

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS



Statement for the Record of Karen R. Harned

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Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Committee on Judiciary

Hearing on *"Oversight of the Americans with Disabilities Act of 1990: The
Current State of Integration of People with Disabilities."*

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Chairman Cohen, Ranking Member Johnson, and members of the subcommittee, On behalf of NFIB, I appreciate the opportunity to submit for the record this testimony for the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties hearing entitled, *"Oversight of the Americans with Disabilities Act of 1990: The Current State of Integration of People with Disabilities."*

My name is Karen Harned, and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB proudly represents approximately 300,000 members nationwide from every industry and sector.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Small business owners are proud of the commitment they have made to accommodate the disabled. Since the passage of the Americans with Disabilities Act in 1990, NFIB members have spent millions of dollars constructing and/or renovating their businesses to remove barriers and provide accessible public accommodations.

Unfortunately, thirty-one years after the enactment of the ADA, many small businesses lack clarity about their current obligations under the Act in a changing world. They struggle to understand when and what structural and online changes are required due to the highly-technical nature of the ADA standards as promulgated for brick-and-mortar businesses, no legal standards regarding website accessibility, and private lawsuits as the chief method for enforcing the law.

In my testimony, I will dive deeper into the issues small businesses confront when trying to comply with the ADA and possible solutions.

Complex Regulatory Regimes, Like the ADA, Are Particularly Difficult for the Small Business Owner to Navigate

It is critical that the subcommittee understand the significant headwinds small business owners face when complying with any regulatory regime, particularly one as complex as the regulations that implement the ADA.

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden.¹ This is not surprising since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new laws and regulations, filling out required paperwork, and ensuring the business complies with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with federal regulation is one less hour she has available to service customers and plan for future growth.

In a Small Business Poll on regulations, NFIB found that almost half of small businesses surveyed viewed regulation as a "very serious" (25 percent) or "somewhat serious" (24 percent) problem.² NFIB's survey was taken at the end of 2016, and, at that time, 51 percent of small business owners reported an increase in the number of regulations impacting their business over the last three years.³

Compliance costs, difficulty understanding regulatory requirements, and extra paperwork are the key drivers of the regulatory burdens on small business.⁴

Understanding how to comply with regulations is a bigger problem for those firms with one to nine employees, since 72 percent of small business owners in that cohort try to figure out how to comply themselves, as opposed to assigning that responsibility to someone else.⁵

NFIB's research shows that the volume of regulations poses the largest problem for 55 percent of small employers, as compared to 37 percent who are most troubled by a few specific regulations.⁶

¹ Babson College, *The State of Small Business in America 2016*, available online at <https://bit.ly/3j9STV6>; Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, (September 10, 2014), available online at <http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>.

² Holly Wade, *Regulations*, Vol. 13, Issue 3, 2017, 6, available online at <http://411sbfacts.com/files/Regulations%202017.pdf> (last visited May 16, 2018).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 10.

⁶ *Id.* at 9.

With that as background, I now turn to the small business experience of trying to understand and comply with the accessibility requirements set forth in Title III of the Americans with Disabilities Act.

Difficulty and Expense of Complying with Barrier Removal Obligations

The ADA was enacted “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities [and] to ensure that the Federal Government plays a central role in enforcing the standards” 42 U.S.C. 12101 (b) (2) and (3). Unfortunately, the current regulatory regime does not fulfill the objective of the law.

Title III of the ADA prohibits discrimination on the basis of disability in the activities of places of public accommodations (businesses that are generally open to the public and that fall into one of 12 categories listed in the law, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation -- as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings) -- to comply with the ADA Standards.⁷

Many small business owners rent space in buildings and facilities that were constructed decades ago. Consequently, they are subject to the ADA's barrier removal requirement. The theory behind barrier removal sounds simple: remove barriers where the removal is “easily accomplishable and able to be carried out without much difficulty or expense.”⁸ The reality is that barrier removal is confusing, difficult, and expensive, due to the U.S. Department of Justice's broad view of what constitutes a barrier and the lack of useful guidance on what kind of barrier removal is readily achievable.

DOJ has, in practice, defined a barrier as any element of a public accommodation that does not comply with the extensive and detailed requirements of the detailed ADA Standards for Accessible Design -- a document that even most lawyers have trouble understanding.⁹ To comply, small business owners would have to hire an ADA consultant to figure out what barriers exist in their facility. After making that determination, small business owners must hire lawyers specializing in the ADA to advise them about which barrier removal is “readily achievable,” since the

⁷ 42 U.S.C. 12181 *et seq.*

⁸ *Id.* at 12181 (9).

