

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 Appropriations

BILL: CS/SB 1398

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on General Government); and Senator Stewart and others

SUBJECT: Accessibility of Places of Public Accommodation

DATE: April 27, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	<u>Favorable</u>
2.	<u>Davis</u>	<u>Betta</u>	<u>AGG</u>	<u>Recommend: Fav/CS</u>
3.	<u>Davis</u>	<u>Hansen</u>	<u>AP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1398 creates a voluntary process to certify places of public accommodation as conforming to the requirements of the federal Americans with Disabilities Act (ADA) after inspection by a qualified expert.

The bill defines a qualified expert as licensed engineers, general contractors, building contractors, building code administrators, building inspectors, plans examiners, interior designers, architects, and landscape architects. Qualified experts also include any person who has had a remediation plan related to a claim under the ADA accepted by a federal court in a settlement agreement or court proceeding, or who has been qualified as an expert in the ADA by a federal court.

An owner of a place of public accommodation who has had the place of public accommodation inspected by a qualified expert may submit certification of conformity with the Department of Business and Professional Regulation (DBPR) which indicates that the place of public accommodation conforms to the ADA.

If the place of public accommodation does not conform to the ADA requirements, the owner of the place of public accommodation may submit to the DBPR a remediation plan, which includes a reasonable amount of time, not to exceed 10 years, for completion of the remediation plan.

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 bill appropriates the sums of \$5,000 in recurring funds and \$155,000 in nonrecurring funds from the Professional Regulation Trust Fund for Fiscal Year 2017-2018 to the DBPR for new costs necessary to carry out the provisions of the bill. *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 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 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.;

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).

- 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

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

³ 42 U.S.C. § 12131 (2017).

⁴ United States Department of Justice, *2010 ADA Standards for Accessible Design*, https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards_prt.pdf (last visited on April 25, 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 April 25, 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.

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:

- 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:

- The plaintiff is considered disabled under the ADA;
- The defendant owns, leases, or operates a place of public accommodation; and
- 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

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 April 25, 2017).

¹² Section 553.507, F.S.

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 April 25, 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).

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 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 Department of Business and Professional Regulation (DBPR), which has 12 divisions:

- Administration;

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 April 25, 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 April 25, 2017).

²² Katie Lagrone and Matthew Aphorpe, *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-look-for-help-over-serial-americans-with-disabilities-act-suers>, (last visited on April 25, 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 April 25, 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 April 25, 2017).

²⁶ *Id.*

- 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.

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.

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.

III. Effect of Proposed Changes:

Certification of Places of Public Accommodation

The bill creates s. 553.5141, F.S., to provide a voluntary process to certify places of public accommodation as conforming to the requirements of the Americans with Disabilities Act (ADA) after inspection by a qualified expert.

The bill defines a qualified expert as:

- An engineer licensed pursuant to ch. 471, F.S.;
- A certified general contractor licensed pursuant to ch. 489, F.S.;
- A certified building contractor licensed pursuant to ch. 489 F.S.;
- A building code administrator licensed pursuant to ch. 468, F.S.;
- A building inspector licensed pursuant to ch. 468, F.S.;
- A plans examiner licensed pursuant to ch. 468, F.S.;
- An interior designer licensed pursuant to ch. 481, F.S.;
- An architect licensed pursuant to ch. 481, F.S.;
- A landscape architect licensed pursuant to ch. 481, F.S.; or
- Any person who has had a remediation plan related to a claim under the ADA accepted by a federal court in a settlement agreement or court proceeding, or who has been qualified as an expert in the ADA by a federal court.

Owners of Places of Public Accommodation

An owner of a place of public accommodation who has had it inspected by a qualified expert may submit certification of conformity with the Department of Business and Professional Regulation (DBPR) that indicates the place of public accommodation conforms to the ADA. The certification is valid for three years after issuance.

The certification of conformity filed with the DBPR must include:

- The date of inspection.
- The name of the qualified expert or other person who performed the inspection.
- Proof of the inspector's qualification as an expert, including a license number or a sworn statement indicating that the person has at least one order by a federal court accepting an ADA remediation plan of the qualified expert in a settlement or by order of the court.
- A written statement by the qualified expert attesting that the information contained in the remediation plan is accurate.

If the place of public accommodation does not conform to the ADA requirements, the owner of the place of public accommodation may submit with the DBPR a remediation plan, which includes a reasonable amount of time, not to exceed 10 years, for completion of the remediation plan. The remediation plan filed with the DBPR must include:

- The date of the inspection.
- The name of the qualified expert or other person who performed the inspection.
- The specific remedial measures that the place of public accommodation has agreed to undertake.

- The anticipated dates each remedial measure will be initiated and completed.
- Proof of the inspector's qualification as an expert, including a license number or a sworn statement indicating that the person has at least one order by a federal court accepting an ADA remediation plan of the qualified expert in a settlement or by order of the court.
- A written statement by the qualified expert attesting that the information contained in the remediation plan is accurate.

The DBPR must develop and maintain a publically accessible website that provides an electronic registry of certifications of conformity and remediation plans.

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.

Appropriation

The bill appropriates \$160,000 (\$155,000 in nonrecurring and \$5,000 in recurring funds) from the Professional Regulation Trust Fund to the DBPR for the 2017-2018 fiscal year to implement the provisions of this act.

Effective Date

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

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 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 Americans with Disabilities Act (ADA).

C. Government Sector Impact:

The bill appropriates the sums of \$5,000 in recurring funds and \$155,000 in nonrecurring funds from the Professional Regulation Trust Fund for Fiscal Year 2017-2018 to the Department of Business and Professional Regulation (DBPR) for new costs necessary to carry out the provisions of the bill. However, the appropriation included costs of approximately \$70,000 to create a system to register licensed experts, which is no longer required in the bill.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. There will need to be modifications to BCIS to house the electronic registry.³¹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 553.5141 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Appropriations on April 25, 2017:

The committee substitute:

- Removes the provision in the bill for certification of Americans with Disabilities Act (ADA) experts.
- Defines the term “qualified expert.”
- Requires that the certification of conformity with the ADA and the plan of remediation filed with the Department of Business and Professional Regulation (DBPR) must include proof of the qualifications of the expert who conducted the inspection and a statement that the information in the certification of conformity or the remediation plan is complete and accurate.

³⁰ Email from the Department of Business and Professional Regulation dated April 25, 2017 (on file with the Senate Appropriations Subcommittee on General Government).

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.

- Provides an appropriation to the DBPR of \$160,000 from the Professional Regulation Trust Fund to implement the provisions in this act.

B. Amendments:

None.

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