



Part Three **ADA Lawsuit Prevention Strategies**

In February 2012, a notorious “drive-by” litigant, attorney Scott N. Johnson, a quadriplegic, sued a housing provider in Vacaville, California. He claimed he twice tried to go to a Vacaville apartment complex “but had to turn away both times because he saw architectural barriers.” (See <http://www.dailyrepublic.com>)

Johnson has filed scores of similar lawsuits against Northern California businesses including more than 1,000 ADA lawsuits since 2003.

Johnson and others who sue for access violations often win and will likely continue winning unless property owners and commercial tenants become proactive in making sure their buildings comply with access laws.

This article will discuss ways small business owners (commercial and residential rental property owners, and commercial tenants) can become access compliant and will lay out strategies to consider when making decisions about how to respond to lawsuits that are lodged against them.

Assess and Evaluate Your Current Situation; Do a Walkthrough

The first step to avoiding litigation is to become access-compliant. Access compliance means making sure the areas of your building and property open to the public are accessible by the disabled community. This task may be easier said than done depending on the circumstance. Sometimes, all it takes to become compliant is moving a barrier like a garbage can away from a doorway, as was the case with Mr. Guerrero described in Part One of this series. In most other cases, however, owners may need to make physical changes, alter policies and practices, and evaluate costs and financial resources of the building and property that are considered to be open to the public. Contractual obligations between commercial landlords and commercial tenants may also need to be reviewed and modified.

Thus, it is highly recommended that one of the first things an owner should do is conduct a walkthrough of the property with an ADA expert. At the very least, obtain some educational material about ADA standards, such as the “ADA Guide for Small Businesses” (download from www.ada.gov), and determine if the property (or area on the property) requires ADA compliance.

Areas of Your Facility That Require Close Attention

Successful accessibility is often measured in inches. Thus, attention to detail can be the difference between access compliance and a hundred thousand dollar lawsuit. The following is a partial list of access areas that small business owners subject to access laws in California should pay close attention to:

- Accessible Parking and Ramps
- Accessible Entrances
- Doors at Entrance to Building
- Sales and Services Counters
- Proper Signage
- Publicly Accessible Bathrooms
- Path of Travel

The “ADA Guide for Small Business” suggests the following:

When deciding which barriers to remove first, we suggest that you first provide access to the business from public sidewalks, parking, and public transportation and then provide access to the areas where goods and services are made available to the public. Once these barriers are removed, you should provide access to public toilet rooms (if toilet rooms are provided for customer use). When these barriers have been removed, it may be necessary to remove any remaining barriers including those that limit use of public telephones and drinking fountains.

Moreover, compliance issues are particularly important when alterations, improvements or additions take place. Because retrofits can be costly, and can include a variety of projects and expenses, new additional obligations that did not exist before may be triggered to make the facility more accessible. Owners should do their homework and engage consultants familiar with disability access prior to embarking on such projects.

Hire a Certified Access Specialist (CASP) or Other Knowledgeable Professional

One of the best ways you can protect yourself against a lawsuit is by hiring a CASp inspector or other such professional (i.e. architect, contractor) with experience and knowledge in access compliance, to review your building or property. CASp inspectors in particular are professionals whose primary service is to inspect buildings to determine whether and to what extent the building is in compliance with federal and state access laws. They will draft a report either certifying that the

facility complies with federal or state access laws, or explain the areas in which the facility is out of compliance.

It should be noted, however, that reliance on the opinion of a professional like a CASp inspector is not an affirmative defense in court. Therefore, hiring a professional to assess your building will not guarantee immunity from liability. Still, hiring a CASp inspector is an important step to becoming access complaint. CASp inspectors can help property owners and commercial tenants understand access requirements and help them prepare to make modifications to the building or property.

An additional benefit to hiring a CASp inspector is that if you are sued in a California state court, having a CASp inspection report in hand stalls a lawsuit from moving forward for three months, and makes the business owner eligible for an “early evaluation conference” (EEC) with the court. The EEC program stalls litigation in order to bring the parties together to resolve the complaints alleged. According to Peter Margen of Margen and Associates, a longtime CASp inspector, the EEC program has been a helpful aid in settling lawsuits. He also notes that because the EEC involves a judge’s review of the case, the program serves to limit frivolous lawsuits and those that lack merit

As a general rule, CASp inspections and the reports provided by the inspectors are inexpensive, confidential, detailed, and easy to understand.

Defense Strategies If You Are Sued

All is not lost if you are sued. Strategies exist to minimize the impact, or get the claim dismissed all together.