⁹ Dept. of Justice, “2010 ADA Standards for Accessible Design” (Sept. 10, 2010), (“2010 ADA Standards”), which updated the “1991 ADA Standards for Accessible Design” (July 1, 1994).

complicated multi-factor test must be applied on a case-by-case basis. Indeed, a review of the little case law on barrier removal shows that even an experienced ADA attorney would have difficulty giving a definitive answer about what barrier removal is readily achievable in many cases.

Adding to the confusion, many state and local building codes continue to allow for the “grandfathering” of older facilities. But the 2010 ADA Standards do not. Therefore, it is easy to see why the owner of a small book shop on Main Street can think she is complying with the law and “up to Code,” but really be in violation of the technical ADA requirements for barrier removal.

Therefore, thirty-one years later, it remains very difficult for small business owners to understand existing obligations under the ADA because the requirements are numerous, highly technical, and not always well-known. The ADA Standards and the Revised ADA Guidelines are clearly written by and for ADA technicians, architects, building code inspectors, and lawyers, not for the business owners who must follow them.

ADA Website Accessibility – A World of Confusion

Each day more and more businesses across the country engage in online commerce -- a trend that only grew during the pandemic. As detailed in our recent white paper, “The ADA and Small Business: Website Compliance Amid a Plethora of Uncertainty,” unlike their brick-and-mortar business, no legal standards exist regarding whether the ADA requires businesses to make their websites accessible and, if it does, what standards must be met.¹⁰

Given the ADA’s absence of clear textual guidance on its applicability to the internet, the courts have been forced to weigh in. As we note in our paper, courts have generally found, “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation” in the ADA applies to business websites.¹¹ But they disagree on just *what is required* and neither Congress nor the DOJ have stepped in to answer this important question.¹²

¹⁰ Rob Smith, “The ADA and Small Business Website Compliance Amid a Plethora of Uncertainty” (July 2021), available online at <https://bit.ly/3n8W0xG>.

¹¹ *Id.* at 5.

¹² *Id.* at 3-4, 7-8.

While Congress could amend the ADA to provide clarity and protect small business from ADA compliance lawsuits, it has failed to do so. And, although the ADA originally vested in the Attorney General the power to issue regulations interpreting, implementing, and enforcing the Act's mandate,¹³ the agency has not proposed, much less issued regulations.

Private groups have stepped in to fill the void. "The Web Accessibility Initiative develops web accessibility guidelines, technical specifications, and educational resources to help make the web accessible to people with disabilities."¹⁴ Putting aside the fact that these Web Content Accessibility Guidelines (WCAG) have already been updated three times since December 11, 2008, they are extremely technical and can cost thousands of dollars or more to implement.¹⁵

ADA Enforcement Through Private Litigation

Although the DOJ is charged with enforcing Title III of the ADA,¹⁶ the primary method of enforcement has been through private plaintiffs in the courts. According to the attorneys at Seyfarth Shaw, who have tracked Title III ADA lawsuits for several years, 2021 marks a record high for this type of litigation.¹⁷

NFIB supports the integration of people with disabilities into our society and condemns bad actors getting a free pass when it comes to ADA compliance. However, the reality is the lack of clear standards for barrier removal and website accessibility often results in predatory litigation motivated by financial gain instead of accessibility for the disabled. The problem is real and has been well documented.¹⁸

¹³ 42 U.S.C 12186(b); 42 U.S.C. 12188(b).

¹⁴ Shawn Lawton Henry, *How WAI Develops Accessibility Standards Through the W3C Process: Milestones and Opportunities to Contribute* (2006), <https://www.w3.org/WAI/standards-guidelines/w3c-process/> updated Nov.2, 2020).

¹⁵ Shawn Lawton Henry, *Web Content Accessibility Guidelines (SCAG) Overview* (2005), <https://www.w3.org/WAI/standards-guidelines/wcag/> (updated Apr. 29, 2021).

¹⁶ 42 U.S.C 12186(b); 42 U.S.C. 1288(b).

