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Legislation in the 107th Congress Requiring Notification Prior to Certain Legal Actions under the Americans with Disabilities Act

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Summary

The Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.*, provides broad nondiscrimination protection in employment, public services, public accommodation and services operated by private entities. H.R. 914 and S.782, 107th Congress, referred to as the ADA Notification Act and the Americans with Disabilities Notification Act respectively, would amend Title III of the ADA, which contains the provisions relating to public accommodations, to require that a plaintiff provide 90 days notice to the defendant prior to filing a complaint. H.R. 914 and S. 782 are virtually identical and H.R. 914 is identical to H.R. 3590 and S. 3122, 106th Cong. This report will be updated as necessary.

The Americans with Disabilities Act

The Americans with Disabilities Act has often been described as the most sweeping nondiscrimination legislation since the Civil Rights Act of 1964. As stated in the Act, its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[1]

Title III provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.[2] Entities covered by the term "public accommodation" are listed and include, among others, hotels, restaurants, theaters, auditoriums, laundromats, museums, parks, zoos, private schools,

[1] 42 U.S.C. §12102(b)(1).

[2] 42 U.S.C. §12182.

day care centers, professional offices of health care providers, and gymnasiums.[3] Although the sweep of Title III is broad, there are some limitations on its nondiscrimination requirements. A failure to remove architectural barriers is not a violation unless such a removal is "readily achievable."[4] "Readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[5] Reasonable modifications in practices, policies or procedures are required unless they would fundamentally alter the nature of the goods, services, facilities, or privileges or they would result in an undue burden.[6] An undue burden is defined as an action involving "significant difficulty or expense."[7]

The remedies and procedures of section 204(a) of the Civil Rights Act of 1964 are incorporated in Title III of the ADA.[8] This allows for both private suit and suit by the Attorney General when there is reasonable cause to believe that there is a pattern or practice of discrimination against individuals with disabilities. Monetary damages are not recoverable in private suits but may be available in suits brought by the Attorney General.[9] The impact of these provisions on small businesses was of concern to Congress when the ADA was enacted. Generally, Title III provisions were not to become effective for eighteen months and there were specific further extensions for small businesses concerning the requirements for new construction and alterations. Actions under section 303 of the ADA were not allowed during the first six months after the effective date for businesses that employed 25 or fewer and have gross receipts of $1,000,000 or less. Similarly, section 303 actions were not allowed during the first year after the effective date against businesses that employed 10 or fewer employees and had gross receipts of $500,000 or less.[10]

Section 204(c) of the Civil Rights Act requires that when there is a state or local law prohibiting an action also prohibited by Title II, no civil action may be brought "before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority...." Although the ADA does not specifically incorporate this requirement, several courts have found that it was a prerequisite to suit.[11] But the one court of appeals to consider this issue found that this requirement was not incorporated in the ADA.[12]

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[3] 42 U.S.C. §12181.

[4] 42 U.S.C. §12182(b)(2)(A)(iv).

[5] 42 U.S.C. §12181.

[6] 42 U.S.C. §12182(b)(2)(A).

[7] 28 C.F.R. §36.104.

[8] 42 U.S.C. §12188. Section 204a-3(a) of the Civil Rights Act of 1964 is codified at 42 U.S.C. §2000a-3(a).

[9] 42 U.S.C. §12188(b)(4).

[10] 42 U.S.C. §12181 note.

[11] See e.g., *Synder v. San Diego Flowers,* 21 F. Supp.2d 1207 (S.D.Cal. 1998).

[12] *Botosan v. Paul McNally Realty,* 216 F.3d 827 (9th Cir. 2000). For a detailed discussion of this issue see Adam A. Milani, "Go Ahead. Make my 90 Days: Should Plaintiffs be Required to (continued...)