1. Demand Letters

A pre-litigation technique used by plaintiffs and their attorneys is the sending of demand letters threatening to sue unless a settlement can be reached or money is paid. As discussed in Part Two, California’s new law, SB 1186, places significant limits on these pre-litigation letters. Of significance, attorneys may no longer demand money. Any pre-litigation letters sent by an attorney must contain the attorney’s bar number, a plain language explanation of the specific access barrier the individual encountered, where it was encountered, the way the barrier interfered with the person’s full and equal use or access, and the date or dates the incidents occurred. Attorneys must also apprise recipients of their legal rights. For a full description of the new attorney and demand letter restrictions please read Part Two.

If you receive a pre-litigation letter, the first thing to do is consult an attorney who is experienced or knowledgeable in matters relating accessibility.

2. Damages

Plaintiffs who lodge state-based claims may sue for a minimum damage amount of \$4000 regardless of whether the violation is minor or easily curable. Under SB 1186, however, you can reduce the minimum damage amount to \$2000 or as low as \$1000 if you correct the violation within a certain period of time and meet other qualifications such as hiring a CASp inspector or qualifying as a small business. (See Part Two of this ADA Article Series.)

3. Delaying the Proceedings and Early Evaluation Conference

If you are a small business or if your building has been CASp inspected, and you have been hauled into a California court to defend, you can delay the proceedings for 90 days and seek an early evaluation conference. (See Part Two of this ADA Article Series.)

4. Federal Claims; Federal Court

There are pros and cons to being sued in federal court, or based on a federal claim. For claims filed in a federal court, a CASp inspection report does not get you a 90-day stay or an early evaluation conference. But note, unlike a state claim, when a federal ADA claim is lodged, plaintiffs are not entitled to damages. Additionally, when violations of federal ADA law are corrected, the federal claim will be dismissed! Unfortunately, a court may still require you to pay the plaintiff's attorney's fees.

If you are sued in the Northern District of California, a federal court that covers San Francisco and the greater Bay Area, there is a special procedure that governs access-related ADA claims called "General Order 56." The procedure calls for a joint inspection of the facility at issue, negotiations for injunctive relief, referral to mediation, and a case conference prior to commencement of any trial. Parties often settle their disputes through this process.

5. Motion to Find Plaintiff a Vexatious Litigant

If a plaintiff who you know is notorious for filing access-related lawsuits has sued you, you may be able to get the court to label him or her a "vexatious litigant." Once labeled, the plaintiff will be required to obtain the judge's permission before filing another lawsuit, give notice to target businesses of the alleged violation prior to filing a claim, and give the business a reasonable opportunity to cure.

6. Lack of Standing

While it is not necessary for a plaintiff to actually set foot on the premises of a facility in order to sue, a plaintiff does have to show at least an intent to return to the property again to enjoy its services and that his or her enjoyment is prevented by the lack of accessibility. Factors courts consider are: 1) the proximity of the business to the plaintiff's home, 2) the plaintiff's past patronage of defendant's business, 3) the definiteness of the plaintiff's plans to return, and 4) the plaintiff's

frequency of travel near business. If you are sued, your attorney will likely focus on these factors.

7. “Existing Facilities” – Barrier Removal Creates an Undue Burden

As discussed in Part One of this series, unaltered structures built before 1993 are considered “existing facilities” under the ADA, and only require removal of barriers to access that are “readily achievable.” Factors that courts use to determine whether removal of a barrier is readily achievable include 1) the nature and cost of the action needed to remove the barrier, 2) the overall financial resources of the site involved, 3) the fiscal relationship of the site in question to any parent entity, and 4) the overall financial resource of the parent entity.

Under the factors listed above, a business owner could argue that removal of a barrier creates an undue burden and financial hardship. This argument is especially relevant when removal of barrier requires modification to a building’s structure. For example building a wheelchair ramp. Remember, however, the clock on removing barriers started ticking around 1993. Therefore, you must be prepared to answer whether you could have saved money over time to afford removing the barrier.

Conclusion

There are many ways a small business owner can protect his or herself from being sued. Some ways are inexpensive, like moving a garbage can away from a doorway. Others can be more expensive, like building a wheelchair ramp, or altering a public restroom or public entrance. We suggest checking out the resources on the ADA website (ADA.gov) and doing a walkthrough of the property. Additionally, and probably the best way to find out whether you are in compliance, is to hire a CAsp inspector or other knowledgeable professional to assess your building. Depending on the size of your property or building that is open to the public, some inspectors can provide you with a full inspection including a detailed report for approximately \$1000.

Finally, if you are sued, losing is not automatic. Plaintiffs always have the burden of proving they were harmed by the access violation they complain of. Additionally, depending on the circumstance, there are defense strategies that can be employed, and ways to lower your damages burden. Our best advice to you is to hire an attorney, because an attorney can best advise you on how to proceed.

Remember, owners are not immune from a lawsuit. Be proactive.

For residential rental property owners, please check out Part Four, which will highlight how and in what ways disability access laws impact apartments, condos, and other residential rental properties.

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