



# Elimination of Bias against People with Disabilities

By Robin Springer

**T**HE AMERICANS WITH Disabilities Act (ADA)<sup>1</sup> was signed into law in 1990, enjoying strong bipartisan support.

Congress passed the law “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,”<sup>2</sup> doing so, in part, because, “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disability... opportunities for which our free society is justifiably famous, [costing] the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.”<sup>3</sup>

## Groundbreaking Legislation

The ADA has three main sections: Title I addresses employment; Title II, government; and Title III prohibits discrimination by places of public accommodations.<sup>4</sup>

Title III provides, “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.”<sup>5</sup> Discrimination includes “a failure to remove architectural barriers...in existing facilities...where such removal is readily achievable.”<sup>6</sup>

There are guidelines for structural elements. For example, doorways must be a certain minimum width and the slope and rise of ramps must also meet certain criteria. These specifications are not arbitrary. If an entrance to a building has stairs but no ramp, people in wheelchairs, who use walkers, or who have other types of impaired mobility cannot get in. If a door is too narrow, people in wheelchairs cannot get through, whether to enter a building or a restroom. Objects protruding from walls must be mounted at specified heights to protect people with visual impairments.

Freedom from architectural barriers helps everyone. Just ask your local FedEx driver or mom with a stroller if they prefer stairs or a ramp. “When a pub has steps I’m disabled. When it’s wheelchair accessible, I’m Marty,” says blogger Martyn Sibley.

In response to earlier Supreme Court decisions that narrowed the definition of “disability” under the ADA, Congress enacted the ADA Amendments Act of 2008, which took effect January 1, 2009. The Department of Justice issued its final rule on October 11 2016. According to Congress:

“The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA... The primary object of attention... should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of ‘disability.’”<sup>7</sup>



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## Architectural Barriers

Architectural barriers are “physical features that limit or prevent people with disabilities from obtaining the goods or services that are offered.”<sup>8</sup> This includes communication barriers, which are barriers, structural in nature, that are an integral part of the physical structure of a facility. For example, conventional signage should be adapted to be accessible to people with visual impairments, and audible alarms should include a visual cue, such as a flashing light, to alert people with hearing impairments.<sup>9</sup>

Facilities constructed after January 26, 1992, must fully comply with the 2010 Standards for Accessible Design. For buildings constructed before January 26, 1992, there is one requirement for facilities undergoing alterations and a less stringent requirement for facilities that have not been altered.<sup>10</sup>

When a barrier is identified, it needs to be removed when to do so is readily achievable. Readily achievable means “easily accomplishable and able to be carried out without much difficulty or expense.”<sup>11</sup> To determine if barrier removal is readily achievable, several factors are considered, including the nature and cost of the action and the time and expense required by the business to remove the barrier.<sup>12</sup>

A business can claim barrier removal is an undue burden, in which case the readily achievable elements are applied as to the business.<sup>13</sup> If barrier removal is found to be an undue burden, the business need not remove the barrier.

Currently, when a person with a disability encounters discrimination on the basis of disability at a place of public accommodation, the person can: (a) talk with the business; (b) file a complaint with the Department of Justice (DOJ); or (c) file a lawsuit as provided under law.<sup>14</sup>

### H.R. 620

The ADA was a compromise; plaintiffs cannot obtain money damages and

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businesses are not required to remove every barrier. There are even tax credits and incentives to assist businesses in complying with the law. In spite of this, thirteen notification bills to weaken the ADA have been introduced in Congress since 1999.

No other federal civil rights law has a notification requirement. For perspective, had the Civil Rights Act been law in 1955 and had it included a notification requirement, Rosa Parks would have had to write a letter to the bus company before enforcing her rights.

H.R. 620 is one such notification bill. Passed by the House of Representatives in February 2018, the legislation is currently pending in the U.S. Senate. H.R. 620 changes the requirement of the ADA from “providing access” to making “substantial progress,” without ever removing the barrier.

The bill says people with disabilities who have had their civil and human rights violated can no longer sue the business (option “c” above). Instead, the person with a disability must send written notice to the business, explaining the exact part of the ADA that has been violated, among other requirements.<sup>15</sup>

H.R. 620 would give the business 60 days to acknowledge there is a barrier, and then a minimum of 120 days to claim it is making “substantial progress” in removing the barrier.<sup>16</sup> There is no penalty to the business for non-compliance as long as it claims “substantial progress.” But there is no definition of substantial progress. The result is that a business could spend years without removing the barrier.

