

## **EQUAL PUBLIC ACCESS OR ACCESS TO DEEP POCKETS? ADA LAWSUITS CONTINUE TO PROLIFERATE**

by Martin H. Orlick

This article was updated for the *JMBM Tax Newsletter*, March 2009

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### **WHAT IS THE ADA?**

The Americans with Disabilities Act (ADA) of 1990 is Civil Rights legislation passed by Congress in 1990 that is intended to prohibit discrimination based on disability. Title III of the ADA addresses barriers that prevent persons with disabilities from full and equal access to places of "public accommodation" and mandates the removal of architectural and communication barriers, requires modifications in policies and procedures, and provides for other accessible services.

Under the ADA, places of "public accommodation" include retail stores, hotels, restaurants, banks, and a host of other places open to the public. Most of the owners and operators of these kinds of properties want to accommodate their disabled customers and often believe they provide the "full and equal access" required under the ADA. But the requirements specified in the Americans with Disabilities Act Accessibility Guidelines (ADAAG) for buildings and facilities are very specific, technical and confusing.

### **HOW DOES THE GOVERNMENT ENFORCE THE ADA?**

The Department of Justice (DOJ) has primary jurisdiction to enforce the ADA and can work with local U.S. Attorneys to enforce compliance. For example, in the last couple of years the DOJ made a "sweep" of hotels in Manhattan, demanding all hotels bring their properties into ADA compliance. Working with the local Attorney General, most hotels have entered into voluntary compliance agreements. Those that did not are being prosecuted. The DOJ has, by and large, delegated ADA enforcement to local building officials.

However, for the most part ADA litigation has been filed by private plaintiffs and advocacy groups.

### **WHY SO MANY PRIVATE CITIZEN LAWSUITS?**

Federal law provides for injunctive relief to stop ADA violations and payment of plaintiffs as well as attorney fees. Under California and other states' laws, such as Colorado, New Jersey and Florida, plaintiffs can also recover actual, punitive and statutory damages. In California, the mandatory minimum statutory damages is either \$1,000 or \$4,000 per violation. Each property may have numerous "violations."

While there are organizations and individuals that file ADA lawsuits with the intent of improving access for the disabled, there are many others that seem to be more focused on collecting damages than fighting the good fight for our disabled citizens. In fact one such "serial plaintiff" and his lawyer, after filing more than 400 almost identical ADA lawsuits -- and "settling" nearly every one of them -- have been declared "vexatious litigants" and are barred from filing any further such suits without first checking in with the court for permission. The U.S. Supreme Court recently upheld the decision, refusing to hear their appeal.

### **IF I RECTIFY THE PROBLEMS, WON'T THEY DROP THE LAWSUIT?**

Most likely, no. There is no "period to cure" written into the ADA and many plaintiffs groups are very aggressive (and successful) with their "sue and settle" tactics.

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### **I AM THE OPERATOR OF THE BUSINESS, NOT THE OWNER — ISN'T THE OWNER RESPONSIBLE?**

Under the ADA, the owner and operator may both be liable to the plaintiff. Neither the owner nor the operator can contract away liability to persons with disabilities. The parties can, however, contractually allocate responsibility among themselves through indemnity agreements.

### **WHAT IF I OWN A PROPERTY CONSTRUCTED BEFORE THE ADA WAS PASSED AND I HAVE NOT PERFORMED ANY RENOVATIONS, ALTERATIONS OR NEW CONSTRUCTION?**

If your establishment is classified as a "public accommodation" you still must make "readily achievable" changes to remove architectural barriers which interfere with disabled persons gaining full and equal access. Readily achievable means easy to accomplish without much difficulty or expense.

### **WHAT IF MY PROPERTY WAS INSPECTED AND APPROVED BY THE CITY'S BUILDING DEPARTMENT?**

You are still responsible for bringing your building into compliance. Most governmental agencies are immune from liability for their mistakes.

### **IS THERE ANY WAY TO OFFSET THE EXPENSE FOR MAKING THESE FEDERALLY-MANDATED CHANGES?**

Yes. To incentivize business owners to remove barriers and comply with the requirements of the ADA in existing buildings, the ADA provides that the taxpayer can take a deduction of up to \$15,000 for ADA barrier removal work. Small employers - those with less than \$1 million in annual revenue or having 30 or fewer employees - can take a credit of up to 50% of the amount spent on barrier removal up to

\$10,250.

As most building owners know, if alterations to an existing building are made, the value of the property may increase, triggering an increase in property taxes. However, if barrier removal is undertaken for the purposes of ADA compliance, those improvements do not trigger a reassessment.

### **WHAT SHOULD I DO IF I GET SUED?**

Take the case seriously. Put aside your feelings that a claim against your business discriminates against the disabled. Immediately, hiring a lawyer experienced in ADA litigation will save you time and money.

### **WHAT SHOULD I DO I NOW?**

An ounce of prevention is always worth a pound of cure. An ADA professional can perform an audit of your property and let you know if you need to make changes to be compliant. California recently adopted a program of Certified Access Consultants who can certify business compliance. At the time this article was written, revisions to the ADAAG have been proposed, but have not yet been adopted, subject to review by the new Obama administration.

### ***Could Your Business Pass This ADA Test?***

### **Do people with disabilities have full and equal access to your shopping center, retail store, hotel, restaurant, bank, winery or other property open to the public, as required by the ADA and similar state laws?**

Walk around your property and visualize what it would be like to be in a wheelchair, or to have a vision or hearing impairment or other disability. In order to rectify perceived abuses and force ADA compliance, some plaintiffs have made a full time job out of visiting properties and going

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down a checklist for ADA violations. The next thing you know, you have a lawsuit on your desk and need to call an experienced ADA lawyer.

But prevention is always best. How would you measure up against some of these common complaints?

*Common access barriers include:*

- inaccessible parking; inadequate number and type of spaces; improper striping and signage; built-up curb ramps in access aisles
- inaccessible entrances and doorways
- inaccessible web site (for retail sales or making reservations)
- inaccessible registration or cashier facilities
- inadequate paths of travel into the establishment and throughout the facility
- inaccessible public restrooms
- inadequate hardware
- inadequate accommodations for service animals
- inadequate emergency warnings, directional signage
- lack of strobe emergency warning lights for hearing impaired persons
- lack of training, policies and practices to assist persons with disabilities
- lack of written policies for ADA compliance

### **Additional items for hotels**

In addition to the items above, hotels need to be aware of the following:

- inappropriate hardware; door view-hole not at wheelchair level; temperature controls too high; improper bathroom facilities; inaccessible closets; improper light fixtures; lack of listening devices; inadequate in-room work areas; ironing boards not at wheelchair level; lack of other accessible in-room accommodations

- inadequate number of accessible rooms by room rate, location, dispersal and types of accommodations
- inadequate swimming pool access
- inaccessible laundry rooms
- inaccessible business centers, conference rooms, spas and health club services
- a list of amenities in the reservation system

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