

Mid-Atlantic ADA Center
Podcast: ADA Today – Episode 2
Notification Acts and H.R.620
Speakers: Caleb Berkemeier, Host, ADA Today,
Nancy Horton, Information Specialist

(Music)

>> CALEB BERKEMEIER: Welcome to ADA Today, a podcast of the Mid-Atlantic ADA Center. I'm your host Caleb Berkemeier, and we're coming to you today from the recording studio here at Transcen, Inc. in Rockville, Maryland. Today's episode is about the ADA Education and Reform Act, also known as HR620. This is not a new piece of legislation and there hasn't been any action on it recently, but we wanted to talk about it now because it provides an opportunity to analyze both the complexities of these kinds of notification bills and the commentary about the bills that tends to obscure these complexities.

Now I want to say from the outset that we recognize HR620 has been a controversial issue, so we think it's important that we make it clear that our purpose is to analyze the issue, not advocate for a position. We don't take a position on this bill, nor do we take political stances on any issue, because we're a non-partisan center whose mission is to educate about the ADA. That's what we'll be doing in this episode.

To help me talk about the ADA Education and Reform Act, I have with me our Information Specialist here at the Mid-Atlantic ADA Center, Nancy Horton. Nancy, welcome to the podcast.

>> NANCY HORTON: Thank you, Caleb.

>> BERKEMEIER: I thought that maybe where we should start is with an overview of the bill itself, a summary of its legislative history, just in case anyone hasn't heard about this piece of legislation. Maybe you could start by telling us what is the ADA Education and Reform Act?

>> HORTON: It's a bill. It was introduced a couple of years ago, at this point, that seeks to do a couple of things. It seeks to amend Title III of the ADA, to require that individuals with disabilities that encounter structural barriers in places of public accommodation - private businesses that offer goods and services to the public, places like stores and restaurants and a variety of private businesses - that individuals that encounter barriers in those businesses would have to provide a notice to the business owner, the business operator before they could file a lawsuit about those barriers. The bill also seeks to require additional education to be provided to the public about the ADA and Title III. It has those two basic components in the bill.

>> BERKEMEIER: And what kinds of waiting periods are required with this bill?

>> HORTON: Well the bill requires, again, that an individual who encounters a barrier and is therefore unable to access goods and services provide a notice to the business, as I said, and give the business an opportunity to respond to the notice, to correct the barrier – to remove the barrier. Once the notice is given – once the notice is received by the business, they would have 60 days to provide to the individual a description of what they're going to do to address the barrier; to remove the barrier.

>> BERKEMEIER: and what happens if the business doesn't respond to that?

>> HORTON: If the business doesn't respond or presumably if they respond saying that they are not going to address the barrier for whatever reason, then after a certain amount of time, the individual would have the right to file a private lawsuit because they would have met that requirement of giving the notice and giving the business the opportunity to remove the barrier.

>> BERKEMEIER: How is that different from the way things are right now?

>> HORTON: Well, under Title III of the ADA, since the beginning of the ADA, there has always been in Title III what's known as a private right of action, which is the lawyerly way of saying people can file a private lawsuit really immediately if they want to. If an individual were to go to a store, for example, and encounter some sort of a structural barrier, they could if they wanted to and had the means to do that, they could file a private lawsuit on their own against that business the next day.

>> BERKEMEIER: Is this the first bill of its kind?

>> HORTON: No, not at all. In fact, there have been a few similar bills introduced over the years. The very first one was introduced many, many years ago at a different Congress. It was actually called something to the effect of a Notification Act. And that's why certain folks, old timers, some of us that have been around working in the field of the ADA for many years tend to call these types of bills Notification Acts in general. The very first one – the first Notification Act was much broader than the current one. It really sought to limit the ability to file private lawsuits without providing notice much more broadly than this one does. A bill really essentially just like this one was introduced in the Congress previous to this one. There have been a few of these bills over the years.

>> BERKEMEIER: What's the current status of this bill?

>> HORTON: This bill has been passed by the House. It was passed by the House about a year ago, actually, at this point. That is really kind of significant

because none of the other bills previously have really gotten as much traction as this one has. It has been passed by the House. The Senate, however, has not taken any action on it at all.

