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Prepare NOW For An ADA Attack

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After more than 10 years of being on the books, government enforcers and private plaintiffs have greatly escalated ADA suits against property owners. Here are some common myths that you should know, as well as some tips on how to minimize your exposure to costly claims under the ADA and comparable state laws.

The ADA and state counterparts.

The Americans with Disabilities Act or ADA has been in force for more than 10 years. The ADA applies to all 50 states, whether or not they have their own statutes on the subject. A few states, most notably California, Colorado and Florida, have laws that in some respects are more stringent than the ADA and which provide for attorneys' fees and damages. Not surprisingly, these state laws have spurred a deluge of private lawsuits which some cynics claim are driven by self-interested plaintiffs' lawyers. To give some sense of how big this is becoming, one observer counted more than 600 recent ADA cases filed in the Northern District of California alone (an area that includes the San Francisco Bay Area). California's version of the ADA is known as the Unruh Act, and it actually predates the ADA by 20 years. Where appropriate, this article will reference California's Unruh Act to illustrate how applicable state law may apply to a situation.

Big penalties may apply to owners, operators, landlords and tenants.

The ADA and the Unruh Act apply to all owners and operators of all places of pubic accommodation within a state. Owners and operators include landlords as owners of a building, and their tenants who operate a business in the building.

Under the ADA, a court may assess civil penalties of up to $50,000 for a first violation and up to $100,000 for subsequent violations.

MYTH: The ADA does not apply until major alterations are made.

Many people mistakenly believe that the ADA is not "triggered" until major construction or alterations. This is false. It is true that new construction and even more limited alterations will require the removal of *all* access barriers. But even for older properties or those that have not been remodeled, the ADA requires that barriers to access be removed whenever "readily achievable."

Readily achievable means easily accomplished and able to be carried out without too much difficulty or expense. Numerous factors determine what is readily achievable, including the benefit afforded by removing the barrier, cost of the removal, financial wherewithal of the owner and whether the modifications change the nature of the business. No consideration is given to whether a barrier existed before the ADA went into effect. The Unruh Act specifically requires that barriers be eliminated whenever property is being improved, but compliance with the Unruh Act in this regard does not eliminate liability for failure to comply with the federal law.

"Wait and see" approaches are now too dangerous!

Up to now, many owners and operators have ignored the ADA and the Unruh Act. Unless property was being remodeled, or an accessibility lawsuit was filed, owners have often adopted a "wait and see" stance. At one time, waiting until litigation was filed was a cost-effective approach for dealing with accessibility issues for existing properties. If no lawsuit was filed, and no remodeling was performed, there was no cost.

In the past, if a lawsuit was filed, an owner would often have been able to negotiate a relatively small settlement, with only minor improvements required. This scenario is becoming less common. The plaintiffs' liar has realized that it must pursue the correction *of* access barriers to sustain credibility. Because the ADA and the Unruh Act allow for an award of attorneys' fees, there is a financial incentive for attorneys to vigorously pursue a plaintiff's claims. Further, in January 2002, the state increased the minimum damages from $1,000 to $4,000 per discriminatory occurrence (defined as a disabled person encountering a barrier to access and each barrier at a property is a separate occurrence). All of these factors have substantially increased the expectations of plaintiffs and their attorneys, increasing litigation costs, settlement demands, and remedial work.

In the past 2 years, there have been nearly 1,000 ADA access suits filed in California federal and state courts. In

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this new wave of litigation, business and property owners now face greater exposure for three reasons:

- It is less likely that the parties will reach an early negotiated settlement.
- Plaintiffs may discover facts that support an award of civil penalties and/or triple damages.
- Remedial costs of compliance are going up.

MYTH: Ignorance is bliss.

Accessibility lawsuits are now far more likely to be pursued beyond the early stages, where attention will focus on the owners' efforts to comply with the ADA. The defense of "I didn't know I had an accessibility problem," does not play well with judges or juries. It is no excuse. Ignorance of the ADA's requirements may even support civil penalties or triple damages.

The wait and see approach is too risky and no longer cost-effective. Many major corporations have instituted programs to investigate the compliance status of facilities. These facility surveys can be done with or without the benefit of counsel. Conducting a survey without an attorney creates a whole new set *of* problems.

Pennywise and pound foolish.

Business and property owners typically want to keep costs down in any undertaking. ADA compliance surveys are no exception and owners sometimes use in-house personnel to evaluate properties. If they have the requisite training, in-house personnel generally have their hands full with their core jobs. Often, owners hire outside consultants such as architects, engineers, or unlicensed ADA specialists to conduct ADA accessibility surveys. These options may be cheaper in the short term, but *the*y fall short in terms of the benefit afforded by retaining counsel with expertise in the ADA, the Unruh Act, and the applicable guidelines, including the ADA Accessibility Guidelines ("ADAAG"), and Title 24 of the State of California. And more importantly, accessibility surveys conducted by or through counsel should be privileged and therefore immune from production in litigation or related discovery proceedings.

