

Accessibility Essentials for
California Businesses Providing Public Accommodations
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Disability Access Laws

Places of commercial business serve an important function in our society and communities because at some point in almost everyone's life we experience living with a disability. Whether temporary, long-term, or simply part of the aging process, we need public and commercial spaces that provide basic amenities for people with disabilities. Not only does this necessitate good universal design and following building codes, but it's also the right thing to do. Performing alterations in order to support independent living is also a CA State and Federal legal requirement. California's first recognition of access for public accommodations, the CA Disabled Persons Act (DPA), passed in 1968. The DPA can be enforced through lawsuits and currently allows for damages set at a minimum of \$1,000, provides for barrier removal, and allows a prevailing plaintiff in an access lawsuit to recover attorney's fees.

The American's with Disabilities Act (ADA), was passed on July 26, 1990. It is not a building code or solely an employment law, but rather an extension of the 1964 Civil Rights Act (see Appendix). The Department of Justice (DOJ) publishes the federal building access code standards. Their standards are based on the U.S. Access Board's ADA Accessibility Guidelines (ADAAG). The most current DOJ standard is the 2010 ADA Standards for Accessible Design (ADAS, aka 2010 Standards), which were made a requirement for new construction and alterations on March 15, 2012.¹ Prior to the 2010 ADAS there was the 1991 ADAAG, which had many of the same provisions. Occasionally, the U.S. Access Board releases updated guides to the ADAS.² While the ADA is a civil rights law that sets in place many aspects of access, the built environment is not required to meet "ADA," but rather the applicable accessibility standards. Many states, including California, have accessibility standards in their building codes in addition to the federal standards.

The 1991 ADAAG was much more comprehensive than the American National Standards Institute (ANSI 117.1) standard that it replaced. California had first replaced the ANSI standards in 1982 when it adopted the Uniform Building Code (UBC) with CA Amendments. By the time the ADAAG were adopted on a federal level, it contained instances that were in direct conflict with the CA Building Code (CBC). The 2013 CBC, which was adopted on January 1, 2014, closely aligned the two standards (DOJ approval still pending) and added amendments where the prior CBC imposed tighter or added restrictions. This makes following the two standards easier now, but trying to figure out what the access standards were when something was built remains difficult. This is significant because it is the standard that is applied when determining what constitutes a violation.

Another challenge California businesses face is due to how the state assesses fines for ADA lawsuits. When the Federal Americans with Disabilities act was passed in 1990, the California Legislature assigned it to an existing Civil Rights law on the books that prohibited businesses from discriminating against individuals and banned other forms of discrimination. The 1959 Unruh Civil Rights Act they adopted for ADA penalties allows for monetary damages set at a minimum of \$4,000 per violation.³ This became the federal amount that a Plaintiff of an access discrimination lawsuit can submit a claim for, which was and still is the steepest penalty of any state. Also, when a defendant challenges an access discrimination suit and loses, the plaintiff is awarded damages to cover the cost of their legal counsel. When congress passed the ADA they added this clause, and it remains the only federal legal action where a defendant can bear the plaintiff's attorney's fees. For these reasons, many business owners settle, or agree to an award money amount out of court, when they find themselves defending against an access discrimination lawsuit. How penalties are assessed in California is a matter



of politics. In some states, businesses can only be sued in order for the Plaintiff to achieve injunctive relief and recover attorney's fees. This means that the non-compliant issue has to be fixed, and there is no financial award of damages to the Plaintiff.

