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RETAIL PERSPECTIVES

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PERSPECTIVES

Compliance With The ADA: Effective Ways To Reduce The Risk Of "Drive-By" Lawsuits

Disability-access lawsuits for alleged violations of the ADA (Americans with Disabilities Act of 1990) and comparable California statutes such as the Unruh or Disabled Persons Act continue to plague businesses. Currently under California law, plaintiffs are allowed to recoup three times their actual damages, and in the event that no actual damages are sustained, they may recover statutory damages no less than $4,000, in addition to attorneys' fees and costs, for violations that may seem minor.

The business community has long complained that these lawsuits are, for the most part, unwarranted and frequently litigated by plaintiffs who are more interested in monetary gain than in promoting access for individuals with disabilities. A typical strategy used by plaintiffs and their consultants is to conduct unsolicited inspections of retail/commercial developments followed by sending draft complaints attached to settlement demand letters, seeking damages for every encountered deviation from the ADA standards. Although these type of claims may be entirely defensible on standing grounds, shopping center developers and owners frequently find themselves cowering to the settlement demands given the prohibitive cost of litigation. Accordingly, it is incumbent on shopping center developers and owners to arm themselves with an understanding of the requirements under the ADA not only to ensure compliance but also to reduce legal exposure.

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The Battle Over Self-Help

A common battle between landlords and tenants during lease negotiations is whether or not, and in what circumstances, a tenant will have the right to exercise self-help following a landlord's failure to perform lease obligations. The outcome of these negotiations will typically depend on the creditworthiness and bargaining strength of the particular tenant.

The issue of self-help usually arises in connection with the negotiation of the landlord's maintenance obligations (although the issue also commonly arises in connection with the negotiation of the general landlord default provision). Under the typical space lease, landlords usually assume certain obligations in connection with the maintenance, repair and replacement of structural and other components of the premises. To the extent a landlord fails to satisfy such obligations, the tenant will want to be in a position where it can remedy the problem and receive reimbursement from the landlord for same. Sophisticated tenants will take a strong position on this issue, especially to the extent the landlord's failure to properly maintain its elements of the premises will interfere with the operation of the tenant's business. The tenant must be in a position where it can rectify the problem sufficiently to continue its operations.

On the other hand, most landlords are compelled to oppose such concessions. Most landlord maintenance and repair obligations relate to structural components of a building or the shopping center, and work relating to such components could potentially affect other premises or components of

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This article provides an overview on the ADA as it relates to places of public accommodation. It also highlights the upcoming compliance date for alterations to existing facilities and new construction. In addition, it sets forth ten common ADA errors and omissions that, if prevented, could decrease the risk of unwarranted "drive-by" lawsuits.

OVERVIEW OF THE ADA

The ADA was signed into law in 1990 and became effective in 1992 as a comprehensive civil rights law prohibiting discrimination on the basis of disability. As one of its many facets, the ADA also established minimum construction-related standards of architectural accessibility for buildings and facilities known as the 1991 ADA Standards for Accessible Design ("ADAAG"). The ADAAG sets the standard for what makes a facility accessible by requiring businesses to remove architectural barriers in existing buildings and to ensure that newly built or altered facilities are constructed to be accessible to individuals with disabilities. It should be noted that "grandfather provisions" often found in building codes do not exempt businesses from their obligations under the ADA.

The 1991 ADAAG requirements remained unchanged until 2010 when the U.S. Department of Justice adopted new standards. While the updated 2010 standards retain many of the original provisions in the 1991 standards, they contain some significant differences, largely driven by the desire to greater harmonize the standards with model building codes and industry requirements. The 2010 standards also account for the use of new technology, and replace some absolute standards with ranges, making the new standards less rigid than the older 1991 requirements.

The 2010 ADAAG standards were published on September 15, 2010, and took effect on March 15, 2011. However, compliance with these new standards is not yet mandatory, but will become mandatory on March 15, 2012. In the period between September 15, 2010 and March 15, 2012, entities many choose between the 1991 standards and the 2010 standards. After March 15, 2012, businesses will no longer have the option as to with which standard they want to comply. Therefore, if an older standard is easier to achieve, and the facility intends to engage in barrier removal, planned alteration or new construction, the option to utilize the old standards must be exercised before March 15, 2012. After that date, businesses have to comply with the 2010 standards.

Who Is Covered By the ADA?

