Florida's Not So happy Anniversary Present to the ADA

By: Matthew Dietz

On the same month as the 27th anniversary of the Americans with Disabilities Act, a Florida law came into effect that shields businesses from liability in ADA lawsuits. Section 553.5141, Florida Statutes, permits certification of a public accommodation as compliant with Title III of the Americans with Disabilities Act if an expert designs a Remediation Plan that requires all issues to be resolved within ten years. Rather than attempting to encourage compliance with the Americans with Disabilities twenty-seven years after the enactment of the law, the Florida legislature attempts to dilute the law.

This new Florida law demonstrates a fundamental misunderstanding of the Americans with Disabilities Act: It confuses basic concepts of States' rights in the court system and subjects experts to negligence actions.

In this article, I will discuss this new law, why it will not work as intended, and whether business owners should actually create a comprehensive Remediation Plan and how that should be done.

The Law – 553.5141

According to this new Florida law, an owner of a public accommodation may submit a certification of conformity that indicates that the physical property, services provided, and policies and procedures adhere to Title III of the Americans with Disabilities Act. An expert (I will discuss them later) inspects the public accommodation, then either certifies it as complying with the ADA or designs a remediation plan that must be completed within ten years. According to this state law, Federal courts *must* take these actions into consideration if the premises are sued

for violating the ADA. The goal of this law is to protect business owners from frivolous or "drive-by" lawsuits.

The Fundamental Misunderstanding of the Americans with Disabilities Act.

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, and discriminatory acts, which are based on timeworn stereotypes. So, this Florida Statute cannot, and does not, cover a fraction of what the law actually protects.

After passage of the law in 1990, it was expected that public accommodations would begin to remove barriers to access. Accordingly, when George Bush signed the ADA into law in 1990, he stated:

> The Americans with Disabilities Act (ADA) is a comprehensive law which seeks to remove both architectural and attitudinal barriers that hinder full integration of persons with disabilities in society. After passage of the law in 1990, it was expected that public accommodations would begin to remove barriers to access. Accordingly, when George Bush signed the ADA into law in 1990, he stated:
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> And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.
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> … I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down. God bless you all.

Twenty-seven years later, the shameful wall of exclusion still stands. However, only a portion of the ADA involves construction of accessible facilities and removal of physical,

architectural barriers, but most of the ADA involves ensuring that procedures or polices do not exclude persons with disabilities, and persons with disabilities are provided accommodations so they have the same opportunities to benefit from the programs and services of a covered entity.

What does the ADA cover?

Architectural Barrier Compliance:

The only time where the construction or alteration of premises can be "fully compliant" is when the structure is constructed or altered to be fully within the standards under the Revised Americans with Disabilities Act Accessibility Guidelines (ADAAG-R). If a structure was built after 1994 and is not fully within ADAAG standards, even within construction tolerances, it is not "ADA Compliant."

However, if a structure predates 1991, a different standard applies: Alterations must be "readily achievable." *Readily achievable* means easily accomplishable 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, the owner of a public accommodation may not be able to physically modify a facility to be fully within the ADA standard, but there may be disagreements on the extent that a facility can be modified. When there is a disagreement, the facility will be subject to suit and cannot be deemed to be ADA compliant.

The definition also 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, just as some modifications may not be readily achievable for small mom-and-pop businesses. 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 for 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.

Policies and Procedures

Certifying that a public accommodation conforms to disability discrimination law is similar to certifying that a public accommodation conforms to racial discrimination law; it depends on who has face-to-face interaction with customers with disabilities and the implementation of appropriate policies and procedures to accommodate customers with disabilities.

Elements for appropriate policies and procedures are:

- Ensuring effective communications with patrons who are Deaf, Blind, or have other sensory impairments. This includes retaining sign language interpreters, producing

documents in Braille or accessible electronic formats, or accessing auxiliary aids and services.

- Having policies and procedures that accommodate patrons with service animals.
- Ensuring patrons with disabilities have an equal opportunity to benefit from a program or service, such as having a ramp to a portable stage, removing a podium, or serving a buffet so all food or beverages are in reach range.
- Providing additional assistance for a person with a disability, such as cutting a person's food that does not have dexterity in their hands or assisting a person in a wheelchair to reach products at the supermarket.
- Arrange that transportation or other programs and services provided to persons without disabilities are equally available to persons with disabilities.

Owners and employees of public accommodations should have training and procedures on how to best serve customers with disabilities. When I train public accommodations on how to comply with the ADA, I make absolutely clear that the customer knows more about his or her needs than anyone else, and the employee does not have the authority to say no. Only a person in a managerial position should have the ability to deny an accommodation, and only where it is an undue burden or fundamental alteration of the resources of the facility. The manager should contact the customer with a disability and explain why her request was denied and then attempt to find an alternate solution.

Can Federal Courts Accept Remediation Plans?

No. No. No. The Americans with Disabilities Act is a Federal law and enforced by Federal Courts. As such, the Florida legislature cannot alter or amend a federal law, and federal courts

do not take state law into consideration. This is an aspect of the Supremacy Clause of the United States Constitution that establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the supreme law of the land. Compliance with the ADA is not as simple as a remediation plan, and when a plan is not reasonable or does not cure the violation, then the public accommodation will always be subject to litigation.