Some of the Senators – Senator Duckworth, a senator from Illinois, together with a number of her colleagues in the Senate, they've written a letter – they wrote a letter to express their strong opposition to the bill and really urging the Senate not to take the bill up, not to consider it, because there is such strong opposition to it. The fact that they haven't taken any action, of course, doesn't necessarily mean that they won't. Sometimes Congress, of course, as we know, does take time to move things forward. The fact that they haven't taken action recently doesn't necessarily mean they won't, but certainly it's clear that there is some pretty strong opposition to the bill in the Senate.

>> BERKEMEIER: Yeah I assume that's why none of these Acts have never gotten passed in the past.

>> HORTON: Yes, and of course in the past there has also been a lot of opposition in the community and a lot of people with disabilities and disability advocates oppose this bill and similar bills and have done a lot of advocacy work trying to get their elected representatives to oppose the bill or not support the bill, certainly there is never consistency among any community. Certainly not everyone with a disability or every disability advocate opposes the bill, but many do, and many opponents have been very vocal about that.

>> BERKEMEIER: It sounds like based on what you're saying that even if this bill doesn't go anywhere, there could still be a new Notification Act on the horizon. It seems like this is an issue that probably is not going to go away?

>> HORTON: It certainly would seem that way. The reason these bills continue to be introduced is because elected representatives get, of course, a lot of input from people who want these kinds of bills and want these kinds of changes to the ADA. Businesses and business organizations, many of them are really pushing legislatures at federal and state levels to address what they perceive as problems with this particular aspect of Title III, where individuals can file lawsuits without providing a notice to businesses. Many businesses think that there should be. There should be a notice requirement.

>> BERKEMEIER: This might be a good place to turn to the commentary that surrounds the bill. There's a lot of stuff out there that has been written. I think that for this episode, we'll focus mainly on two pieces of commentary. One from Representative Ted Poe in an op-ed he wrote in support of the bill. And I believe he introduced the bill, correct?

>> HORTON: Yes he did. And he introduced the previous one as well.

>> BERKEMEIER: And then secondly, the letter that Tammy Duckworth with her colleagues sent to Mitch McConnell and the article that is on her website in her newsletter, where you can find that letter.

We'll focus on these two sources mainly for this discussion, because they really do contain probably most of the arguments for and against this bill.

Let's start with the op-ed written by Ted Poe. We'll just go through and highlight some of the arguments that he's making and see what your analysis is of his claims.

One big thing that he's addressing in this op-ed is that the Notification Act is needed because of what he's calling drive-by lawsuits. I wonder if maybe you could give us a description of what that means?

>> HORTON: The so-called drive-by lawsuit has sort of earned its nickname because of the practice of literally driving by a business and taking note of barriers that you can spot by doing that – by literally driving by. So a lot of these lawsuits in the earlier days, years ago, a lot of them were focused on parking – accessible parking – because it's something you can see if you just drive by. You can see if they don't have any accessible parking, or it isn't properly configured or it doesn't have the appropriate signs, or things like this. So it came to be known as the drive-by lawsuit when somebody would file a lawsuit without necessarily even attempting to enter the business, or access goods and services, or interact with the business operator.

Now today, we are seeing sort of an expansion of that, especially as we move more and more into the digital age here and we now have the so-called Google lawsuits where people go on Google Earth and look at satellite images of properties and can do something similar where they can identify barriers that are easily seen, things like parking in surface lots of whether there are lifts on swimming pools; things of that nature, and then filing lawsuits, again, perhaps never trying to enter the business. And in some cases, without even having to do the drive-by. So a lot of this issue is around the so-called drive-by lawsuits and many businesses are upset by this because they feel that these lawsuits, some of them are not sincere, the individuals aren't really trying to come and do business there.

>> BERKEMEIER: So when it comes to drive-by lawsuits, I've read a lot of arguments from opponents of this bill that either these kinds of lawsuits are exaggerated, like there aren't as many of them as supporters want to say that there are, or that a lawsuit, regardless of how it happens, is targeting a legitimate issue, so there shouldn't be a problem here at all.