As referenced above, on properties that have not been substantially improved or altered, the ADA requires the removal *of* barriers whenever the removal of a barrier is readily achievable. This is a complex analysis of many factual and legal issues. A non-attorney consultant would be able to identify whether a particular feature complied with the ADAAG, but this is only a foundational issue. Failure to comply with ADAAG standards for new construction does not necessarily mean that a purported barrier exists or that it should be corrected. Yet, this is what most reports from non-attorney consultants conclude. An attorney with expertise in the ADA can do much more to assist an owner in reducing the risk of future litigation in a more cost-effective manner.

ADAAG is just a set of guidelines.

First, the ADAAG is not law. The ADAAG is a set of guidelines published by the United States Department of justice, but a court recently ruled that ADAAG should be accorded great weight in addressing ADA compliance. The ADAAG is needed because the ADA itself does not provide specific details as to how facilities are to be made or kept accessible. For example, the ADAAG provides that a ramp cannot exceed a 1:12 (8.33%) slope. If a non-attorney consultant observed a ramp with a 10% slope, the consultant would almost universally recommend the re-construction of the ramp. This recommendation would not account for either the readily achievable analysis, or the fact that the ADAAG is only a set of guidelines, the application of which is controlled by decisions in the courts.

The experience afforded in litigation is also invaluable in addressing and prioritizing the removal of barriers to access. Some barriers to access are lawsuits waiting to happen. For example, the lack of a disabled parking warning sign at the property entrance is easily observed by anyone driving around in a car. Often, the lack of a parking sign or accessible space is easy to correct. On the other hand, some access barriers (like elevators) are costly to correct, but unlikely to result in litigation. For example, a toilet stall may not comply with the clearances of the ADAAG, but if it meets certain minimum dimensions, it is less likely to be a problem. An attorney with ADA litigation experience can assist an owner or operator to get the most benefit for the fewest dollars by prioritizing the removal of barriers.

The Attorney-Client and Attorney Work-Product Privileges protect the owner or operator. Using a non-attorney consultant to assess properties creates another

substantial problem. Any *such* report *is* subject to discovery in subsequent litigation. Without the benefit of counsel employing and directing the consultant, any consultant's report and communications can be discovered, subpoenaed and used against the owner. When ADA lawsuits were typically settled in the early stages, these concerns were minor. Now, they are major.

A simple example illustrates the point. A typical consultant's report will contain citations to the ADAAG and Title 24, include photographs, and specify dimensions and measurements to support the analysis. An owner receiving such a report is effectively on notice of accessibility issues. Typically, an owner will not correct every access barrier to achieve full compliance with the ADAAG and Title 24. Lacking full compliance, but having been put on notice, an owner is exposed for civil penalties and triple damages.

Advantages of hiring an attorney with expertise in ADA evaluations and litigation.

By hiring experienced ADA counsel, business and property owners can solve several problems.

- First, an attorney with experience in ADA litigation can evaluate existing conditions and provide an analysis as to which conditions are likely to result in litigation, which conditions are legally too costly to repair, and which conditions are technically non-compliant, but still provide adequate access.
- Second, an attorney with experience in ADA barriers and their removal can also evaluate and recommend less expensive accommodations, which again, although technically non-compliant, still provide improved access and serve to resolve possible future claims.
- Third, by utilizing an attorney with experience in ADA evaluations, owners can obtain reports, consisting of legal conclusions and opinions, that provide guidance for minimizing the risk of future litigation, while minimizing the risk associated with documentation that is subject to discovery in litigation.

NOW is the time to act!

The ADA and other comparable state laws can no longer be ignored. Lessors, owners and operators of businesses and properties are well-advised to anticipate the risk of ADA litigation, and take steps before a lawsuit is filed to evaluate facilities and minimize future exposure. By evaluating properties with the benefit of counsel, owners are better able to evaluate steps to compliance, undertake reasonable improvements, and avoid the risk associated with creating a discoverable paper trail.
By following this course of action, owners also obtain other additional benefits. By removing barriers, the owner shows good faith in attempting to comply with the law, without creating evidence that the owner was on notice of other issues. It is important to realize that by settling with a plaintiff who uses a wheelchair for mobility, you are not settling with any other persons with similar disabilities or with persons with visibility impairment. By removing barriers you obtain the greatest protection from future litigation.

About the Author

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