H.R. 914 and S. 782

The two ADA Notification Acts in the 107th Congress, H.R. 914[13] and S. 782,[14] like their predecessors H.R. 3590[15] and S. 3122,[16] 106th Cong., would add provisions to the remedies and procedures of Title III of the ADA to require a plaintiff to provide notice of an alleged violation to the defendant.[17] This notice may be provided by registered mail or in person and shall contain the specific facts regarding the alleged violation including the identification of the location at which the violation occurred, and the date on which the violation occurred. The notice also shall inform the defendant that civil action may not be commenced until the expiration of a ninety day period. A court does not have jurisdiction unless this notice is provided, at least ninety days have passed, and the complaint states that the defendant has not corrected the alleged violation. If these requirements are not met when a civil action is filed, the court shall impose an appropriate sanction on the attorneys involved.[18] If the criteria are subsequently met and the action proceeds, the court may not award attorneys' fees.

There has been no committee action on the legislation in the 107th Congress. Hearings were held by the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 3590 on May 18, 2000.[19]

Arguments For and Against Requiring Notification

Arguments in Favor of Requiring Notification Act.

The main argument in favor of requiring notification is that such notification would prevent what some of the legislation's supporters have described as "drive by lawsuits." In his testimony on H.R. 3590, 106th Cong., Representative Foley, who along with Rep. Shaw, introduced the bill, noted that the ADA was an important piece of civil rights legislation but stated that "to put it simply, the ADA is being used by some attorneys to

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[12] (...continued)
Provide Notice to Defendant Before Filing Suit Under Title III of the Americans with Disabilities Act?" 2001 Wisc. L. Rev. 107 (2001). This article argues that the best reading of the ADA is that it requires, like Title II of the Civil Rights Act, that plaintiffs provide thirty days notice to a state or local agency responsible for combating discrimination prior to filing suit. The article concludes that this interpretation renders federal legislation to provide notice unnecessary.

[13] H.R. 914 was introduced by Rep. Foley.

[14] S. 782 was introduced by Senator Inouye.

[15] H.R. 3590 was introduced by Rep. Foley.

[16] S. 3122 was introduced by Senator Hutchinson.

[17] H.R. 914, 107th Cong., H.R. 3590, 106th Cong., and S. 3122, 106th Cong. are identical. S. 782 contains some minor differences.

[18] S. 782 provides for "an appropriate sanction on the attorney for the plaintiff."

[19] Hearing on H.R. 3590, the ADA Notification Act, Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. [http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0f.htm]

shake down thousands of businesses from Florida to California."[20] Rep. Foley observed that Title III of the ADA does not allow for the collection of damages by plaintiffs but does allow for attorneys' fees and stated that "some attorneys apparently have figured out that the ADA can be a real cash cow for minimum work on their part."[21] He cited the actions of a group in Florida that "filed a blizzard of lawsuits against dozens of businesses" as exemplifying the reason for H.R. 3590. Representative Foley noted that in all the cases of which he was aware, the businesses had agreed to fix the problems once they were made aware of them but still found themselves faced with thousands of dollars in attorneys' fees.[22] Representative Canady made similar arguments at the hearing on H.R. 3590 and also observed that even if some businesses refuse to make their properties accessible after notice, these businesses would still be subject to the requirements of the ADA.[23]

Similarly, one of the most prominent supporters of H.R. 3590, Clint Eastwood, testified in support of the legislation at hearings on May 18, 2000, noting that he had been sued because a hotel he owned was not in compliance with the ADA. The suit against his Mission Ranch Hotel and Restaurant alleged that at least one bathroom and the hotel parking lot did not comply with the ADA and asked for $577,000 in attorneys' fees. Like the bill's sponsors, Mr. Eastwood argued that he and other small businesses were being "preyed upon by money seeking attorneys."[24]

(name redacted), the managing partner of a national management labor and employment law firm, also argued in support of H.R. 3590 at the 2000 hearings. He described ADA "drive by suits" as "all too common" with four major "ADA enforcement groups" having filed 112 lawsuits since January 1, 2000. Mr. Bell further argued that H.R. 3590 "does not make any substantive legal changes to the ADA. It does not reduce in any way or to any degree the substantive rights of persons with disabilities."[25]

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[20] Testimony of the Honorable Mark Foley, Hearing on H.R. 3590, the ADA Notification Act Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. Published at [http://www.house.gov/judiciary/fole0518.htm]

[21] *Id.*

[22] *Id.* Several organizations have echoed these arguments in voicing their support for H.R. 914 and S. 782. See e.g., statement of the National Restaurant Association, [http://www.restaurant.org/government/ada_notice.cfm]

[23] Opening Statement of Chairman Charles T. Canady, Hearing on H.R. 3590, the ADA Notification Act Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. Published at [http://www.house.gov/judiciary/cana0518.htm]

[24] "Clint Eastwood Battles Disabled Advocates," *USA Today* (May 18, 2000) [http://www.usatoday.com/news/wasdc/ncsthu01.htm]

[25] Testimony of (name redacted), H.R. 3590, the ADA Notification Act Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. Published at [http://www.house.gov/judiciary/bell0518.htm]

Arguments Opposed to Requiring Notification.