>> HORTON: Well, I think it's a really interesting issue and it sort of involves a number of factors that we probably want to talk about a little bit. It's difficult to say

if based on statistics, how many lawsuits might lack merit or have merit or be brought in good faith, or not be brought in good faith. Statistics do tell us one thing, in that many lawsuits that are filed under Title III, are filed by a relatively small number of plaintiffs. It's certainly clear that a relatively limited number of plaintiffs are bringing a large number of lawsuits. That fact alone doesn't necessarily mean that those lawsuits lack merit, that they are not identifying real barriers in the real world. Whether those individuals who are bringing those lawsuits are really in fact bringing them in good faith and they really have standing to bring those lawsuits – in other words, they are people who really want to be customers or have been customers or would be customers of a particular business if it weren't for the barrier that they are identifying is something that - statistics don't really tell us that. We can't really make judgments about the merit of a lawsuit or whether the individual is bringing it in good faith, based on those numbers. But there certainly have been at least some indications that at least some of these lawsuits are being brought not in good faith. There have been a couple of instances where plaintiffs and even attorneys have been sanctioned by courts because their lawsuits, their filings are clearly not sincere; they're so sloppy they have misinformation in them. Clearly they appear sort of boilerplate types of filings that make it pretty clear that the plaintiff is not really a person would, could even potentially become a customer.

>> BERKEMEIER: Could you talk about what a demand letter is and what happens when a business receives one?

>> HORTON: A demand letter is really essentially a notice. It is sort of a type of a notification, which is what this bill seeks to require. There really are sort of a couple different – there are different types of what we might call a demand letter. Some demand letters might look pretty much like what this bill seeks to require: it's very specific, it identifies specific barriers, it describes them in some detail so that a business operator would be able to go and look at their space or their element or their parking or their restroom, what have you, and understand what the barrier is that the person is talking about, and says, this is a problem for me, I can't come in and do business with you, and if you don't fix this or talk to me about it, I'm going to sue you. That really is sort of a type of demand letter, but we also see demand letters that basically may demand money, may threaten legal action, may not really identify a barrier with much detail, but just something along the lines of, your business has got barriers or it's not accessible and if you give me some money, I'll leave you alone, and if you don't I'll sue you; something of that nature. So it's kind of a range of what folks tend to call demand letters.

>> BERKEMEIER: So when a business gets a letter like this, what do they typically do? Do they go through the process that the ADA lays out, or does something else happen?

>> HORTON: A couple of things could happen. I'm not even sure there's a typical sort of reaction to these. Some – and of course, it depends on the nature

of the demand later – but the ones, the demand letters that a lot of business feel are really not being provided in good faith; they're really just looking for money and they're not really seeking to improve accessibility. This kind of thing is -some business will pay that money because it's literally – it costs them less money to give somebody whatever it may be, a few hundred dollars, a couple thousand dollars than to either fight the lawsuit – defend themselves against the lawsuit, and/or fix the barrier. Of course, the problem with that is if they have given somebody money just to leave them alone, then the barrier is still there, and the business has spent their money, the barrier still exists and now the business has less money to deal with the barrier, and the business is still liable to the next person who may come along and either be affected by the barrier, or make another similar demand.

If it's a demand letter that's more like the kind of notice that this bill seeks to require, then sometimes that may spur the sort of interaction that could potentially deal with the barrier and get the barrier removed, or help the individual understand why there may be some limitations that prevent the removal of the barrier, or that sort of thing. There might be an interaction that could have a more positive outcome for everyone: the barrier gets removed, the individual can now do business at this business, the business owner has now improved accessibility, they've expanded their customer base, and that sort of thing. There is sort of a range of what happens when a business gets a letter like this.

>> BERKEMEIER: Let's turn to the opponents of HR620 and the Duckworth letter. I've noticed a sentiment that's common in many of the pieces that oppose this bill. They typically say something along the lines of: this bill will gut enforcement of the ADA. That's actually a blurb in the article that appears on Senator Duckworth's newsletter.

What is your assessment of that claim? Would this bill gut enforcement of the ADA?

>> HORTON: Well, technically I think no, it really doesn't gut enforcement of the entire ADA. I think that whether it's opponents or proponents of this bill, I think people feel strongly; they're passionate about these issues, and I think that's why we get a lot of the really passionate debate that we get. I think that's understandable.

The reason that some of the opponents of this bill have this perspective is not necessarily just based on the technicality of the bill, but the perception of the bill. As most of us know, we human beings, we act based on our perceptions.

So there's no doubt that this bill would roll back the options that individuals with disabilities have for enforcement under Title III. It creates a delay in their ability to bring a private lawsuit, so it's definitely a reduction, if you will, a rollback of their

rights in that sense, and people feel strongly about that. Not only because it rolls back rights a little bit.

