

It's a Trap! – How Florida's Cure for "Drive-by" Lawsuits fails Florida's Businesses and Persons with Disabilities

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Florida's newest knee-jerk reaction to Americans with Disabilities Act lawsuit demonstrates a lack of understanding of the Americans with Disabilities Act, the role of experts in ADA suits, and the effect of state law in Federal Court. It contains all of the hallmarks of a frustrated and sloppy defense lawyer after resolving his only ADA case.

Section 553.5141, Florida Statutes, permits certification of public accommodations as compliant with Title III of the Americans with Disabilities Act if they have a remediation plan completed by an expert that required issues to be remediated within ten years.

Why is it a trap?

The Americans with Disabilities Act is a comprehensive mandate to eliminate barriers for 54 million persons with disabilities across the United States. Title III of this law includes all public accommodations into this mandate. It covers access into new facilities, old facilities, policies and procedures, auxiliary aids and services, eligibility bars, or just discriminatory acts which are based on time-worn stereotypes of persons with disabilities. So, this Florida Statute cannot, and does not, cover a fraction of what the law actually covers.

Can this law just cover "drive-by" lawsuits?

Again, no. The only time where the construction or alteration of a premises can be "fully compliant" is when the structure is constructed or altered to be fully within the standards under the Americans with Disabilities Act Accessibility Guidelines, and the facility does not add any fixtures which may hinder access of persons with disabilities. Fixtures may include tables, displays, counters, and shelving. If a structure was built after 1994, and was not built fully within ADAAG standards, even within construction tolerances, it will not be fully "ADA Compliant"

However, when a structure predates 1991, then a different standard applies. The standard that applies is that a public accommodation must remove architectural barriers where such removal is readily achievable. *Readily achievable* means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable the ADA regulations require the entity include several factors in the analysis which include –

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;

- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Because of the “readily achievable” standard, it may not be possible to physically modify a facility to be fully within the ADA standard. But, there may be disagreement on the extent that a facility can be modified. Anywhere there is a disagreement, then the facility will be subject to suit and cannot be deemed to be ADA compliant.

However, the definition requires that more than just ability to physically modify the premises be taken into account. The definition requires an evaluation of the financial means of the owner or operator of the facility. Accordingly, most alterations would be readily achievable for a large, financially liquid company, but some modifications may not be readily achievable for a small mom and pop businesses. As such, whether modifications are readily achievable has much to do with the success of the business that owns the facility and the cost of the modifications.

However, small businesses are provided incentives of which they should take advantage when making accessibility modifications. For example, qualified small businesses can take a disability access tax credit for \$5,000 of tax credits for \$10,000 spent in making their facilities accessible for persons with disabilities.