Part Two
New California Disability Access Law Signed: SB 1186

Every year, disability access laws are introduced in the California legislature as fast as they are killed. Just this year 14 bills were introduced, attempting to fix what many in the small business community argue is an unfair and unbalanced approach to disability access compliance.

Small business owners (which includes commercial and residential rental property owners and commercial tenants) have been hit hard by what has become a growing trend in California: expensive lawsuits; predatory and abusive litigation practices; and costly compliance requirements.

One bill, however, finally made it to the Governor's desk. SB 1186, signed into law September 2012, is a bipartisan measure authored by Senate President pro Tem Darrell Steinberg and Republican Senator Bob Dutton. It represents one of the biggest overhauls in California disability access laws since the laws were adopted more than 20 years ago.

Of course, not everyone is happy with the final product. Some in the small business community argue the new law does not go far enough. They were hoping for an amendment allowing business and property owners an opportunity to fix minor and easily curable violations without consequence. Some in the disability community, on the other hand, argue that the bill goes too far, claiming the measure establishes pre-litigation hurdles that are unprecedented for a protected class under anti-discrimination laws.

While some discontent remains, the consensus is that SB 1186 represents the best possible compromise at this time to achieve better compliance while decreasing the incidence of predatory and abusive litigation practices.

This article analyzes the most important aspects of the bill, which includes a ban on money demands, regulations on demand letters and attorney conduct, expansion of those who may request litigation delays and early evaluations, qualifications for statutory damages reductions, commercial property owner and tenant disclosures, and the expansion in disability access education. The article will conclude with an expansive list of disability access law changes brought about by SB 1186.

Demand Letter and Attorney Conduct Regulations

SB 1186 addresses the growing problem of "pay-now or pay-more-later" extortion-like demand letters sent by profiteering plaintiffs and their attorneys to scare small business owners into making quick settlements. Small business owners who neither understand the law nor their legal rights often settle out of fear. Consequently, access violations are not remedied, and courts are prevented from determining whether these claims are legitimate and from punishing unscrupulous plaintiffs and their attorneys for their predatory practices.

SB 1186 heavily regulates this pre-litigation practice. First, it bars any attorney from demanding or agreeing to accept money. Second, any pre-litigation "demand letter" sent by an attorney must contain the attorney's bar number, and state with clarity the facts giving rise to the alleged access violation. Third, attorneys who send demand letters must also send copies of the letters to the State Bar (until January 2016) and the California Commission on Disability Access (Commission).

Fourth, attorneys who file complaints with the court must also send copies of the complaints to the Commission (until January 2016). Finally, all complaints and demand letters sent to defendants or potential defendants must be accompanied by a comprehensive "written advisory" explaining to the recipient his or her legal rights. Attorneys who violate these rules are subject disciplinary action by the State Bar.

It should be noted, however, that the new law does not prohibit attorneys from offering or conducting pre-litigation settlement negotiations for damages and attorney's fees. Important, however, is that settlements may only occur after a written or oral agreement is reached between the parties for the repair or correction of the alleged violation or violations of a construction-related accessibility standard.

The likely effect of these new attorney regulations is pretty substantial. Attorneys will be less likely to bring frivolous or meritless claims knowing that their claims will be scrutinized and because of the risk of disciplinary action. As such, the incidence of demand letter profiteering will likely decrease.

Business and property owners will also be better informed about their legal rights and the reasons they may be in violation of access laws when they receive demand letters or complaint notices than they were before.

There are, however, aspects of the law that some disfavor. For example, nothing in the new law regulates plaintiffs' conduct. Thus, plaintiffs may continue to lodge money demands and avoid advising the recipient of his or her legal rights. Also, the old system allowing for quick out-of-court settlements without the need for litigation or the requirement to correct violations may have been preferred by some small business owners. That's because for some, it may be cheaper to settle out of court than pay attorney fees, damages, and expenses to correct the access violations.

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The disability community also believes these new hurdles will have a chilling effect on suits that are valid and meritorious, and will therefore lead to less compliance and continued barriers for the disabled community. They argue that with all the new hoops attorneys will have to go through, attorneys will be less inclined to take their cases. The counter argument is that nothing in the new law affects the ability of a plaintiff to sue for attorney's fees. These fees are and remain the greatest incentive for attorneys to get involved. In any event, at this point it is unclear how attorneys will react.