But I think that it's important for all of us to understand that sort of technical side of the bill as well and what it really says and seeks to accomplish. It's a pretty narrow bill. The bill does not affect the actual barrier removal obligation in Title III. It doesn't actually change the fact that businesses are required to remove barriers under Title III when it's readily achievable to do so. And the bill doesn't affect at all either the provisions or the ability to file lawsuits or take other action under any other part of the ADA – anything else that Title III addresses, including the requirements for construction and alternations to be accessible under Title III, all the other requirements related to the operation of businesses for businesses to generally not discriminate against people with disabilities, to make reasonable modifications in their policies, to provide aides and services that might be needed to communicate effectively with individuals who have disabilities related to hearing or vision or things of that nature. It doesn't affect any other part of Title III, nor does it affect in any way shape or form the other titles.

>> BERKEMEIER: That's a really interesting point, the fact that the obligations overall remain the same. I'm wondering though, in practice, what happens when there is a Notification Act introduced? I noticed that a lot of the opponents of the bill say that if there is Notification Act, there won't be the same incentives for businesses to do the barrier removal that they should always be trying to do regardless of whether someone who is disabled comes into the business and makes the barrier clear. If a notification is required first, then businesses can just sit around and wait until they get the letter. Opponents say this means that people who are disabled have to experience the humiliation of encountering a barrier and then educating the owner of the business, who is responsible for that barrier to have it removed. In practice, the incentives are removed. What do you think about that?

>> HORTON: I think as it stands and as it has always been under Title III, businesses are supposed to be proactive. They aren't supposed to wait until someone comes along and encounters a barrier and is maybe excluded or is not able to access goods and services. Businesses are supposed to be proactive.

>> BERKEMEIER: I want to move to another argument that opponents will reference when it comes to the 120 days that a business has to address the barrier of which they have been notified, at the very least they have to have made substantial progress in removing the barrier. What does substantial progress mean, though?

>> HORTON: I'm not sure anyone knows that. It's just sort of a term that's in the bill. I don't think it really is defined or quantified or anything of that nature. I think this is one of the concerns that many folks have about the bill, is that this

will simply be another point of contention; something else for folks to argue about and courts to wrangle with: what does that mean? What does substantial progress mean?

It's a vague term but I think it's probably purposefully so. The ADA itself found the regulations for the various parts of the ADA have a lot of similar types of terminology and concepts, and I think that some of that stems from the nature of the ADA itself, the nature of disability and all of the issues that the ADA addresses. Disability is a much more individualized experience than some of the other protected classes under other – for example, Civil Rights Act which protects people in various classes, depending on things like race and religion and national origin and some other factors that are usually much more straightforward.

When we're talking about disability and accessibility, we get into a whole range of factors that we don't necessarily have to deal with under other Civil Rights laws. So it's a bit different when we talk about barrier removals specifically in existing buildings, we're talking about a wide range of activities. We're talking about anything from changing the doorknob to completely redoing a restroom or building a ramp or doing any number of construction and alteration sorts of activities. So to address a barrier could be something relatively quick and easy to accomplish, and it could be a big project that would take much more time and would have to be planned around all kinds of factors, including business-related factors that have to do with the disruption of the business, while maybe some construction-type work takes place; weather factors, things that need to wait until the ground thaws in the Spring – there are just all kinds of factors that could be involved in removing a barrier.

So I suspect that this language is designed to sort of allow for the kind of flexibility that we find in other parts of the ADA to enable more real world based solutions to this wide variety of issues that we're attempting to address.

>> BERKEMEIER: I've also noticed in some of the articles that the notification has to provide a citation that the part in the ADA that it violated and therefore people would have to use lawyers to be able to send these notifications. Is that a part of the bill, and do you think that lawyers would be required to send the notifications?

>> HORTON: I don't necessarily think so. The language in the bill basically says something to the effect that the notice has to be in writing, and it has to be specific enough to enable the business owner or operator to identify the barrier.

It doesn't specifically say that it has to quote section numbers and have all kinds of – there's nothing that really specifically indicates that it would have to be done by a lawyer – the notice. It certainly could be, but I don't know that it necessarily has to be. I think this is another one of these sort of double sided

arguments in that from the business perspective, if an individual with a disability is really aware of, has encountered a barrier that is preventing them from reasonably accessing goods and services, then shouldn't the individual be able to basically describe that experience, that barrier? Your door is too narrow; your lavatory is too high. With enough detail in normal, common, layperson-type language to enable the businessperson to understand what they're talking about; what they're referring to.