Those opposing notification have made several arguments including that legislation requiring notification would undermine enforcement of the ADA, that if attorneys are "preying" upon business such actions are best dealt with by state bar disciplinary procedures or by the court, and that such legislation would require individuals with disabilities to know the details of the ADA's requirements.

The Department of Justice in a letter sent to Rep. Canady, argued that H.R. 3590, 106th Congress, "would work to undermine voluntary compliance with the Americans with Disabilities Act and ...would unduly burden legitimate ADA enforcement activity."[26] The letter noted that if attorneys are engaging in frivolous or harassing litigation the appropriate mechanism for addressing such problems is with the ethics and disciplinary bodies of state bar associations or the court where the litigation is pending. In addition, he detailed the efforts the Department of Justice has made to provide technical assistance.[27]

Similarly, one of the witnesses for the 2000 hearing on H.R. 3590, Andrew Levy, a trial lawyer from Maryland, argued that the proposed amendment "will make enforcement of the ADA cumbersome, much more expensive, and from a practical standpoint, frequently impossible. Worse, it will eliminate much of the existing incentive businesses have to attempt to comply with the law voluntarily."[28] He noted that there was no damage provision in the law and observed that since there was no risk of damages, "the effect of prohibiting lawsuits unless they get 90 days notice is to allow – indeed, encourage – them to do nothing until they get a letter."[29] He also observed that attorneys' fees are only available if the plaintiff wins and are limited to what the judge finds is "reasonable" and that the Department of Justice has significant technical assistance available for small businesses. In addition, Mr. Levy questioned the attorneys' fees Mr. Eastwood indicated were involved in his case stating: "The fees could only have grown to the size they did because of his refusal to comply with the law voluntarily and the scorched earth manner in which his lawyer conducted the defense."[30]

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[26] Letter to Honorable Charles Canady, Chairman, Subcommittee on the Constitution, House Committee on the Judiciary from Robert Raben, Assistant Attorney General, reprinted at [http://www.jfanow.org/cgi/getli.pl?1063]

[27] *Id.* The current position of the Department of Justice on the legislation pending in the 107th Congress is unknown.

[28] Testimony of Andrew D. Levy, H.R. 3590, the ADA Notification Act Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. Published at [http://www.house.gov/judiciary/levy0518.htm]

[29] *Id.*

[30] *Id.* For a more detailed discussion of the litigation Mr. Eastwood was involved in see Adam A. Milani, "Go Ahead. Make my 90 Days: Should Plaintiffs be Required to Provide Notice to Defendant Before Filing Suit Under Title III of the Americans with Disabilities Act?" 2001 Wisc. L. Rev. 107, 178-181 (2001). This article notes that the plaintiff in the case attempted to provide Mr. Eastwood with notice via registered mail but he refused to accept the mail.

Another witness at the 2000 hearings, Fred Shotz, the ADA consultant for the City of Lake Worth, Florida, also argued against the legislation, stating that "[t]he ADA is not broken and it does not need to be fixed."[31] Mr. Shotz argued that bill would require every individual with a disability to know the details regarding ADA access requirements and would limit an individual's ability to obtain legal representation. For example, he noted that if an individual with quadriplegia encounters an inaccessible restaurant he or she would have to go to the library to find the details for the width of a door and then go back to the restaurant to measure the door and either pay a lawyer to write a letter or write one herself and go to the Post Office to mail the letter certified mail. Then he or she must go back to the restaurant after 90 days to determine if the condition has been corrected.[32]

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[31] Testimony of Fred Shotz, H.R. 3590, the ADA Notification Act Before the House Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. Published at [http://www.house.gov/judiciary/shot0518.htm]

[32] *Id.*