to protect the public and a statement of the reasons why these efforts are not adequate to protect the public;
- A copy of any federal legislation mandating regulation;
- An explanation of the reasons why other types of less restrictive regulation would not effectively protect the public;
- The cost, availability, and appropriateness of training and examination requirements;
- The cost of regulation, including the indirect cost to consumers, and the method proposed to finance the regulation;
- The cost imposed on applicants or practitioners or on employers of applicants or practitioners as a result of the regulation; and
- The details of any previous efforts in this state to implement regulation of the profession or occupation.
- The act requires the agency proposed to have jurisdiction over the regulation to provide the Legislature with the following information:
 - The resources required to implement and enforce the regulation;
 - The technical sufficiency of the proposal, including its consistency with the regulation of other professions; and
 - Any alternatives that may result in less restrictive or more cost-effective regulation.
- In determining whether to recommend regulation, the legislative committee reviewing the proposal is directed to assess whether the proposed regulation is:
 - Justified based on the statutory criteria and the information provided by both the proponents of regulation and the agency responsible for its implementation;
 - The least restrictive and most cost-effective regulatory scheme necessary to protect the public; and
 - Technically sufficient and consistent with the regulation of other professions under existing law.

The act requires the agency proposed to have jurisdiction over the regulation to provide the Legislature with the following information:

- The resources required to implement and enforce the regulation;
- The technical sufficiency of the proposal, including its consistency with the regulation of other professions; and
- Any alternatives that may result in less restrictive or more cost-effective regulation.

In determining whether to recommend regulation, the legislative committee reviewing the proposal is directed to assess whether the proposed regulation is:

- Justified based on the statutory criteria and the information provided by both the proponents of regulation and the agency responsible for its implementation;
- The least restrictive and most cost-effective regulatory scheme necessary to protect the public; and
- Technically sufficient and consistent with the regulation of other professions under existing law.

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

In addition to the Florida Constitution, the Florida Statutes further specify conditions under which public access must be provided to government records. Section 119.01, F.S., provides that it is the policy of the state that all state, county, and municipal records are open for personal inspection and copying by any person, and that it is the responsibility of each agency to provide access to public records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any public record unless an exemption applies. The state's public records laws are construed liberally in favor of granting public access to public records.

Effect of the Bill

The bill provides for the certification and regulation of individuals who are experts in the ADA Standards for Accessible Design for Title III of the ADA, and requires DBPR to establish a program for certification of such experts.

Definitions

The bill provides a definitions section which includes the following terms: Commerce; Department; Facility; Certified expert; Place of public accommodation; Private entity; and Registry.

DBPR

The bill provides that DBPR must:

- Create a program to provide certification for experts who have the knowledge, training, or experience to advise public places about the ADA Standards for Accessible Design for Title III of the ADA (ADA expert);
- Create requirements allowing for certification as an ADA expert;
- Develop and maintain a public website which provides a registry of ADA experts, certifications of conformity, and remediation plans; and
- Adopt rules to administer the regulation of certified experts.

Certified Experts

The bill provides that:

- ADA experts **must** provide inspections of places of public accommodation (public places) to determine if the public places are compliant with the guidelines of Title III of the ADA.
- ADA experts must provide certificates of conformity to owners whose public places comply with the guidelines of Title III of the ADA. The certificates of conformity are valid for three years.
- ADA experts must provide remediation plans to owners whose public place do not comply with Title III of the ADA. An ADA remediation plan must include:
 - The date the public place was inspected;
 - The name of the certified expert or other person who inspected the public place;
 - The specific remedial measures the public place intends to undertake; and
 - The anticipated date of initiation and completion for each remedial measure that the public place agreed to undertake.
- ADA experts must provide owners a reasonable amount of time, not to exceed 10 years, to complete a remediation plan.

Courts

The bill provides that in any lawsuit in the state that alleges violation of Title III of the ADA the court must consider any remediation plan filed by the public place before the action:

- To determine if the plaintiff's complaint was filed in good faith; and
- To determine if the plaintiff is entitled to attorney fees and costs.

The Sunrise Act

DBPR has indicated that 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

Public Records Law

The bill creates public records by requiring DBPR to maintain a list of all remediation plans and certifications of completion they receive on a website that is available to the public. These reports include expert reports that indicate that businesses are not in compliance with the ADA.

B. SECTION DIRECTORY:

Section 1. Creates s. 553.5141, F.S., providing for the certification and regulation of certain experts by DBPR.

Section 2. Provides an appropriation.

Section 3. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate licensing fees from the issuance of 350-500 new licenses.³³

2. Expenditures:

The computer application used by the Florida Building Commission is called the Building Code Information System (BCIS). It is anticipated BCIS will house the electronic registry created in the bill. There will need to be modifications to BCIS to house the electronic registry and register licensed experts.³⁴ For fiscal year 2017-2018, the bill provides \$160,000 (\$5,000 recurring and \$155,000 nonrecurring) from the Professional Regulation Trust fund that may be used for these modifications.

FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Licensed design and construction professionals currently performing ADA consultant services may be required to meet the requirements of the new certificate and pay an additional fee for certification even though the professional requirements for an already held license may include specific ADA knowledge.

Current experts in ADA compliance that do not obtain certification from DBPR could be the subject of disciplinary action for providing guidance about Title III of the ADA to owners of public places.