“H.R. 620 will destroy any incentive under the ADA for timely removal of architectural barriers in public accommodations,” U.S. Senator Tammy Duckworth, a double-amputee and Army veteran, writes in a letter to the Senate opposing the bill.<sup>17</sup>

H.R. 620 is silent regarding filing complaints with the DOJ; however,



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10 of 25 (or 40 percent) of guidance documents the Department rescinded in 2017 concern disability,<sup>18</sup> suggesting it may not pursue claims of accessibility violations.

### What H.R. 620 Does Not Do

Proponents of H.R. 620 make several claims about its benefits:

**1 Claim:** H.R. 620 makes the ADA stronger.<sup>19</sup>

**Response:** H.R. 620 makes the ADA weaker because businesses are no longer required to comply with the law. In effect, it penalizes businesses that have complied.

**2 Claim:** The ADA exposes businesses to substantial money damage awards.<sup>20</sup>

**Response:** There are no money damages available under the ADA. Plaintiffs can only obtain injunctive relief and in some cases, attorneys' fees.<sup>21</sup>

**3 Claim:** Exorbitant numbers of plaintiffs and attorneys wrongly file Title III lawsuits.<sup>22</sup>

**Response:** Just because someone files more than one lawsuit does not mean there is not more than one violation. Additionally, bar associations and courts have the tools to address the issue should a party be accused of impropriety.

According to the 2010 census, there were 56.7 million people with disabilities. In 2016, there were nearly 7.7 million business establishments,<sup>23</sup> but there were only 6,601 Title III lawsuits,<sup>24</sup> more than 260 of which regarded website accessibility.<sup>25</sup> Thus, approximately one one-hundredth of one percent of people with disabilities ever even file a Title III claim.

Filing a lawsuit takes physical, mental, and emotional energy, both on the part of the attorney

and plaintiff. Plaintiff Ingrid Tischer describes the "humiliatingly detailed" questions she was asked about her urination habits during her deposition in her Title III lawsuit against Marriott Hotels. "I was exposed as the lady who's all fancy and expects to use a toilet while she's staying in a hotel."<sup>26</sup>

**4 Claim:** The ADA must be amended to facilitate mediation and alternative dispute resolution.<sup>27</sup>

**Response:** The Department of Justice already refers ADA disputes to mediators who are trained in the requirements of the ADA. This mediation is provided at no charge.<sup>28</sup> Further, the bill states that the amendments go into effect 30 days after the date of enactment of the Act.<sup>29</sup> However, it calls for a consultative process, including time for public comment,<sup>30</sup> a process that will take significantly longer than 30 days, and which will leave people with disabilities without a remedy to redress discrimination.

**5 Claim:** Insufficient resources exist to assist businesses in complying with the law.<sup>31</sup>

**Response:** The federal government provides extensive educational and technical assistance resources to assist businesses in complying with the ADA. These include the ADA website,<sup>32</sup> DOJ ADA hotline,<sup>33</sup> DOJ technical assistance materials,<sup>34</sup> and ten federally funded ADA Centers that provide in-depth resources and training at no charge.<sup>35</sup>

Several years ago, the Independent Living Resource Center in San Francisco received a \$25,000 grant to offer free architectural access services to small businesses in the city to help the businesses come into compliance with the ADA. The Center had sufficient funds to help approximately 250 businesses and spent a year reaching out to

more than 1,500 businesses. Only three accepted.<sup>36</sup>

Owning a business comes with responsibility, the responsibility to obtain appropriate licenses, to pay taxes, to comply with health and safety laws, and to comply with anti-discrimination laws, including the ADA. It is hard to imagine a business that did not pay its taxes or comply with health and safety codes avoiding consequences from non-compliance. Nor would we excuse a business that refused service based on race. Violating the rights of people with disabilities should be no different.

"This is why we have regulations; because people don't do the right thing," says disability advocate Aimee Sabo.<sup>37</sup>

When speaking with people who do not understand the discriminatory nature of bills such as H.R. 620, they often argue, "If I was with someone who is handicapped and they couldn't get into the building, I would take them somewhere else." But what if there is not somewhere else? What if the disabled person is being denied medical care? What if he or she is being denied access to a restroom? What if you are not with the "handicapped" person? What if you are the person with a disability?

