CALIFORNIA SEEKS TO LIMIT "DRIVE-BY" ADA LAWSUITS: PART 2

Ali P. Hamidi
Cox, Castle & Nicholson LLP
San Francisco, CA

Robert J. Sykes
Cox, Castle & Nicholson LLP
Irvine, CA

Part 1 of this article provided an overview of the Americans with Disabilities Act (ADA) and recent efforts by the California Legislature to reduce the number of so-called "drive-by" ADA-related lawsuits. Part 2 discusses ways that shopping center owners and retailers can bring their facilities into compliance with the law and therefore reduce the overall risk of ADA lawsuits.

It should be noted at the outset that since the publication of Part 1, Senate Bill 1186 has been signed into law. This bill, which was authored by the Senate Pro Tem Darrell Steinberg, a Democrat, and Sen. Bob Dutton, a Republican, is a comprehensive ADA-reform law that, among other things, attempts to reduce abusive disability access suits. SB 1186 represents a bipartisan effort of legislators, stakeholders and industry trade groups, such as the California Business Property Owners Association, as well as the California Building Standards Commission. The key provisions of SB 1186 are the following:

1. SB 1186 requires an attorney who represents a disabled plaintiff to provide a written advisory with each demand letter and complaint sent to or served upon a defendant or potential defendant property owner for any construction-related accessibility claim. The bill further requires an allegation of a construction-related accessibility claim in a demand letter or complaint to state facts sufficient to allow a reasonable person to identify the basis for the claim. Moreover, any complaint alleging a construction related accessibility claim must be verified by the plaintiff under oath.

2. The bill prohibits a demand letter from including a request or demand for money or an offer for settlement based on the payment of money. An attorney who issues a demand letter demanding money may be subject to discipline by the State Bar.

3. In response to the tactic of sending the same plaintiff back to the same property on multiple occasions and/or claiming damages for each violation on a visit, in each instance creating multiple claims for violations under the ADA, the law now requires the court to consider the reasonableness of the plaintiff's conduct in making multiple visits in light of the plaintiff's obligations to mitigate damages. Multiple claimed violations of the ADA encountered on the same day are now considered to be one violation.

4. The law also provides relief for businesses that have been inspected under the Certified Access Specialist (CASp) program by allowing businesses to make repairs within 60 days of service of the complaint. The law reduces an owner's minimum liability for statutory damages from $4,000 to $1,000 or $2,000, depending on specific circumstances, such as whether the owner has corrected the claimed violations within 30 or 60 days from notice or is a small business owner. Therefore, the importance of businesses partnering with certified access specialists is now more pronounced than ever.

5. Moreover, as noted in Part 1 of this article, under existing California law, once a facility has been inspected by a CASp, 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. SB 1186 permits other defendants to file a request for a court stay and early evaluation conference pursuant to this provision, including (A) a defendant, until January 1, 2018, whose site's new construction or improvement on or after January 1, 2008, and before January 1, 2016, was approved pursuant to the local building permit and inspection process, (B) a defendant whose site's new construction or improvement was approved by a local public building department inspector who is a CASp, and (C) a defendant that is a small business.

6. A commercial property owner is required to state on any lease form or rental agreement executed after July 1, 2013, whether the property being leased or rented has undergone inspection by a CASp.

Is Your Facility in Compliance?

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

Unaltered Existing Facilities

If your business facility was built or altered in compliance with the 1991 ADA Standards for Accessible Design (ADAAG), or if you removed architectural barriers in compliance with those standards, you do not have to make further modifications, even if the new 2010 ADAAG 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.

If your facility is not compliant with the older 1991 standards, however, 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:

1. Provide access to the public accommodation from public sidewalks, parking and public transportation
2. Provide access to those areas of the public accommodation where goods and services are available to the public
3. Provide access to restroom facilities
4. 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 that 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.

Alterations to Existing Facilities

Both the ADAAG and the California Building Code (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.

(Note: When the cost of improvements made to the path of travel exceeds 20 percent 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 be made accessible only 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 was approximately $132,500. The CBC does allow for exceptions upon submittal of an application and approval by the local building department.)

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 measured 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 percent 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 that 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 inches (8 feet) wide.

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 inches 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 inches 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 inches 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.

ALI P. HAMIDI is a partner at Cox, Castle & Nicholson LLP in San Francisco, CA, where he specializes in commercial business and real estate litigation, and employment litigation and counseling.

ROBERT J. SYKES is a partner in the Irvine, CA, office of Cox, Castle & Nicholson LLP, where he specializes in commercial property development and leasing transactions.