

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/CS/HB 727	FINAL HOUSE FLOOR ACTION:		
SUBJECT/SHORT TITLE	Accessibility of Places of Public Accommodation	117	Y's 0	N's
SPONSOR(S):	Commerce Committee, Government Operations & Technology Appropriations Subcommittee, Careers & Competition Subcommittee, Leek, Edwards and others	GOVERNOR'S ACTION:		Approved
COMPANION BILLS:	CS/SB 1398			

SUMMARY ANALYSIS

The bill passed the House on April 28, 2017, and subsequently passed the Senate on May 1, 2017.

Under the Americans with Disabilities Act (ADA), individuals with disabilities may sue places of public accommodation including private businesses for alleged violations of the ADA. Although a prevailing plaintiff is entitled to injunctive relief, they are not entitled to damages for past discriminations. However, the ADA grants courts discretion to award attorney's fees to the prevailing party.

The bill:

- Allows businesses that hire qualified experts in the Americans with Disabilities Act (ADA) to file remediation plans or certificates of conformity with the Department of Business and Professional Regulation (DBPR).
- Defines "Qualified expert" to mean a person who is licensed as an engineer, general contractor, building contractor, building code administrator, building inspector, plans examiner, interior designer, architect, landscape architect, or a person who has been recognized by a federal court as an expert in Title III of the ADA or prepared a Title III of the ADA remediation plan accepted by a federal court.
- Requires DBPR to establish a public website with a registry of remediation plans and certificates of conformity.
- Puts the public on notice that any business that filed a remediation plan or certificate of conformity with DBPR is in compliance with the ADA or is making reasonable efforts to come into compliance.
- Requires courts to consider ADA expert reports 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.

The bill was approved by the Governor on June 23, 2017, ch. 2017-139, L.O.F., and became effective on July 1, 2017.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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 promote compliance with the ADA, 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 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 and 553.513, F.S.

⁷ Florida Building Commission, *supra*, note 5.

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 courts 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 *Id.*

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

¹⁴ *Ass'n of Disabled Ams.*, 469 F. 3d, 1359, at 1360.

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 (last visited on May 10, 2017).

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 courts have previously indicated that a person may testify as an expert in Title III of the ADA if the person meets the first requirement of Rule 702 of the Federal Rules of Evidence.²⁴ The Rule provides that a witness may testify as an expert if the witness' scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.²⁵ Additionally, the Southern District of Florida has previously indicated that it will accept remediation plans to comply with the ADA that are prepared by ADA experts.²⁶

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.²⁷

²⁰ See Vu, Launey, & Ryan, *supra*, note 16.

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 *Hoewischer v. Sailormen, Inc.*, 2012 U.S. Dist. Lexis 95754 4 (M.D. Fla. 2012).

²⁵ See Fed. R. Evid. 702(a).

²⁶ See *Access 4 All, Inc. v. Bamco VI Inc.*, 2012 U.S. Dist. Lexis 18685 17, 25 (S.D. Fla. 2012) & *Harty v. North Lauderdale Supermarket, Inc.*, 2015 U.S. Dist. Lexis 101848 3, 11-12 (S.D. Fla. 2015).

²⁷ 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).

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 the plaintiff is prevented from filing a claim.²⁸

Department of Business & Professional Regulation (DBPR)

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.²⁹ 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.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,
- 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

²⁸ 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).

²⁹ See Business & Professions Subcommittee, *Regulatory Profiles: 2017*, (Jun. 30, 2016).

³⁰ s. 20.165, F.S.

DBPR indicated that multiple licensed professionals serve as ADA experts in judicial proceedings including but not limited to:

- Interior designers;
- Architects;
- Professional engineers;
- Building code officials;
- Building code inspectors; and
- Plans examiners.³²

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 allows places of public accommodation to register remediation plans and certifications of conformity by certain experts in the ADA Standards for Accessible Design for Title III of the ADA, and requires DBPR to establish a website with a registry of remediation plans and certificates of conformity from businesses that have been inspected by an ADA expert. The filing of the remediation plan or certification of conformity with DBPR puts the public on notice that such business that filed a remediation plan or certificate of conformity with DBPR is in compliance with Title III of the ADA or is making reasonable efforts to come into compliance with Title III of the ADA.

Definitions

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

DBPR

The bill provides that DBPR must develop and maintain a public website which provides a registry of certifications of conformity and remediation plans.

Qualified Experts

The bill provides that:

- Qualified expert includes licensed:
 - Professional engineers;
 - General Contractors;
 - Building Contractors;
 - Building Officials;

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

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

- Building Inspectors;
- Plans Examiners;
- Landscape Architects
- Interior Designers; and
- Architects.
- Qualified expert also includes any person who has been recognized by a federal court as an expert in Title III of the ADA or who prepared a remediation plan accepted by a federal court.
- Owners who have had their public places inspected by an expert may submit a remediation plan or certificate of conformity from the expert to DBPR.
- An ADA remediation plan must include:
 - The date the public place was inspected;
 - A reasonable amount of time, not to exceed 10 years, to complete a remediation plan;
 - The name of the ADA expert or other person who inspected the public place;
 - The specific remedial measures the public place intends to undertake;
 - The anticipated date of initiation and completion for each remedial measure that the public place agreed to undertake;
 - The ADA expert's proof of qualification; and
 - A statement in writing by the ADA expert attesting that the information contained in the remediation plan is accurate.
- An ADA certificate of conformity is valid for three years and must include:
 - The date the public place was inspected;
 - The name of the ADA expert or any other person who inspected the public place;
 - The ADA expert's proof of qualification; and
 - A statement in writing by the ADA expert attesting that the information contained in the certificate of conformity is accurate.

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 or certificate of conformity filed with DBPR 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.

Public Records Law

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

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

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.³³ For fiscal year

³³ *Id* at 6.

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.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Public places may proactively come into compliance with Title III of the ADA in order to prevent having to pay attorney's fees if they are sued in the future for violating Title III of the ADA.

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.

D. FISCAL COMMENTS:

None.