### Shifting the Paradigm of Disability

One of the problems endemic to the disability conversation is the pictures in peoples' heads of what disability looks like. Close your eyes. What images come to mind? Wheelchairs? People who are blind? People who use ventilators to breathe? Who require the care of an attendant? People perceived as trying to game the system?

Disability includes all of those people. But that's not the whole picture. It includes athletes and lawyers and school teachers. It includes first responders who were injured while protecting us. It includes our veterans, who are coming home missing limbs, with traumatic brain injury, and PTSD. More than four million people with disabilities are veterans with service-connected disabilities.<sup>38</sup>

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It includes people with arthritis or other joint-related disabilities. It includes people with memory loss and sensory disabilities. And it includes people with temporary disabilities, whether from a sports-related injury, the effects of chemotherapy, or heart or lung disease.<sup>39</sup>

Case in point: On January 28, 2016, a local bar association's Diversity Committee held an event on the second floor of a building that had no elevator, preventing people with disabilities from attending.<sup>40</sup> Although the Bar was informed prior to the event that this would result in discrimination, it decided to keep the event at that venue because it had already signed a contract.<sup>41</sup>

It begs the question: Would the result have been different had the discrimination been based on race instead of disability? "People would never ask a person of color to enter a restaurant from the back door. So why is it okay for someone who has a disability?," asked NYPD Assistant Commissioner, Carol Ann Roberson.<sup>42</sup>

### Putting the Numbers in Perspective

The International Council of Shopping Centers, National Association of Realtors, U.S. Chamber of Commerce, and Home Depot, among at least fourteen other national and international organizations, have lobbied to pass H.R. 620.<sup>43</sup> While it is not possible to extrapolate exact dollars spent promoting H.R. 620, in 2017 these four groups alone spent \$115 million lobbying on issues, including H.R. 620.

Would people be more responsive if they knew there are more people with disabilities in the United States than there are people of Hispanic or Latino origin, the country's largest ethnic, racial, or cultural minority group?<sup>44</sup> According to the 2010 Census, there were 56.7 million people (19 percent) with disabilities residing in the U.S., compared to 50.5 million people (16 percent) of Hispanic or Latino origin.<sup>45</sup>

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## Spending Power of Americans with Disabilities

The disability market has an annual disposable income of \$544 billion.<sup>46</sup> Friends and family of people with disabilities add 105 million people and \$3.9 trillion in disposable income.<sup>47</sup> That's more than twice as large as the pre-adolescent "tween" market, with almost three times the disposable spending power.<sup>48</sup>

When it comes to travel, adults with disabilities spent \$17.3 billion in 2015.<sup>49</sup> Since people with disabilities typically travel with one or more other adults,<sup>50</sup> the economic impact is actually double, or \$34.6 billion in 2015.<sup>51</sup> Further, people with disabilities spent an additional \$3.6 billion on combination work and leisure travel.<sup>52</sup> Diners with disabilities spent \$35 billion in restaurants in 2003,<sup>53</sup> with more than 75 percent of people with disabilities eating at restaurants at least once a week, spending two to three times more per meal than people who are not disabled.<sup>54</sup>

That's a lot of money non-compliant businesses are missing out on. Maybe enough to get their attention. If your clients are not going to comply with the ADA because it's the law, get them to comply for the money. 

<sup>1</sup> 42 U.S.C. §12101 *et seq.*

<sup>2</sup> 42 U.S.C. §12101 (b)(2).

<sup>3</sup> 42 U.S.C. §12101.

<sup>4</sup> 42 U.S.C. §§12111-12189

<sup>5</sup> 42 U.S.C. §12182(a).

<sup>6</sup> 42 U.S.C. §12182(b)(2)(A)(iv).

<sup>7</sup> Public Law 110-325.

<sup>8</sup> U.S. Small Business Administration and U.S. Department of Justice, *Americans with Disabilities Act ADA Guide for Small Businesses* (June 1999), <https://www.ada.gov/smbusgd.pdf>.

<sup>9</sup> Department of Justice, *Technical Assistance Manual on the American with Disabilities Act*, §III-4.4100 (1994).

<sup>10</sup> 28 C.F.R. §§36.401-36.406.

<sup>11</sup> 42 U.S.C. §12181(9).

<sup>12</sup> 28 C.F.R. part 36 §36.104.

<sup>13</sup> *Id.*

<sup>14</sup> 28 CFR §§36.501-36.502.

<sup>15</sup> H.R. 620 Report No. 115-539 §3.

