

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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February 2, 2009

Congressional Research Service

Report RS20596

*THE AMERICANS WITH DISABILITIES
NOTIFICATION ACT, H.R. 3590, 106TH CONGRESS*

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Updated June 13, 2000

Abstract. The Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101 et seq., provides broad nondiscrimination protection in employment, public services, public accommodation and services operated by private entities, transportation, and telecommunications. H.R. 3590, 106th Congress, the ADA Notification Act, 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. Hearings were held on May 18, 2000.

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CRS Report for Congress

Received through the CRS Web

The Americans with Disabilities Notification Act, H.R. 3590, 106th Congress

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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, transportation, and telecommunications. H.R. 3590, 106th Congress, the ADA Notification Act, 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. Hearings were held on May 18, 2000. 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, 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

¹ 42 U.S.C. §12102(b)(1).

² 42 U.S.C. §12182.

³ 42 U.S.C. §12181.

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

H.R. 3590

The ADA Notification Act, H.R. 3590, 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. This notice may be provided by registered mail or in person

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). However, other courts have found no such requirement. See e.g., *Mirando v. Villa Roma Resorts, Inc.*, 1999 U.S. Dist. LEXIS 17887 (S.D.N.Y. Nov. 18, 1999).

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. This 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. If the criteria are subsequently met and the action proceeds, the court may not award attorneys' fees.

Department of Justice Views on H.R. 3590.

The Department of Justice did not testify at the hearings but has gone on record as opposing H.R. 3590. In a letter sent to Rep. Canady, Assistant Attorney General Robert Raben argued that the bill “would work to undermine voluntary compliance with the Americans with Disabilities Act and ...would unduly burden legitimate ADA enforcement activity.”¹² He 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.¹³

Hearing Testimony in Favor of H.R. 3590.

The ADA Notification Act attempts to prevent what its supporters have described as “drive by lawsuits.” In his testimony, 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 shake down thousands of businesses from Florida to California.”¹⁴ 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 the “some attorneys apparently have figured out that the ADA can be a real cash cow for minimum work on their part.”¹⁵ 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.

One of the most prominent supporters of H.R. 3590, Clint Eastwood, testified in support of the legislation at hearings, 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

¹² 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>]

¹³ *Id.*

¹⁴ Testimony of the Honorable Mark Foley, 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>]

¹⁵ *Id.*

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."¹⁶

Christopher Bell, the managing partner of a national management labor and employment law firm, also argued in support of H.R. 3590. 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 concluded 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."

Several witnesses testified concerning their specific knowledge regarding certain lawsuits. Tammy Fields, testifying on behalf of the Palm Beach County Board of County Commissioners, stated that the County Commissioners adopted a resolution urging passage of the H.R. 3590. This occurred after thirty-eight law suits were filed by one law firm in a two week period against small businesses in a depressed area.¹⁷ Donna and David Batelaan testified that they were the co-owners of a mobility equipment business in Florida and had mobility impairments themselves. They were sued for parking spaces that were not in compliance with the ADA. They lauded the purposes and effects of the ADA without which "we may not have been able to come here today to testify" but argued for notice for small businesses so they would not be subjected to large attorneys' fees.¹⁸ Terri Lynn Davis, a manager of a commercial office and retail center and volunteer for a group raising money for United Cerebral Palsy, testified about her experience in being sued for having six instead of seven parking places available for individuals with disabilities.¹⁹

Hearing Testimony in Opposition to H.R. 3590.

Although the actions of some attorneys are almost universally deplored, there is considerable disagreement concerning whether the approach taken by H.R. 3590 is appropriate. One of the hearing witnesses, 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

¹⁶ "Clint Eastwood Battles Disabled Advocates," *USA Today* (May 18, 2000) [<http://www.usatoday.com/news/wasdc/ncsthu01.htm>]

¹⁷ Testimony of Tammy K. Fields, 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/tfie0518.htm>] See also, Testimony of Joseph R. Fields, Jr., 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/fiel0518.htm>]

¹⁸ Testimony of Donna M. Batelaan and David Batelaan, 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/bate01518.htm>]

¹⁹ Testimony of Terri Lynn Davis, 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/davi0518.htm>]

law voluntarily.”²⁰ 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.”²¹ 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.”²²

Another witness, 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.”²³ Mr. Shotz made several specific arguments. First, he stated that the bill would have much broader impact than described and would affect all businesses, not simply small business. He observed that there are various categories of lawsuits under title III of the ADA, including suits involving new construction, additions to existing facilities, alterations to existing facilities, accessible route improvements, and architectural barrier removal in entities of various sizes. Of these types of suits, Mr. Shotz stated that only architectural barrier removal in facilities owned by small partnerships and individuals would possibly be worthy of the protections of the legislation. He also 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.²⁴ Mr. Shotz noted that he was aware of several law firms that were “taking advantage of disability laws.” He felt that this problem could be addressed by the ethical requirements of the Bar and the authority of district court judges.

Dr. Steven Rattner, a dentist who has been deaf from birth, also testified against the legislation arguing that adding the notice provision would create significant barriers to obtaining accommodations such as sign language interpreters for continuing education classes.²⁵ Similarly, Christine Griffin, the executive director of the Disability Law Center,

²⁰ 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>]

²¹ *Id.*

²² *Id.*

²³ 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>]

²⁴ *Id.* Mr. Shotz gave an example of how the legislation would work if an individual with quadriplegia encounters an inaccessible restaurant. He stated that 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 she must go back to the restaurant after 90 days to determine if the condition has been corrected.

²⁵ Testimony of Dr. Steven Rattner, H.R. 3590, the ADA Notification Act Before the House
(continued...)

gave examples of several situations where she felt a notification requirement would be problematic.²⁶

²⁵ (...continued)

Committee on the Judiciary, Subcommittee on the Constitution, May 18, 2000. Published at [<http://www.house.gov/judiciary/ratt0518.htm>]

²⁶ Testimony of Christine Griffin, 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/grif0518.htm>] See also Testimony of Kyle Glozier, 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/gloz0518.htm>]