Part One
California Small Business Owners: An Easy Target of ADA Lawsuits

If you own, lease or operate a place that serves the public in California, you are at high risk of being sued and losing thousands of dollars under federal and state disability access laws. A record number 14,000 disability access-related lawsuits have been filed in just the last few years. Many businesses have paid thousands of dollars to settle lawsuits or correct alleged access violations, dismissed employees, and sought bankruptcy protection. Many businesses have even closed as a result of being sued.

Small business owners, which for the purpose of this article includes small commercial property owners, commercial tenants, and residential rental property owners *are most at risk* for being sued.

This article, Part One of five, discusses why small businesses are being targeted, and the perils of non-compliance.

In Part Two, we will discuss SB 1186, a recently signed disability access measure representing the biggest overhaul to California disability access laws since the laws were adopted more than 20 years ago, and which could substantially help small business owners in the long run.

In Part Three, compliance and lawsuit defense strategies will be discussed.

Part Four will focus on residential rental property owners.

In Part Five, ideas and solutions to create fairness in the law and achieve greater compliance, including the roaring debate in the California Legislature, will be explored.

California and Federal Disability Access Laws
Under California law and Title III of the federal American's With Disabilities Act (ADA), property owners and leasing tenants running businesses of "public accommodation" must meet very specific building code standards to make sure the disabled community has equal access to the parts of their business open to the public. Examples of places of public accommodation include restaurants, hotels, movie theaters, stadiums, lecture halls and other places of gathering, grocery stores,

California Strategic Advisors
1107 Ninth Street, Suite 625, Sacramento, CA 95814
916.447.7229 • www.CalStrategic.com

gas stations, parks, schools, doctor's offices, private schools, and commercial facilities such as factories and office buildings, and residential rental properties with areas open to the public.

Business and property owners who fail to comply with access laws risk exposing themselves to expensive lawsuits. In May 2011, for example, the justice department brought suit against the owners, developers and design professionals involved in the design and construction of nine multi-family housing complexes. (See http://www.justice.gov/opa/pr/2011/May/11-ag-646.html).

Justice Department's suit alleged that the properties were inaccessible to persons with disabilities because they lacked accessible pedestrian routes and accessible parking; had steep cross and running slopes; had doors that were not sufficiently wide enough to allow passage by persons in wheelchairs; and had light switches, electrical outlets, thermostats and other environmental controls in inaccessible locations. Further, the leasing offices were inaccessible to persons with disabilities because they lacked accessible pedestrian approach routes, compliant parking spaces, counters, and door hardware.

Even slight barriers to access, ones that can be easily fixed by merely moving an item such as a garbage can out of the way, are subject to lawsuits.

Complying With Both Federal and State Access Laws is Not Easy

In California, small businesses must comply with both the ADA and California's own set of access laws. These laws are ever changing and often confusing. Federal ADA laws were established around 1992, and then updated in 2010. On the other hand, California laws, which often impose more stringent standards than its federal counterpart, were first adopted in 1982 under the California Building Code. Since then, California laws have been revised, updated, and overhauled numerous times including as recently as 2012. Who can keep up?

Adding to the confusion, federal and state laws are often different from one another, and in some instances directly conflict. Where a direct conflict exists, a business owner who complies with one law will be in violation of another. This year, the California State Architect division identified at least seven direct conflicts between the new 2010 California Building Code regulations and the new 2010 federal ADA building code revisions. Although emergency regulations have recently been adopted to resolve the conflicts, whenever new federal or state access laws are adopted, small businesses are always vulnerable to lawsuits during the period in which the State has not resolved the conflicts.

"Existing Facilities": The Confusing and Complex Nature of Access Laws

Access laws can be quite complicated to understand, often leading to misperceptions and misunderstanding about what the law is and to whom it applies.

California Strategic Advisors
1107 Ninth Street, Suite 625, Sacramento, CA 95814
916.447.7229 • www.CalStrategic.com

Take for example one of the most common misperceptions that "existing facilities," (buildings in existence prior to 1993 when the ADA was adopted) are "grandfathered" and exempt from Title III ADA requirements. In fact, there is no grandfather clause under the ADA. Whether a building must be updated to comply with current standards depends on the circumstances.

The ADA requires buildings erected on or after January 26, 1993, to be fully compliant with ADA standards. Alterations made to facilities on or after January 26, 1992, must also comply with the ADA. Examples of alterations that would make a facility subject to full compliance with ADA standards include renovating the entranceway, service counter area, and bathrooms.