The CASp Program & SB 1608

In 2003, the California Senate passed Senate Bill 262 (Chapter 872, 2003), which enacted the Certified Access Specialist (CASp) program. In 2008, the first CASp exam was administered. A CASp is required to pass examinations by the State of California which demonstrate specialized knowledge of state and federal accessible building codes, and the CASp program is designed to meet the public's need for experienced, trained individuals who can inspect buildings and sites for compliance with accessibility standards. A CASp can render a determination that a business meets all applicable standards, but has no enforcement authority when it does not. "Having a business/property reviewed by a CASp shows that you care about ensuring equal access for all of your customers, and that you intend to follow the law. The good-faith effort of hiring a CASp may lessen your liability and provide certain legal benefits if an accessibility claim is filed against you." ⁴ Another way to lessen a business's liability is to implement policies in order to provide better service to those with disabilities and become familiar with the federal statutes. ⁵

A CASp is required to render an impartial opinion and any services, reports, and information they provide can be kept confidential. The program is voluntary, meaning that other professional standards still apply to those rendering services as a CASp. It was also not created to form an advocacy group for either the disabled or business community, but rather to raise awareness, promote education, and render opinions based on authoritative knowledge. While licensed design professionals such as engineers and architects can provide services to provide access compliance, there is one benefit of hiring a CASp which no other professional can offer that SB 1608 created in 2008 which is called the Construction-Related Accessibility Standards Compliance Act (CRASCA, Civil Code 55.51-55.545). It states, "Only a CASp can provide services that offer you qualified defendant status in a construction-related accessibility lawsuit... if you receive an inspection of your existing facility and a report from a CASp, and abide to a schedule of improvements toward compliance before a construction-related accessibility claim is filed against you." This "qualified defendant" status is enacted when a complaint has been filed and served on a business and/or its property. If it has been inspected by a CASp, then the business or property owner may have the right to a court stay (temporary stoppage) and early evaluation conference to evaluate the merits of the construction-related accessibility claim. ⁶ The most important part of following CRASCA is that the business demonstrates a good-faith effort to remove barriers and sets a schedule for doing so. These benefits have been limited to the State Courts so far, but the Federal Courts which handle about half of the disabled access cases in California have similar standards that make the process of hiring a CASp and removing barriers before a lawsuit happens extremely beneficial.

SB 1186

There was some relief for businesses in CA on January 1, 2013, when SB 1186 became law. ⁷ It placed new requirements on disability access litigants and their attorneys and made it so that penalties were assessed per the number of times access was denied. California Civil Code 55.56 states in part, "Statutory damages... may be recovered in a construction-related accessibility claim against a place of public accommodation only if a violation... denied the Plaintiff full and equal access to the place of public accommodation on a particular occasion... Statutory damages may be assessed... based on each particular occasion that the Plaintiff was denied full and equal access, and not upon the number of violations of construction-related accessibility standards identified." ⁸ SB 1186 also reduced statutory



damages for certain violations and established injunctive relief rules for small businesses that reduced penalties if a minor violation could be corrected within 30 days.

Beating Serial Litigation

Despite the changes afforded by SB 1608 and SB 1186 to the California Civil Code, there has been little effect on the number of lawsuits filed, which have continued to increase since SB 1186 went into effect in 2013. Out of a population of over 38 million people in California, there are an estimated 10% who are living an independent life with a disability. The vast majority of them don't see any of the money from these claims, but they have benefited from them because of the access improvements that have resulted directly and indirectly from them. One could argue that there could be different modes of enforcement where the monetary damages awarded from these claims is instead spent towards providing more and better access. However, access is enforced through lawsuits and there is abuse of the system, as some of the serial Plaintiffs don't even live in California and many file these lawsuits in order to make a living. There is even a website dedicated to calling out the attorneys that file suits on behalf of serial Plaintiffs.⁹ One Plaintiff alone, who happens to reside in Arizona, has filed over 250 suits from 2001 to 2015.¹⁰

What serial lawsuits amount to for an owner is the more successful a business is, the less likely that a low cost settlement can be reached. At the same time, many struggling businesses have gone out of business from being involved in a lawsuit. Access improvements are almost always less expensive than defending a lawsuit in court, and most lawsuits are the first notice a business gets that there may be an issue, despite the legal obligation placed on businesses to provide access.¹¹ The rise in the number of attorneys recognizing them as viable business models has not gone unnoticed. AB 1521 was passed in 2015 and went into effect in January of 2016. It defines the term "high frequency litigant" and requires those meeting the definition to pay a \$1,000 fee for every claim that they file. Businesses served by a high frequency litigant are also entitled to a court stay, early evaluation conference, and a site visit.

