

## Some Inexpensive Ways to Reduce Your Risk of ADA/access Lawsuits

***“How the average small business can reduce the risk of being sued in an ADA/access lawsuit by as much as 90% or more with less than \$1,000.”***

California has now seen at least 14,000 ADA/access lawsuits, and many think the numbers will start increasing more rapidly as new attorneys learn how easy it is to make money with these “guaranteed win” lawsuits. One reason for this crisis is that too many business owners mistakenly believe that they are “grandfathered” or otherwise exempt from compliance with access standards. Although the “grandfathering” of older properties may apply to certain building codes, access lawsuits are brought under a civil rights rationale, and of the 14,000 access lawsuits we are tracking— many of which have been filed against very old and historic properties— we know of none in which the age of the property relieved the owner of the obligation to meet appropriate disabled access standards.

Other businesses (correctly) complain that they cannot get good information from a single source, because California’s access standards directly conflict with the ADA Accessibility Guidelines in a number of important respects. But does that mean you should do nothing and increase the risk of being sued? Certainly not. This article attempts to provide a point-by-point program any business can use to significantly reduce— because our legislators have made sure you will not be able to eliminate it— your risk of being sued in an ADA/access lawsuit.

1. **If you are currently being sued . . .**: If you are currently being sued in an ADA/access lawsuit and are not already represented by an attorney, we suggest that you consider speaking only with lawyers who have handled at least 50 access cases, with as many as possible by the attorney suing you. Because only a few cases out of the 14,000 lawsuits have resulted in victories, you may wish to speak with at least one of the attorneys who have prevailed in some access action; particularly if they did this against the attorney suing you. A list of the victories around the State is posted at ADAlawsuits.com. If you are being sued, you should check with your attorney about any of the information provided in this article before taking any action.
2. **Inspection**: If you have not already had your property inspected for access issues by a qualified inspector, you should consider doing so right away. Even if you are not being sued, you should find and retain this inspector through your

attorney so the inspector's findings will be protected by the attorney-client privilege or the attorney work product privilege if you are later sued. Because a number of inspectors have provided information about the properties they've inspected to plaintiff's attorneys, who later sued the property owner, this is another reason to find and hire an inspector through an attorney you trust. A good inspection can cost as little as \$600 and can be invaluable in a future lawsuit if you develop and follow an appropriate plan to fix cheaper problems sooner and more expensive ones over time. Many access lawsuits have been dismissed for little or nothing when the owner could prove that they were making progress in good faith according to such an implementation plan.

- a. **"Why can't I just look up the codes myself?"** Many business owners we see who try to research and implement access standards themselves fail to identify at least one issue. As you may know, all a professional plaintiff needs is one issue to recover a significant settlement. We've seen lawsuits involving as little as a paper towel dispenser which was 1" too high, or a coat hook in a restroom which was also 1" too high. In each case, tens of thousands of dollars was spent unnecessarily. To make it worse, because California and Federal guidelines conflict directly as to some important details, few business owners will have all the information necessary to know which standard to use in every case; there are more than 100 different measurements which apply in the average restroom and any of them can lead to a lawsuit.
- b. **Making sense of the report:** Most business owners say "just tell me what I have to do" and think the report they receive will do that. Unfortunately—while your legislators could have set an objective standard like those in the building code-- they chose not to do this. Instead they use a "readily achievable" standard for access renovations, which means you only need to make the renovations which are accomplished "without much difficulty or expense."
  - i. **The "nasty" side of access lawsuits:** The problem with the "readily achievable" standard for access renovations is that "much difficulty or expense" applies to each firm differently, so now attorneys are going around demanding financial statements from the companies they sue to determine whether they had the money to make the renovations they claim should have made by now. They will argue that if you had set aside just 1% of your gross income since 1992 (when the ADA became effective), you would have enough money to do nearly every renovation they claim should be made. If they can show that you didn't make even one renovation you could have afforded to make, they will claim you intentionally discriminated against their clients; unfortunately, because the law is written so vaguely, they will almost always be able to come up with some claim, such as the need for an employee policy statement to assist disabled visitors, Braille on

menus, etc. Many firms settle these lawsuits just to avoid producing their financial statements.

- c. **Developing an Implementation Schedule:** While access inspection reports can sometimes be discouraging if they identify large or costly issues, you should begin by identifying those renovations which you can do this week. Sometimes, it is as simple as walking through every aisle of your business with a yardstick out in front of you; if the aisles are not at least 36" wide, a wheelchair might not be able to get through. Immediate repairs could also include replacing door knobs, signs, faucet handles, etc., wrapping the pipes under the sink (to prevent burns to wheelchair users), lowering all dispensers so that their operative parts are less than 40" above the floor, etc.

For renovations which are costly or will take more time, you may be able to make them part of a written "implementation schedule"— but be sure to carefully document and comply with it. Ways to document it include writing a check to the access inspector, saving receipts for hardware and signs used to increase access, keeping copies of permits obtained, letters written, etc. By showing that you properly budgeted for larger and more complex renovations, you may be able to resolve a lawsuit filed later on by providing some of the documentation through your attorney.