Businesses that provide goods or services to the public are called "public accommodations" under the ADA. The ADA has established requirements for 12 categories of public accommodations, which include shopping malls, stores, restaurants, bars, service establishments, theaters, hotels, recreational facilities, private museums and schools, doctors' and dentists' offices, and other businesses. Nearly all types of businesses that serve the public are included in the 12 categories, regardless of the size of the business or the age of their buildings. Commercial facilities, such as office buildings, factories, warehouses, or other facilities that do not provide goods or services directly to the public are nevertheless subject to the ADA's requirements for new construction and alterations.

Federal or State Law?

What complicates the task of compliance in California is the fact that facilities are required to comply with both state and federal accessibility standards which at times conflict, and at best, lack consistency. The California Building Code ("CBC") which was adopted in 1982 and became the minimum standard of accessibility for buildings within California, often goes beyond the incorporation of the federal design standards by imposing even more stringent standards with the addition of a number of accessibility requirements that exceed the federal mandates.

Since its inception, the CBC has gone through several iterations, with the most recent version being the 2010 CBC. For example, an existing facility in California had to have complied with the earlier version of the CBC when the building was originally permitted for construction, and will have to comply with the current CBC for alterations made to the facility.

Is Your Facility In Compliance?

The ADA and California's regulations are to be used differently depending on whether you are altering an existing building, building a band new facility, or simply attempting to remove architectural barriers that have existed for years in order to ensure compliance.

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1. Unaltered Existing Facilities

If your business facility was built or altered in compliance with the 1991 standards, or if you removed architectural barriers in compliance with those standards, you do not have to make further modifications, even if the new 2010 standards have different requirements. This provision is applied on an element-by-element basis and is referred to as the "safe harbor" under which elements in facilities that were built or altered in compliance with the 1991 standards would be not required to be brought into compliance with 2010 standards until the elements become subject to a planned alteration.

However, if your facility is not compliant with the older 1991 standards, the ADA requires removal of architectural barriers when it is "readily achievable" to do so. Readily achievable has been defined as "easily accomplishable without much difficulty or expense." This requirement is based on the size and resources of a business. In determining whether an action is readily achievable, courts have considered the following factors:

- The nature and cost of the action needed to remove the barrier
- The overall financial resources of the site involved
- The fiscal relationship of the site in question to any parent entity
- The overall financial resources of the parent entity

The ADA has also provided guidance by establishing a priority for readily achievable barrier removal as follows:

- Provide access to the public accommodation from public sidewalks, parking and public transportation
- Provide access to those areas of the public accommodation where goods and services are available to the public
- Provide access to restroom facilities
- Provide access to other goods, services, facilities, privileges, advantages, or accommodations within the place of public accommodation

In addition, the ADA has provided examples of barrier removal which may be readily achievable, a few of which are the following:

- Installing ramps
- Making curb cuts in sidewalks and entrances
- Repositioning shelves
- Widening doors
- Installing accessible door hardware
- Installing offset hinges to widen doorways
- Installing grab bars in toilet stalls
- Creating designated accessible parking spaces

When alterations are done solely for the purpose of barrier removal, the ADA has allowed the work to be limited to the specific barrier removal and no path of travel improvements are triggered or required. Also, if the measures required to remove a barrier would not be readily achievable, businesses are allowed to take alternative measures that may not fully comply with ADA requirements, but the entity must still ensure that its accommodations are made available to disabled individuals.

If you intend to remove barriers before March 15, 2012, you have the choice of using either the 1991 ADA standards or the 2010 standards. However, the ADA has made it clear that you must use only one standard for removing barriers in an entire facility. For example, you cannot choose the 1991 standards for accessible routes and the 2010 standards for restrooms.

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2. Alterations to Existing Facilities

Both the ADAAG and the CBC require that "alterations" meet accessibility standards. An alteration is defined within the ADA and the CBC as a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof. This has been interpreted to include any remodeling, renovating, rehabilitating, reconstructing, changing or rearranging structural parts of a facility, or changing or rearranging plan configuration of walls and partitions.

Once you choose to alter elements that were in compliance with the 1991 standards, the "safe harbor" no longer applies to those elements, and you will have to meet the 2010 standards for those specific elements. Also, if the alteration is to a primary function area of the facility, then the path of travel to that function area, which includes the restrooms, telephones and drinking fountains serving the altered area, must also be brought into compliance with the 2010 standards. However, when alterations are done solely for the purpose of barrier removal under the ADA, then the work can be limited to the specific barrier removal. No path of travel improvements are triggered or required.

