

ADA Litigation is on the Rise and Small Businesses are Being Targeted

By Dan Ballesteros and Justine Cannon

Recent years have seen a marked increase in the number of lawsuits filed against businesses and building owners for violations of the Americans with Disabilities Act (ADA). Earlier this year, we made a presentation to the San Jose Downtown Association, which held a special meeting about a “serial plaintiff” who had filed ADA lawsuits against 75 local businesses. This plaintiff, John Ho, had already made his way through Southern and Central California, collecting hundreds of thousands of dollars in settlement from business and property owners.

John Ho is not alone. There are several “serial plaintiffs” throughout California bringing formulaic lawsuits alleging accessibility violations, sometimes without even actually visiting the business. California has 40% of the nation’s ADA lawsuits but only 12% of the country’s disabled population.

Current Federal and State Laws

The federal ADA, and state law — including the Disabled Persons Act (DPA) and Unruh Act — privatize the process. Instead of using taxpayer money to hire government inspectors to ensure ADA compliance, such laws allow private citizens to sue property owners and businesses and demand repairs.

Federal and state accessibility standards must be adhered to every time a commercial or public building or area is designed, built, remodeled, or repaired. Accessibility standards cover everything from the maximum slope allowed in a parking lot to the allowable height of a customer counter. California’s standards are, of course, stricter than federal.

Legislative Help?

In 2012, Senate Bill (SB) 1186 aimed to curb ADA lawsuit abuse by providing some limited protections to defendants. SB 1186 identifies circumstances in which business and property owners can reduce — but not eliminate — statutory damages by completing repairs within a prescribed period of time, or by participating in the CASp inspection process (*see Kim Blackseth’s inset article*).

What Constitutes a Violation?

Many estimate that less than 5% of California businesses are in complete compliance with accessibility laws. Even minor violations — a bathroom mirror installed slightly too high, or a display rack too close to a door — can be violations. The most common violations relate to accessibility in parking lots, paths of travel, and restrooms.

Why Should you Hire a CASp?

by Kim R. Blackseth

A Certified Access Specialist (CASp) has been tested and certified by the State of California. A CASp will know which standards apply to your property based on the age of your facility and its history of improvements. Only a CASp can provide services that offer you “qualified defendant” status should a claim be filed against you. You can retain the services of a CASp at any time; however, you will benefit the most if inspection services, including the delivery of a CASp Inspection Report, occur before a claim is filed against you.

You are not required to hire a CASp. An election not to hire a CASp is not admissible in court.

After an inspection is completed, a CASp will issue a Disability Access Inspection Certificate. While you are advised to keep the report itself confidential, the certificate is offered to you as proof that you are a holder of a CASp report. Proponents suggest that posting the certificate acts as a deterrent to ADA plaintiffs.

Kim R. Blackseth, Interests, Inc., has provided ADA and accessibility consulting for 24 years. Kim is CASp certified and has received many honors and appointments. If you would like to schedule a CASp inspection, or if you have questions about the CASp process, please contact Kim Blackseth at kimblackseth@mac.com.

Does a Plaintiff Have to Give Notice Before Bringing a Lawsuit?

Currently, no pre-litigation notice is required - but legislators are working on it. H.R. 994, or the "ACCESS Act," was introduced in March 2013 by Rep. Ken Calvert. The bill would require written notice to a business owner, specifying the alleged violations, before filing a lawsuit. It would then give the business owner 120 days in which to repair the conditions. If timely completed, a lawsuit would be prohibited.

H.R. 994 is not yet law. For now, the first notice of an ADA lawsuit will usually be service of a complaint.

What Will it Cost an Owner?

A plaintiff can require that a business owner remedy any and all violations at the premises. California law allows a plaintiff to recover actual and statutory damages. The DPA and Unruh Act allow a plaintiff to recover from \$1,000 to \$4,000 *per offense*.

A prevailing ADA plaintiff is also entitled to recover reasonable attorneys' fees. Thus, in addition to paying your own lawyer, unless you prevail on every claim, you will also have to pay the plaintiff's lawyer. In a recent case involving a local restaurant, the restaurant and the landlord successfully argued that the hydraulic lift demanded by plaintiff was not "readily achievable." Unfortunately, the judge decided that the restaurant should have offered curbside service to accommodate disabled patrons. The plaintiff was awarded only \$14,000 in damages, but the defendants had to pay not only their own lawyer, but more than \$750,000 in fees and costs to reimburse plaintiff.

Can a Business Successfully Defend an ADA Lawsuit?

It is certainly possible to obtain a defense verdict. Clint Eastwood did! Defense verdicts happen when the repairs sought by plaintiff are not "readily achievable." This is especially true in older or historic buildings. Similarly, plaintiffs must demonstrate they were actually at the property for a business purpose. This may be difficult where the same plaintiff has filed numerous lawsuits involving the same limited time period.

How Can a Business Insulate Itself From ADA Lawsuits?

Compliance with accessibility standards is the ideal protection. Although compliance does not prohibit a complaint being filed, completing the CAsP inspection process is a strong deterrent as certification may be displayed.

If your business is served with an ADA complaint, it is important to seek the counsel of the right attorney who can assess the validity of the plaintiff's claims, find your strongest defenses, negotiate the best possible outcome, and, if necessary, strongly represent your interests at trial. Contact Dan Ballesteros or Justine Cannon for assistance with ADA issues and litigation.



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The Fine Print.

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