- d. **The biggest "red flag"— parking:** Many have described ADA/access lawsuits as "drive-by" lawsuits. In fact, a remarkable number of these lawsuits are filed by Plaintiffs who did not even exit their vehicle after they saw that the disabled parking area was not properly configured (or may not have even visited your property at all). For this reason, the best investment you can make in disabled access is in your parking lot. Experienced access lawyers have speculated that you may be able to eliminate as much as 90% of your chance of being sued by ensuring that your parking area beautifully complies with all access standards, and this may only require a few hundred dollars to do.

If a "scout" drives by your parking area and sees that it is highly compliant with access standards, they may think that you have already been sued and modified the area as a result. If that was the case, they know that you might still be in the process of making other renovations over time as part of that lawsuit. Because of this, they might well prefer to target a business which has made no effort to accommodate the disabled, especially since there are so many others to choose from.

The foregoing is not meant to suggest that you should make access renovations only to your parking area, and not to the rest of your property— only that it should be your very first priority if you want to reduce your lawsuit risk. If you will be repaving an area, or otherwise making your existing disabled parking unavailable during renovations, you

may want to make special arrangements during that time. A growing number of lawsuits are being filed by disabled claimants against businesses which are in the process of making renovations to improve access. Some have suggested that some professional plaintiffs are being “tipped off” by contractors— in one case, a well known professional plaintiff “happened” to arrive the very day a parking lot was being repaved and just before the disabled lines could be painted! Watch out for opportunists!

### 3. **Other considerations:**

- a. **Video surveillance cameras:** Only a very small number of these lawsuits are filed against businesses which maintain conspicuous video surveillance of their premises. The fact is that an unscrupulous plaintiff may not want to make a claim against facilities where videotape could reveal that (1) s/he did not visit the premises as represented, or (2) s/he was not diligent or resourceful in dealing with access issues, etc. While businesses may balk at the several thousand dollar expense of implementing such a system, this will usually be much less than just the initial deposit you will pay to retain a defense attorney if you are sued. Many of the smallest settlements in California range from \$4,000 to \$45,000; a good video surveillance system (and 2 years of tapes) will certainly cost much less than that.
- b. **The “Big Bell”:** A buzzer with a large ISA (wheelchair) symbol on the oversized button is available and can be put at the entrance to a building so that a disabled customer can summon assistance from staff. Sometimes this alerts staff to bring out a temporary ramp; other times, they may simply help open a door which is awkward, etc. While we cannot suggest that these alternative accommodations are sufficient or acceptable, we see few lawsuits against businesses which have implemented them.

Another factor makes this device particularly attractive is that a “professional plaintiff” who wants to “set up” a business may well be unwilling to use it. The last thing a person trying to fabricate a claim wants is for a fawning, attentive staff member hovering over them trying to assist with their every need (and, more importantly, a witness in their lawsuit!). For this reason, some have suggested that this inexpensive device can be extremely effective in deterring opportunistic lawsuits— just be sure your staff knows what to do when it rings! Some businesses have linked their video camera systems to the Big Bell to make a record of anyone who summons assistance in this manner, and how the assistance is provided; thus, if an opportunistic lawsuit is filed, they can ask the plaintiff whether they pressed the buzzer, and if so, what the result was. If not, could any of the discrimination they claim have been avoided by using it?

- c. **“Flip-up” / “slide-out” service counters**: It can be very costly to lower service counters to the correct height required for wheelchair access. While the increasing use of “flip-up” and “slide-out” counters may not be an approved alternative to the preferred lowering procedure, many professional plaintiffs might find it difficult to claim that they were discriminated against by a firm which installed one of these; the total cost may well be less than \$200.00.
- d. **Assistance signs**: A large, easily readable sign which states something like “Staff will be please to assist the disabled— please just ask us” can help reduce the risk of claims relating to an inability to reach or operate certain things. Obviously, you should ensure a written policy exists that employees will stop what they’re doing and graciously assist any disabled visitor. Additionally, employees should be trained to identify those who may be experiencing difficulty who might not happen to be using a wheelchair or cane.
- e. **Employee handbooks**: Under California’s “Catalyst Doctrine” if an access lawsuit leads to any improvement in access for the disabled, the plaintiff’s attorney may be able to recover 100% of their fees and costs from the defendant. One strategy which allows some of them to be somewhat careless in the lawsuits they file is that if all else fails, they can always claim that the defendant business had not implemented policies and procedures for their employees to make them aware of the needs of the disabled and help minimize their inconvenience. Sample downloadable handbook language is posted at [ADAlawsuits.com](http://ADAlawsuits.com).
- f. **Clarify leasing provisions**: Because too many commercial leases do not clearly confirm whether the landlord or tenant will be responsible for making access renovations, many simple, inexpensive steps which could have prevented lawsuits are never taken. Simply addressing this issue between landlord and tenant during the leasing/renewal process can help avoid considerable uncertainty and expense. Guidance for drafting lease provisions is posted at [ADAlawsuits.com](http://ADAlawsuits.com).

Because there are so many issues to consider in increasing access for the disabled, many businesses put off doing anything because it can be very difficult to find reliable information. The better approach is to take care of the simple and inexpensive fixes immediately, and then carefully develop a plan to handle the larger, more costly ones over time. Too many firms have closed because of these lawsuits and a remarkable number of these closures could have been prevented by simply following the steps outlined above.

The foregoing should not be considered legal advice, and you are urged to consult with a qualified attorney about any matter of legal significance to you.