Does this law cover "drive-by" lawsuits?

Again, no. Remediation Plans made pursuant to this new law are not meaningful in Federal Court, where ADA lawsuits are filed. Even if a public accommodation is certified or has a remediation plan, it can only be "fully compliant" if it is within the Americans with Disabilities Act Accessibility Guidelines' standards.

But won't qualified experts make sure that businesses adhere to the ADA?

Maybe. It depends on your expert. You must remember that professionals, even though they may be skilled in their trade, are not guaranteed to be experts on the ADA.

In my twenty years of experience, I have worked with many experts in all aspects of disability compliance to opine about compliance with the law. Each expert is a specialist in his or her field. To be deemed an expert in federal court, a person must be educated, trained, and experienced in a field. However, the Florida law has derived its own definition of experts:

(d) "Qualified expert" means:

1. An engineer licensed pursuant to ch. 471.
2. A certified general contractor licensed pursuant to ch. 489.
3. A certified building contractor licensed pursuant to ch. 489.
4. A building code administrator licensed pursuant to ch. 468.

5. A building inspector licensed pursuant to ch. 468.

6. A plans examiner licensed pursuant to ch. 468.

7. An interior designer licensed pursuant to ch. 481.

8. An architect licensed pursuant to ch. 481.

9. A landscape architect licensed pursuant to ch. 481.

10. Any person who has prepared a remediation plan related to a claim under Title III of the Americans with Disabilities Act, 42 U.S.C. s. 12182, that has been accepted by a federal court in a settlement agreement or court proceeding, or who has been qualified as an expert in Title III of the Americans with Disabilities Act, 42 U.S.C. s. 12182, by a federal court.

Most of the "Qualified experts" cannot testify in court regarding policies and procedures to accommodate persons with disabilities. Furthermore, many of the above professionals cannot create an architectural barrier removal plan. In order to widen a door to ensure that there is a 32" clearance, for example, the expert must understand if it is even possible to widen the door and the costs of doing so. If a landscape architect or an interior designer made a remediation plan that involved trades the expert was unfamiliar with, then that expert will be held liable for negligence when the public accommodation is sued.

During a lawsuit, a remediation plan may convince a Federal Court to deem that it cannot order any effective relief and may not award the plaintiff fees and costs. However, the expert *must* be someone who has actual training in remediating such barriers and be able to assess a reasonable time to accomplish the removal of barriers based on the resources and revenues of the public accommodation.

Should I have a Remediation Plan?

Remediation plans, whether or not completed pursuant to a Florida law, are relevant in any action under the Americans with Disabilities Act, and are a good business practice to ensure that you are providing your products and services to all of your customers. These are the steps that I would advise my clients to accomplish to devise a reasonable ADA compliance plan:

1) **Hire a licensed contractor or architect with experience in ADA compliance to review the premises and develop a remediation plan and consult an expert before performing any future alterations.**

While the Florida law states that ten years is acceptable for a remediation plan, a Defendant would be hard pressed to find any court that would agree with this length of time. Whether a remediation plan is reasonable depends on the difficulty of the architectural modifications and the revenue of the public accommodation. The modifications also need to be accomplished depending on the priorities. The priorities of barrier removal as stated by ADA regulations are as follows:

> (c) *Priorities*. A public accommodation is urged to take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities.
> (1) First, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking, or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.
> (2) Second, a public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, providing Brailled and raised character signage, widening doors, providing visual alarms, and installing ramps.
> (3) Third, a public accommodation should take measures to provide access to restroom facilities. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of

ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.

(4) Fourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

When alterations are underway, that area should be fully accessible and any barrier removal modification plan should take into account the availability of tax credits. I have never seen a barrier removal plan with the largest corporations and the most difficult modifications take more than four years.

2) **Review all policies and procedures to ensure that there are specific policies regarding providing sign language interpreters or other auxiliary aids and services, service animal policies, and reasonable accommodation policies.**

3) **Train all personnel in these policies at initial hiring and annually.**

4) **If you have any current customers with disabilities, engage them and ask what they like or where they have issues. Your current customers will have the best insight on what needs to be done. If you do not have any customers with disabilities, that issue is indicative of the lack of accessibility.**

5) **Speak to your employees with disabilities, and ask about barriers that they may face and what could be changed to make the customer experience better. Again, if you do not have any employees with disabilities, it may also demonstrate a corporate culture of not welcoming customers with disabilities.**

Is there a better solution than this Florida "Remediation Plan" Statute?

The new Florida law, Section 553.5141, Florida Statutes, is a mean spirited response to a twenty-seven year old mandate to eliminate discrimination against persons with disabilities. However, Title III of the ADA ***does not*** provide damages as a remedy to an aggrieved party. As such, there is no alternative for an aggrieved party than to file a case in federal court.

For straightforward barrier removal cases, a better solution would be to enact a remedy that is more beneficial to the aggrieved party than a federal lawsuit. For example, if the

legislature amended the Florida Civil Rights Act to include the ADA, claims would be required to exhaust administrative conditions before filing a lawsuit to obtain damages. However, most claims would be resolved within the administrative process, so there would be nothing for a federal court to litigate. In most cases, damages would be nominal—especially compared to litigation in federal court.