Both the ADA and the CBC have made it clear that during an alteration, only one accessible route is required and only one entrance serving the altered area needs to be accessible. This is unlike the requirements in new construction where the CBC requires all routes and all entrances to be accessible.

Disproportionate costs (path of travel improvements): When the cost of improvements made to the path of travel exceeds 20% of the cost of the alteration to the primary function area, the ADA considers this ratio to be disproportionate, in which case the path of travel need only be made accessible to the extent necessary without having to incur the disproportionate cost. However, what complicates this analysis is that the CBC differs in this area from the ADA, and only recognizes disproportionate costs when the total construction costs of alterations does not exceed the construction cost index, which for 2011 is approximately $132,500. The CBC does allow for exceptions upon submittal of an application and approval by the local building department.

3. Construction of New Facilities

Buildings constructed prior to March 15, 2012 can comply with either the 1991 ADA standards or the 2010 ADA standards. Buildings constructed on or after March 15, 2012 must comply with the 2010 ADA standards. The last application for a building permit determines the date of construction. Hence, if the last or final building permit application for a new construction is certified before March 15, 2012, businesses can comply with either the 1991 or the 2010 standards.

It should be noted that all buildings and facilities must still be constructed in full compliance with the requirements of the CBC in effect at the time of the permit application.

TEN COMMON ADA ERRORS AND OMISSIONS

Successful accessibility under the ADA is often measure in inches, as quoted from the Department of Justice, and therefore attention to detail will make the difference between achieving access or becoming exposed to litigation. The following is a sampling of common errors or omissions that if prevented, can minimize legal exposure.

Parking Area

1. Accessible parking space and access aisle are not level in all directions

Parking spaces and access aisles must be level with surface slopes not exceeding 2% in all directions in order to prevent a wheelchair from rolling away from a car or van.

2. No accessible route from accessible parking to an accessible entrance

Parking access aisles must be part of an accessible route to the building or facility entrance so that a person using a wheelchair, scooter or walker has a way of getting from the accessible parking space to the building entrance without having to use a roadway or vehicular route which can be dangerous.

3. No van accessible spaces provided in the parking lot

One in every eight accessible spaces must be served by an access aisle 96" (8 feet) wide.

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Ramps

4. Curb ramp located across a circulation path has steep unprotected flares

If a curb ramp is located where pedestrians must walk across the ramp, or where it is not protected by handrails or guardrails, it must have flared sides to prevent wheelchair users from tipping over.

5. Landing areas where ramps change direction are too small

If ramps change direction at landings, the minimum landing size must be 60" by 60" in order to allow wheelchair users to turn on a level surface.

6. Missing handrails on access ramp

Handrails must be provided on both sides of the ramp, with a finish height of 34" to 38" above the ramp/landing surface.

Signage

7. Missing ISA Sign At Entrances

At every primary public entrance and at every major junction along or leading to an accessible route, there needs to be an International Symbol of Access ("ISA") logo posted with a direction indicator to the accessible entrances.

8. Disabled parking signs not filled in (or simply missing)

Warnings signs regarding unauthorized use of disabled parking spaces posted at each entrance to off-street parking facilities must be filled in with information where towed vehicles can be reclaimed and what telephone numbers to call.

Doors

9. Door hardware requires grasping or twisting of the wrist to use

Door handles, pulls, latches, locks and other operating devices on accessible doors must have a shape that is easy to grasp with one hand. Lever operated mechanisms, push-type mechanisms, and U-shaped handles are acceptable designs, and must be mounted no higher than 48" above the finished floor.

10. Inadequate maneuvering clearance at doors

The clearance area at doors that are not automatic or power-assisted must provide sufficient space for a wheelchair to maneuver. Also, the floor or ground area within the clearance space must be level and clear.

CERTIFIED ACCESS SPECIALIST PROGRAM

In 2009, California implemented the Certified Access Specialist Program ("CASp"), a piece of legislation designed to curb abusive ADA litigation. Under this program, certified individuals specializing in construction-related accessibility can inspect facilities and provide a report that either certifies that the facility complies with state and federal disability access laws, or which explains the steps necessary to achieve full compliance. Once a facility has been inspected under this program, the CASp inspection report makes the business owner eligible to request a 90-day stay of any ADA lawsuit and an early evaluation conference with the court to determine if the lawsuit has any merit.