And again, this whole aspect of the bill that talks about education being available, something that we like to remind folks of is there is a lot of information already available to the public. To businesses and to people with disabilities and others – anyone who is interested – there is information available. That cuts both ways. A business should be able to find out about the ADA standards; they're out there, they are online, there are places they can call, like ADA centers to get information, to get materials, to learn about the ADA standards, to find help and how to assess facilities and learn about the standards and everything. And that information is available to individuals with disabilities as well.

>> BERKEMEIER: So as we conclude our conversation, I wanted to ask you one more question that's a little more broad, a little more overarching. I'm getting the sense as I read arguments opposing bills like the ADA Education and Reform Act that advocates and people in the disability community tend to assume that any barrier to access is a violation of one's civil rights. They seem to also further assume that the ADA is on their side; it backs them up in that belief.

I'm curious if you think that's actually the case. Are all barriers violations?

>> HORTON: Well, no, and that's a very good point that I think is often overlooked in the debate about this bill. There is, if you read the bill, and you read all of these articles on the debate back and forth, nobody really seems to be addressing the fact that under Title III of the ADA, barrier removal is only required when it's readily achievable. That is another one of those - call it vague or call it flexible (laughing), as you prefer, sort of concepts in the ADA.

The ADA and the regulations and the standards have always recognized that it's not reasonable and it's not always possible to achieve a sort of new construction level of accessibility in existing buildings. Readily achievable barrier removal is what applies to existing buildings. They're not being altered, we're not talking about new construction, or even alteration, they're just sitting there and the business is operating.

Readily achievable takes into account both structural conditions and financial resources of the businesses. Structural conditions are usually things that don't change over time. If there are structural conditions that really limit or prevent the removal of barriers, that could range from something as simple as there is just not room to build a ramp or install a lift to overcome a couple of steps or a few

steps or something and it's really just not possible of the context of the building and the site and the surrounding structures and all of those kinds of issues so it can't be done. It includes considerations for things like historic significance of historic properties, things that shouldn't be torn out or torn down. There are all kinds of factors that need to be considered in specific situations.

There are barriers that are out there in the world that are going to stay there because it's not readily achievable to remove them, perhaps only at this time, if it's a financial resource limitation, the barrier removal might be readily achievable at some point in the future but it isn't now. There are cases when barrier removal will never be achievable because it's a structural issue or an issue that is just never going to change and can't be overcome. Those barriers really are not violations of the ADA. The ADA doesn't say we have to knock down all the existing buildings or stop using them. We're going to continue to use them.

That, I often find, is sort of a missing piece of this whole debate, or the understanding of the whole idea of barrier removal under Title III.

>> BERKEMEIER: This has been a really enlightening conversation. One thing I've definitely learned from it is that these issues are complex; the ADA is a complex law, and reforms to the ADA are going to be complex as well. It's probably good for all of us to remember when we're reading things about the ADA or reform acts to always think about how maybe what's being put out there in terms of commentary doesn't quite capture all of the complexities of what is going on.

Do you have any final thoughts that you'd like to leave us with, Nancy?

>> HORTON: I guess I would say that – and as you said before, Caleb, we are not proponents nor opponents of this particular bill or bills like it. That's not our role. Again, I would like to reiterate, there are sources of ADA information and education available; sources that are free, that are readily available. There are the regional ADA Centers, the Department of Justice operates a toll-free telephone center, as do the ADA Centers, they have all kinds of technical assistance material available. The US Access Board is a great source of information about building standards, about facility access. There is a lot of information out there that can help people with disabilities, businesses, interested parties in learning about accessibility, about the ADA standards, and maybe help folks do better and interact with each other and move towards solving accessibility problems.

>> BERKEMEIER: Nancy, thanks for joining us.

>> HORTON: Thank you, Caleb.

(Music)

>> BERKEMEIER: ADA Today is produced by the Mid-Atlantic ADA Center and is part of WADA podcast network. You can find our sister podcast, ADA Live, at ADALive.org. For questions about the Americans with Disabilities Act, call the ADA National Network toll-free at 800-949-4232 and visit our website at ADAinfo.org.

The Mid-Atlantic ADA Center is a grant-funded project operated by Transcen, Inc., whose mission is to improve the lives of people with disabilities through meaningful work and community inclusion. Find out more by visiting transcen.org.