Minimum Statutory Damages Reduction for "Small Businesses" and Other Qualifying Defendants

SB 1186 reduces the statutory minimum damages that may be claimed by a plaintiff for each violation from $4000 to as low as $1000 if certain conditions are made. For example, any defendant who hires a Certified Access Specialist (CASp) and meets applicable compliance standards prior to a lawsuit, would be liable for minimum statutory damages of $1,000 per offense, when the defendant corrects the alleged construction related accessibility violation within 60 days of being sued. CASp inspectors are professionals whose primary service is to inspect buildings and property to determine whether and to what extent the building or property is in compliance with federal and state access laws

Similarly, any defendant who qualifies as a "small business," defined as having 25 or fewer employees and no more than $3.5 million in gross receipts, would be liable for minimum statutory damages of $2,000 per offense, when the defendant corrects the alleged construction related accessibility violation within 30 days of being sued.

The hope is that this provision will encourage defendants to quickly correct their access violations. While a few thousand-dollar reduction may compel some to remedy their violation faster, quick compliance will likely depend on the circumstances. Correcting a violation is both an admission of guilt and potentially very expensive. Additionally, a couple thousand-dollar reduction may be inconsequential when compared to attorney's fees. Thus whether the provision will increase quicker compliance likely depends upon the type of violation, the cost of curing the violation, and the strength of the defense strategies available to a defendant under the circumstances.

Additionally, with respect to the decrease in minimum damages for business owners who hire a CASp inspector, some argue SB 1186 does not go far enough. Because there is no "reasonable reliance" standard under the law, small business owners can be found liable even if they spend thousands of dollars in building modifications to comply with the law based on the recommendation of a CASp inspector. That means the mistakes of professional access specialists remain the burden of business owners. SB 1186 also does not address the high cost of attorney's fees that small business owners would still be liable.

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Favorable Court Proceedings for Small Businesses
Prior to SB 1186, a defendant who hired a CASp inspector to evaluate his or her property prior to the commencement of a lawsuit, was granted the option to request an early evaluation conference (EEC) and entitled to an immediate mandatory stay of the proceedings. An EEC brings the parties together, allows the judge to determine whether the case is frivolous or not, and potentially ends the case at an early stage. A mandatory stay (or delay in the proceedings) halts the proceedings and freezes the plaintiff's attorney's fees at that point.

Under SB 1186, those who qualify as a "small business" are now entitled to the mandatory stay and EEC.

SB 1186 also allows either party to request a mandatory evaluation conference (MEC) conducted by the court within 90 days to 120 days of the request. Similar to the EEC under existing law, at the MEC a judge would evaluate the status of the case, consider the current condition of the property, determine whether the defendant has made repairs or plans to make repairs, evaluate the asserted damages and attorney's fees of the plaintiff, and determine whether the case can be settled in whole or in part. While these defendants would not be eligible for the court stay of the proceedings, the MEC could assist in resolving the case at an early stage while promoting compliance.

New and Beneficial Education and Access to Specialists
SB 1186 requires cities and counties to collect a $1 fee upon issuance or renewal of a business license or similar instrument to pay for more CASp in local building departments, to reduce costs of CASp testing and certification to encourage more private CASp, to strengthen the CASp program by enabling the Division of State Architect develop audit procedures for the CASp program to maintain quality control, develop "best practices" guidelines, and pay for development of more educational and training resources at state and local level to promote compliance.

Commercial Property Owner and Commercial Tenant Disclosures
SB 1186 also addresses liability concerns that arise between commercial landlords and commercial tenants. Under current law, both the owner of a building and its leasing tenant are jointly liable for any access violations that exist. Commercial tenants have complained that they are often blinded sided with suits alleging access violations that existed before they leased the building. Commercial landlords complain that sometimes they are held liable for access barriers that their tenants create, for example placing a garbage can too close to an entranceway.

SB 1186 attempts to create some transparency at the point of lease by requiring commercial landlords to state whether the building has or has not been CASp inspected. This small step gives tenants a better idea about the accessibility condition of a building prior to signing a commercial lease, and increases awareness

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of the duties of the landlord and tenant. Residential properties will not be affected by this new provision.

Conclusion

Overall, SB 1186 is a significant compromise, and represents the biggest change in state disability access laws since they were established. In particular, it is a substantial step forward in reducing predatory lawsuits. Whether it will promote and increase more compliance, however, remains to be seen. In Part Five we will discuss other solutions and ideas that have been debated over the years, which could potentially have a bigger impact on access laws than SB 1186.

Part Three will highlight steps property and business owners and commercial tenants can take to achieve access compliance, and address strategies for dealing with access-related lawsuits that are filed against them.

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