³² Florida Department of Business and Professional Regulation, Agency Analysis of 2017 House Bill 727, p. 6 (Mar. 4, 2017).

³³ *Id.* at 4.

³⁴ *Id.* at 6.

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 Title III of the ADA.

- C. FISCAL COMMENTS:
None.

III. COMMENTS

- A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal government.

2. Other:

None.

- B. RULE-MAKING AUTHORITY:

Yes. The bill provides DBPR rule making authority to establish licensure and regulation of licensed experts.

- C. DRAFTING ISSUES OR OTHER COMMENTS:

ADA is a federal law that preempts state laws unless the state law grants disabled persons more rights than the federal law. Federal courts have invalidated state requirements related to ADA claims and have determined that a state's procedural laws cannot be applied to a plaintiff's ADA claim.³⁵ The bill's requirement that a court must consider remediation plans may be federally preempted by the ADA and may not be applied to a plaintiff's lawsuit.

Although the bill indicates that "any remediation plan filed by the place of public accommodation" is required to be considered by a court, the bill does not indicate that a certificate of conformity must also be considered.

The bill requires DBPR to maintain a website which provides a list of remediation plans and certifications of conformity. It is unclear if there is any requirement to submit remediation plans or certificates of conformity to DBPR by the certified expert.

Businesses that obtain reports from ADA experts under this program may be reluctant to file a document that proves they are not in compliance with the ADA because of the fear of getting sued.

DBPR indicated that interior designers, architects, engineers, code experts, and ADA consultant experts currently serve as ADA expert witnesses during judicial proceedings. The bill would require these licensed individuals to obtain another license and pay another licensing fee to become an ADA expert. The fee for licensure is not provided.³⁶

The bill does not indicate whether certificates can be disciplined or how the certificates would be removed.

DBPR indicated that the bill conflicts with the Florida Americans with Disabilities Accessibility Implementation Act (Act) because the Act only applies to new construction, change of use, alterations,

³⁵ See *Owens v. Ishihara-Liang, Inc.*, 2016 US Dist. Lexis 59511 (E.D. Cal. 2016) & *Lamark v. Nuredin Noorallah Laiwalla*, 203 US Dist. Lexis 104526 (E.D. Cal. 2013).

³⁶ Florida Department of Business and Professional Regulation, Agency Analysis of 2017 House Bill 727, p. 6 (Mar. 4, 2017).

& buildings where previous alterations/work were done in violation of permitting laws whereas the bill applies to removing barriers to access in existing facilities.³⁷

DBPR expressed the following concerns in its agency analysis:³⁸

“The Department’s role in regulating the licensed experts is unclear. The bill only outlines a program where the Department is providing a certification/registration. There is no examination or disciplinary provisions in the bill. It is also unclear, at this time, if an examination would be a necessary requirement for licensure.”

“Building code inspectors and plans examiners ensure that new buildings and remodels are compliant with the Florida Accessibility Code of the Florida Building Code. They would also be responsible for ensuring compliance with the FBC and the Florida Accessibility Code if a building were to undergo a change of use. However, the American with Disabilities Act does not apply to just new construction, remodels or buildings undergoing a change of use. Lawsuits for violations of the American with Disabilities Act can also be brought against existing buildings in certain situations.”

“Rulemaking will be needed to reflect proposals in the bill. However, it is unclear as to gauge the parameters needed for the establishment of a new program for licensing, and the bill does not provide sufficient information or guidance as to a determination of whether an applicant has the requisite “sufficient training, knowledge or experience to advise places of public accommodation regarding the compliance guidelines” to be deemed an “expert”. Furthermore, while the bill addresses rulemaking authority to implement the provisions of the bill, such authority could be construed as overly broad and could be seen as an invalid exercise of legislative authority under Ch. 120, F.S. Additionally, it is unclear as to who would be responsible for licensing and regulating the program within DBPR. Lastly, the bill’s July 1, 2017, effective date may not provide sufficient time for the Department to develop and adopt administrative rules and regulations necessary for the bill’s implementation.”

“This bill provides the state/state courts with authority over compliance with federal law (Americans with Disabilities Act - ADA) that is likely unenforceable and possibly unconstitutional as the Department of Justice has jurisdiction over ADA compliance and complaints. Further, it is unclear as to whether the criterion for the remediation plan is in conflict or compliance with the federal ADA.”

“Lastly, section 553.507, F.S. specifically states that “barrier removal” only applies to new construction, change of use, alterations, & buildings where previous alterations/work were done in violation of permitting laws, and therefore, conflicts with the ADA and the language contained in the bill.”³⁹

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 28, 2017, the Careers and Competition Subcommittee adopted a strike-all amendment and reported the bill favorably as a subcommittee substitute. The amendment adds the following elements to the original bill that:

- Creating a certification program as opposed to a licensure program;
- Providing that certifications of conformity are valid for 3 years after the date of issuance; and
- Providing that remediation plans issued by a certified expert must be completed by the owner in a reasonable time, not to exceed 10 years.

On April 4, 2017, the Government Operations & Technology Appropriations Subcommittee adopted an amendment and reported the bill favorably as a subcommittee substitute. The amendment provides an appropriation for the Department to implement the bill.

The analysis is drafted to the subcommittee substitute.

³⁷ *Id.* at 7.

³⁸ *Id.* at 7.

³⁹ *Id.* at 6-7.