There are possible restrictions on CASp benefits in federal litigation. Recently, a federal court in California ruled in *O'Campo v. Chico Mall, LLP* that a public accommodation certified under the relevant California Act is not entitled to the state procedural benefits and protections afforded by the Act if the action is filed in federal court under the ADA. Nevertheless, we still encourage shopping center owners and developers to partner with an access specialist early on in the construction phase in order to receive the guidance necessary to be able to navigate through the ADA and CBC requirements.

This article was authored by Ali P. Hamidi of the Litigation Team of Cox, Castle & Nicholson LLP. Mr. Hamidi specializes in commercial business and real estate litigation, and employment litigation and counseling. His ADA practice includes counseling businesses on ADA compliance as well as defending retail/commercial developers in ADA lawsuits in state and federal courts. Mr. Hamidi can be reached at (415) 262-5106.

THE BATTLE OVER SELF-HELP

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the shopping center. Accordingly, landlords will commonly try to limit a tenant's ability to make such changes, out of fear that a tenant's work may inadvertently affect other aspects of the shopping center. Furthermore, landlords oppose providing tenants with self-help rights in an effort to avoid potential disputes in the future over whether or not a tenant was justified in performing work at the landlord's expense.

Except in connection with negotiations with sophisticated or well leveraged tenants, most tenants are left with no ability to exercise self-help from a contractual standpoint. In such circumstances, if a landlord fails to satisfy its maintenance and/or repair obligations, the landlord may be subject to claims of a landlord default and the remedies that flow from such default. On the other hand, tenants with significant bargaining strength are often able to negotiate self-help rights under certain circumstances.

When representing the landlord, it is important to limit a tenant's self-help rights to situations where the landlord's failure to properly maintain the premises will have a material, adverse affect on the ability of the tenant to operate its permitted business from the premises. Furthermore, it is important to limit a tenant's self-help remedy to a situation in which the landlord has failed to satisfy its obligation following written notice and an opportunity to cure. In addition, many landlords require a second notice and opportunity to cure (albeit usually for a shorter period of time) before the tenant will be entitled to exercise self-help. It is also important, when representing landlords, to ensure that any self-help right exercised by a tenant is limited to rights relating to maintenance obligations within the premises. Tenants should not have the right to effectuate changes or perform other work in the common areas or in a way that will potentially detrimentally affect other occupants of the shopping center.

In the event a tenant exercises self-help, it will want to be in a position where it immediately receives reimbursement from the landlord for such work. On the other hand, the landlord will need the ability to properly review expenses before reimbursing the tenant. Accordingly, many self-help provisions will provide for the landlord to reimburse the tenant within 30 days following the landlord's receipt of invoices and other documentation reasonably requested by landlord to justify the expenses. Landlords usually will also want to make sure that they are only responsible for the costs reasonably incurred by the tenant. Sometimes the tenant will negotiate for an offset right to the extent the landlord fails to reimburse its costs within a negotiated period of time. Whether or not an offset right is granted is often dependent upon the relative bargaining strengths of the parties. If the landlord must agree to an offset, it should attempt to limit the amount of the offset in any given month to a particular percentage of rent or otherwise attempt to toll the tenant's ability to offset during any period during which the landlord is disputing the subject claim.

The ability to exercise self-help in a situation where a landlord is not complying with its maintenance obligations under the lease is an issue of paramount concern to the tenant. However, without negotiating the proper protections, the landlord can expose itself to numerous risks at the hands of the tenant.

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The Retail Group of Cox, Castle & Nicholson LLP

LOS ANGELES OFFICE

2049 Century Park East, 28th Floor
Los Angeles, California 90067-3284
P 310.284.2200 **F** 310.284.2100

Gary Glick
Scott Grossfeld
Dan Villalpando
Matt Seeberger
Anne Clinton
Drew Kim
Aimee Frank

ORANGE COUNTY OFFICE

19800 MacArthur Blvd., Suite 500
Irvine, California 92612-2435
P 949.260.4600 **F** 949.260.4699

Bob Sykes
Hans Lauterbach

SAN FRANCISCO OFFICE

555 California Street, 10th Floor
San Francisco, California 94104
P 415.392.4200 **F** 415.392.4250

Scott Brooks
Greg Caligari