<sup>16</sup> *Id.*

<sup>17</sup> Letter to Mitch McConnell, March 28, 2018, p. 2.

<sup>18</sup> Department of Justice, Office of Public Affairs (December 21, 2017) <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents>.

<sup>19</sup> "Poe Leads Bipartisan Legislation to Curb Abusive ADA Lawsuits and Improve the ADA," January 25, 2017, <https://poe.house.gov/2017/1/poe-leads-bipartisan-legislation-to-curb-abusive-ada-lawsuits-and-improve-the-ada>.

<sup>20</sup> *Id.*

<sup>21</sup> 28 CFR §36.501.

<sup>22</sup> See *Supra* Note 23.

<sup>23</sup> <https://www.census.gov/quickfacts/fact/table/US#viewtop>.

<sup>24</sup> Minh N. Vu et al., "ADA Title III Lawsuits Increase by 37 Percent in 2016," ADA Title III Blog (January 23, 2017) <https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016>.

<sup>25</sup> Kristina M. Launey and Melissa Aristizabal, "Website Accessibility Lawsuit Filings Still Going Strong" ADA Title III Blog (August 22, 2017) <https://www.adatitleiii.com/2017/08/website-accessibility-lawsuit-filings-still-going-strong>.

<sup>26</sup> <https://talesfromthecrip.org/2017/07/09/this-crip-stays-in-the-picture-a-past-plaintiff-on-opposing-h-r-620-californias-ada-notification-act/>.

<sup>27</sup> H.R. 620 Report No. 115-539 §5.

<sup>28</sup> United States Department of Justice Civil Rights Division, "Department of Justice ADA Responsibilities: ADA Mediation Program." Information and Technical Assistance on the Americans with Disabilities Act. [https://www.ada.gov/mediation\\_docs/mediation-q-a.htm](https://www.ada.gov/mediation_docs/mediation-q-a.htm).

<sup>29</sup> H.R. 620 Report No. 115-539 §4.

<sup>30</sup> H.R. 620 Report No. 115-539 §5.

<sup>31</sup> See *Supra* Note 23.

<sup>32</sup> United States Department of Justice Civil Rights Division, <https://www.ada.gov>.

<sup>33</sup> United States Department of Justice Civil Rights Division, "ADA Information Line." <https://www.ada.gov/inline.htm>.

<sup>34</sup> United States Department of Justice Civil Rights Division, "Information and Technical Assistance on the Americans with Disabilities Act." <https://www.ada.gov/tapubs-pg2.htm>.

<sup>35</sup> ADA National Network, "Contact Your Region/ADA Center." <https://adata.org/find-your-region>.

<sup>36</sup> Jessie Lorenz, "The Americans with Disabilities Act is Under Attack," San Francisco Examiner (December 21, 2017).

<sup>37</sup> Interview March 14, 2018.

<sup>38</sup> [http://factfinder2.census.gov/bkml/table/1.0/en/ACS/14\\_1YR/B21100](http://factfinder2.census.gov/bkml/table/1.0/en/ACS/14_1YR/B21100).

<sup>39</sup> 42 U.S. Code §12102.

<sup>40</sup> San Fernando Valley Bar Association Diversity Committee's "Diversity Mixer" at the Villa in Woodland Hills, California.

<sup>41</sup> Conversation on or about January 21, 2016, between Robin Springer and Linda Temkin, the San Fernando Valley Bar Association's Director of Education and Events.

<sup>42</sup> Losing It, (2001)

<sup>43</sup> [www.opensecrets.org](http://www.opensecrets.org).

<sup>44</sup> 2010 U.S. Census.

<sup>45</sup> *Id.*

<sup>46</sup> Fifth Quadrant Analytics, "The Global Economics of Disability Report," at 4 (April 2013).

<sup>47</sup> *Id.*

<sup>48</sup> Solutions Marketing Group, "Understanding the Market" (March 15, 2016) <https://smgroupblog.wordpress.com/2016/03/15/understanding-the-market>.

<sup>49</sup> Open Doors Organization, "2015 Market Study" (July 31, 2015) <http://opendoorsnfp.org/wp-content/uploads/2016/05/ODO-Study-Press-Release-Final.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Department of Justice, "Disability Rights Online News" (July 2004) <https://ada.gov/newsstr0704.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> Open Doors Organization, "People with Disabilities Will Spend \$35 Billion Dining Out in 2003" (May 16, 2003) <https://opendoorsnfp.org/news/news-items/#prwillspend>.