An "existing facility," one built before 1993, on the other hand, is not under an immediate requirement to be fully compliant. However, commercial property owners and leasing commercial tenants are under an obligation to remove barriers to access that are "readily achievable," defined as "easily accomplishable without much difficulty or expense." Determination of whether removing a barrier is "readily achievable" calls for a cost-balancing assessment based on the size and resources of the business, and the expense of compliance measures that could be taken.

While barrier removal can be something as simple as moving a garbage can from one location to another, it can also be a complex and expensive change like building a wheelchair ramp or otherwise substantially altering the entrance of a commercial property.

Complicating matters even more is the fact that the barrier removal obligation is a "continuing obligation" that started in1993 when the ADA was adopted. Thus, even if building a wheelchair ramp is too expensive a task to take on now, courts will look to see if over time, the owner could have saved up money to accomplish such a task.

Moreover, if removing a specific barrier is not readily achievable, building owners and tenants must provide alternative means of access that are readily achievable. For example, providing an alternative entrance or making sure an employee is available to meet the disabled person at the front of the building.

As one can see, the law is not straightforward or easy to understand.

Access Laws are Favorable for Plaintiffs and Expensive for Defendants

Not only are the laws confusing, ever changing, and difficult to comply with, access laws are set up so that small businesses will almost always pay.

To sue, plaintiffs do not even need to step foot into a building they allege is in violation of access laws. A plaintiff need only show an intent to return to the facility

California Strategic Advisors
1107 Ninth Street, Suite 625, Sacramento, CA 95814
916.447.7229 • www.CalStrategic.com

again to enjoy its services, and that his or her enjoyment is prevented by the lack of accessibility.

Access laws also do not require plaintiffs to give small business owners a chance to fix a violation before bringing a suit. Moreover, after a suit is brought, fixing a violation does not relieve a defendant of liability—even if the violation is minor or technical.

The remedies under federal and state law also heavily favor plaintiffs.

Under federal law, a plaintiff may obtain injunctive relief and attorney's fees, while an action by the U.S. attorney may bring equitable relief, monetary damages on behalf of the aggrieved party, and a civil penalty of up to $100,000.

Under California law, unlike most states, plaintiffs may sue for monetary damages in addition to attorney's fees and costs. Statutory minimum damages can be as high as $4000 per violation.

Of the remedies provided under state and federal law, attorney's fees are probably the most important. Most plaintiffs cannot afford to hire an attorney. Since the law allows plaintiffs to sue for attorney's fees, however, many attorneys are willing to represent plaintiffs because they know if they win their fees will be paid.

Additionally, attorney's fees often constitute the largest portion of the costs associated with litigation. Simply put, when a small business owner defendant loses an access-related lawsuit, the defendant must pay tens of thousands of dollars in plaintiff attorney's fees, in addition to all the fees charged by the defendant's own attorney.

Conclusion

Small business owners remain highly susceptible and vulnerable to access related lawsuits. The plaintiff-friendly legal rules and remedies make it profitable and easy to sue. Even small and easily curable violations are worth thousands of dollars to plaintiffs and their attorneys. On top of that, many owners struggle to comply in the first place because it can be expensive, and the laws are complex and always changing.

For better or for worse, small business owners remain and will continue to be the target of access law litigation. Under the current system, small business owners will also continue losing these suits, unless they start taking steps to become complaint.

Part Two will discuss important changes to disability access laws brought about by SB 1186. Part Three will highlight steps property owners and commercial tenants

California Strategic Advisors
1107 Ninth Street, Suite 625, Sacramento, CA 95814
916.447.7229 • www.CalStrategic.com

can take to achieve access compliance. Part Three will also address strategies for dealing with access-related lawsuits.

_____

By Ron Kingston and Etan Zaitsu

California Strategic Advisors
provides lobbying, legal, and consulting services for businesses and trade associations.

Ronald M. Kingston, the President of California Strategic Advisors, is one of the most accomplished lobbyists in California. He has successfully written numerous legislative measures relating to housing, building, real estate disclosure, environmental hazards and new construction standards. He has a long and accomplished track record representing landlords, REALTORS ®, the finance industry, homeowner associations, judicial council, and many other interest groups and business.

Etan Zaitsu, a member of the California Bar, recently joined California Strategic Advisors as lobbyist.

Contact:
Ron Kingston: Ron@CalStrategic.com / 916.447.7229 ext. 102
Etan Zaitsu: Etan@CalStrategic.com / ext. 103