¹⁷ Minh Vu et al., *ADA Title III Federal Mid-Year Lawsuit Numbers At An All-Time High* (Aug. 18, 2021), <https://www.adatitleiii.com/2021/08/ada-title-iii-federal-mid-year-lawsuit-numbers-at-an-all-time-high/>

¹⁸ Allen Martin, "Serial Plaintiff Turns California ADA Lawsuits Into A Lucrative Cottage Industry" (August 2, 2021), <https://sanfrancisco.cbslocal.com/2021/08/02/serial-plaintiff-turns-california-ada-lawsuits-into-lucrative-cottage-industry/>; Lauren Markham, "The Man Who Filed More Than 180 Disability Lawsuits," *New York Times* (July 21, 2021) https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html?mc=aud_dev&ad-keywords=auddevgate&gclid=Cj0KCOjwtrSLBhCLARIsACh6RmiloD7RBSIQXMeMiA9h_Qi0WNfj5GKr1wiOKX3IG4a2N1HekLwXjsIaAo0gEALw_wcB&gclid=aw.ds (updated Aug. 29, 2021); Sam Stanton, "Serial ADA Filer in California Submits 1,000 Complaints After Indictment on Tax Charges," (June 22, 2021) <https://www.sacbee.com/news/local/article250786089.html>; Emily Mibach, "Judge Quickly Stops Frequent ADA Plaintiff From Suing Three Local Businesses," *Palo Alto Daily Post* (July 13, 2020); <https://padailypost.com/2020/07/13/judge-quickly-stops-frequent-ada-plaintiff-from-suing-three-local-businesses/>;

In addition to these reports, over my nineteen years at NFIB I have heard from countless members who have been hit by these lawsuits. Here's a recent story I received highlighting the issues associated with website accessibility and the litigation that follows.

I am a small business, employing only 13 people full time (with an additional 10 employees seasonally). We roast, season, package, and ship Gourmet Virginia Peanuts. We are located in what is categorized as an economically depressed area.

I have two websites on which I sell our roasted peanuts. I have been sued by two different plaintiffs represented by two different New York City law firms in New York Federal Court. Both are class action lawsuits requesting jury trial on the grounds that neither of my websites are accessible to blind people. My lawyers are saying that there is no standard listed in the ADA, but that judges in New York are interpreting the law to include websites as "places of public accommodation," which would, therefore, fall under Title III of the ADA.

I have always been one to study up and follow the laws as it pertains to my business -- we try to do things the right way. In this instance, there is NOTHING in the ADA that specifically addresses web sites. More concerning is that the ADA does not lay out specifically what standard a website has to meet. My biggest concern (apart from the out-of-pocket expense my lawyers are recommending I settle for), is that the settlement will lay out a standard I have to meet to be compliant. What happens if the DOJ sets a different standard? How am I, as a business owner, supposed to be compliant with a standard that does not yet exist? And how can I be sued for that? I have tried to warn anyone I know who sells online that these lawsuits are being filed, but a few of my competitors have already been served with the exact same lawsuits from the same plaintiffs.

It is all very frustrating for me, as you can see. Thank you for your efforts and thank you for listening.

The high cost associated with litigation that results from confusion over ADA requirements does nothing to improve access for disabled customers. But litigation over even the slightest deviation from complicated ADA guidelines or worse, website “standards” that don’t even exist, can prove disastrous for NFIB members and the millions of small businesses across the country, who do not have compliance officers or attorneys on staff.

Solution

As we look past problems and toward solutions, NFIB strongly encourages Congress to enact legislation that was introduced in the last Congress, the ADA Education and Reform Act of 2017. This legislation would provide small business owners time to remedy alleged Americans with Disabilities Act (ADA) violations before being forced into a settlement or a legal challenge. The legislation would give well-meaning small business owners, who have no in-house compliance officers or lawyers and may not even know where to go for outside counsel, a chance to remedy an alleged ADA violation before being sued for noncompliance.

Finally, Congress should pass legislation clearly defining its intent with regards to websites under the ADA. Small business owners need a clear and easy-to-understand standard in order to comply with the law and avoid opportunistic lawsuits.

Conclusion

Accessibility makes good business sense. Small businesses understand the importance of ensuring access for people with disabilities. A small business cannot afford to lose an employee and it cannot afford to turn away a customer. But small businesses also cannot afford the costs associated with hiring an ADA consultant or defending the business against a lawsuit. The ADA needs to be clarified and enforced in a manner that benefits the disabled by providing access without putting well-meaning small business owners out of business.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.