

Americans with Disabilities Act Update: What you need to know

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Why Are We Here?

- 2016 - 2017 Federally Filed Lawsuits Increased by 18%
 - 2015 – 2016 Increase by 37%
- 2015 – 2016 Increase of 13.4% State Court Filings
 - 2017 numbers are pending
- Of the 3,340 Federal and State Filings, 57% were filed by three law firms; six law firms filed 81% of total.
- Central Valley is third largest area hit (behind Bay Area, and Los Angeles)

Types of Liability

- **Americans with Disability Act (42 USC §12101)**
 - Injunctive Relief
 - Prevailing party attorneys' fees and costs
- **CA Civil Rights Act – Unruh Act (Civil Code §51)**
 - Injunctive relief
 - \$4,000.00 per occurrence NOT per violation
 - Prevailing plaintiff attorneys' fees and costs
- **Disabled Persons Act (Civil Code § § 54-55.3)**
 - \$1,000.00 per violation plus attorneys fees and costs.

Americans with Disabilities Act

- Enacted in 1990, affects buildings altered or constructed after January 26, 1993.
- Modeled after the Civil Rights Act of 1964
 - “Disabled” became a protected class in 1968.
- Differences between Titles I, II, and III
 - Title I = Employment
 - Title II = Public entities
 - Title III = Public accommodations
 - Restaurants, Hotels, Retail

Americans with Disabilities Act

- “The ADA prohibits discrimination on the basis of disability in the **enjoyment of public accommodations**, including with respect to access (42 U.S.C. §12182.) Businesses must ‘remove architectural barriers...in existing facilities...where such removal is **readily achievable**.’” (*Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038, 1044.)
 - Historically, only injunctive relief for ADA violations in California.

Unruh Act

- Pre-Dates ADA:
 - Enacted in 1959;
 - “Disabled” became a protected class in 1968;
 - \$4,000.00 minimum
 - Treble damages
 - Punitive damages
 - Attorneys’ fees for prevailing Plaintiff.
 - **ADA Violations are violations of the Unruh Act**

How To Protect Yourself

Compliance is Your Only Defense!

But... in the meantime, hire a CASp ☺

What is a CASp?

- **Licensed Professional**
 - (i.e. architect, engineer, contractor)
- **Perform Inspections of Property**
 - Identifies federal ADA violations, and California Building Code violations
- **Affords legal protection for small businesses in State Court, and for all businesses in Federal Court**

How the Game is Played

- File in Federal Court
 - “Readily achievable” barrier removal
 - Balancing test
- Bootstrap State Law Claims
 - CBC violation = ADA violation
 - Notice and opportunity to cure
 - CASp inspection

Recent California Law Reform

- **AB 150 – Notice and Opportunity to Cure (*Failed*)**
 - 6-months advanced notice before filing a Complaint;
 - Preclusion of Complaint if good faith effort to correct the alleged violation(s).
- **AB 2093 - Leased buildings and agreements (signed)**
 - New/Renewed lease disclosure
 - Disclosure of CASp report for “premises”
- **AB 1230 – CalCAP Small Business Loan (signed)**
 - \$50K for small business loans to ADA improvements (including CASp inspections)
- **SB 269 – Small Business Protection (signed)**
 - 25 employees or less and less than \$3.5M
 - Presumption of no difficulty, discomfort or embarrassment
 - Reduction in statutory penalties

Recent Federal Reform

- **H.R. 620, ADA Education and Reform Act of 2017 (*in committee*)**
 - Develop a program to educate local governments and property owners on strategies for promoting access.
 - 60-day notice and opportunity to cure period, with an additional 60-days if good faith effort to comply is shown.
 - Develop an early mediation program, including a stay of discovery during mediation.
- **H.R. 4719, COMPLI Act (*in Committee*)**
 - Would provided 90-day notice and opportunity to cure.
 - Additional 30-days if “good faith effort” is made to correct, and unable to do so.
 - Ex. Unable to get permit approval in time.

What's the Correct Construction Standard

Construction Standards

- Existing buildings = readily achievable barrier removal (construction tolerances?)
- New construction = 2016 California Building Code (construction tolerances?)
- Alteration and modifications
 - Must meet applicable CBC cycle
 - Financial thresholds for modifications (approx. \$150K)
- “Grandfathering” is a myth.

Top 10 Violations in 2017

1. Number of Parking Spaces
2. Non-Compliant Parking Spaces
3. Curb Ramps
4. Paths of Travel to/from Parking Spaces
5. Van Access aisles
6. Parking Signage
7. Counter Heights
8. Maintenance
9. Access routes within Facility
10. Door Hardware

Not Applicable to “Employee Only” Areas



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Top 10 Violations in 2017

1. Number of Parking Spaces
2. Non-Compliant Parking Spaces:
Slope/Paint/Incorrect size



Top 10 Violations in 2017

3. Curb Ramps



Top 10 Violations in 2017

4. Accessible Route and Entry



Top 10 Violations in 2017

5. Van Access Aisles

Why is this NOT compliant?



Top 10 Violations in 2017

6. Parking Signage



Top 10 Violations in 2017

7. Counter Heights



Top 10 Violations in 2017

8. Maintenance



Top 10 Violations in 2017

9. Interior Access Routes



Top 10 Violations in 2017

10. Hardware



Watch Out for Restroom Violations



Website Compliance

- As of August 2015, 751 Federal Suits Filed.
 - 432 of those filed since January 1, 2017.
- Department of Justice = “inactive list”
- Jurisdictional Split on “Place of Public Accommodation”
 - *Robles v. Dominos Pizza LLC – Dismissed (Central District)*
 - *Gil v. Winn-Dixie Stores – Jury Verdict (Southern Dis. Of Fl)*

Re-cap

1. Compliance is the only way to protect yourself.
2. Proactively hire an **experienced** attorney.
3. Get a CASp report.
4. Make changes per CASp report and schedule.
5. Budget for continual “barrier removal.”
6. Check your website.

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