In 2014, the California Commission on Disability Access (CCDA) reported 3,175 disabled access cases in California, and that number has continued to trend upward with 4,271 total cases in 2018.¹² All business owners in California that are either an owner or a tenant of a building open for business to the public have a legal obligation placed on them to comply with disability access laws. A CASp survey is only the first phase of access compliance. No survey, not even one by a CASp can stop all lawsuits from happening. However, a CASp survey with a plan to bring a business into access compliance is a business owner's best chance at fulfilling their legal obligation and receiving "qualified defendant" status if a lawsuit does happen.⁶

Landlord and Tenant Responsibilities

With regards to the responsibilities of a tenant vs. the owner of a property, both can legally be held liable for a claim. It is wise for both parties to agree on lease terms designating which party is responsible for the construction and maintenance of common areas. This is especially important because the most common access violations are outside in the areas usually controlled by landlords and shared by multiple tenants. From July through November of 2015, (8) of the top (10) disabled access demand letter and claim violations were in regards to parking and the route from arrival points through the tenant's front door.¹³ Many of these barriers are conditions that could be scoped out by looking on Google Street View, without ever going to the property.

As of July 1, 2013, when a tenant leases a property, the landlord is required to state in the lease whether a CASp inspection has been performed, and if one has been provided, then the landlord must disclose whether the property is fully compliant in the opinion of that CASp. Despite the disclosure in



the lease, the landlord is not required to have a CASp report performed, and they are not required to bring the property into compliance before leasing it if deficiencies have been found. The purpose of this law is to generate discussions between landlords and their tenants about providing access.

Existing Construction

Nothing is “Grandfathered In”, but buildings built before 1992 that have not undergone an alteration would only have to provide accommodations whenever they can be provided without much difficulty or expense. This is referred to as “Readily Achievable” barrier removal. In California, there are sometimes instances where barriers meet the standards of “Safe Harbor.” This is when they meet the Federal ADAS and the CBC that was in effect when the feature was built, but don’t meet the current CBC. Until that particular feature is renovated (or required to be upgraded because of a remodel), it is considered to be in compliance. Removal of readily achievable barriers will vary depending on the profitability of the business. However, if a barrier cannot be removed, then the goods and services provided by the business must still be made available through alternate means.

Determining whether a barrier is readily achievable requires an examination of the difficulty in removing the barrier and the financial resources of the business, which will include the entire portfolio of the business and not just the financial resources dedicated to the individual site when the business has more than one entity or multiple locations. A CASp may be able to render an opinion that something is technically infeasible or cannot be accomplished without much difficulty or expense based on the financial resources of a client. Along with the federal requirements of the ADAS, there is some relief in the form of Federal Tax Credits. Business owners should familiarize themselves with these credits, especially when performing upgrades to remove readily achievable barriers.¹⁴

Alterations and New Construction

New construction, whether it’s a ground up development, a remodel, or tenant improvement of a new or existing space, requires an architect to prepare plans for permit and construction. It is the architect’s responsibility to design the project to the standards of the California Building Code, however, an architect’s level of liability is only to that of the Standard of Care.¹⁵ That means that architects “...can be held negligent if (they) are not reasonably competent or have failed to exercise due care under the circumstances.”¹⁶ Basically, architects are expected to provide the level of services that would be expected of another architect. Owners and tenants are ultimately responsible for providing accessibility, and much of it depends on maintenance and having proper operations procedures in place. Architects do their best to deliver project designs that meet all of the required standards, especially those pertaining to the health, safety, and welfare of the general public. However, their scope of responsibility is too great in order for them to be highly trained specialists in any one category. California requires five hours of continuing education to be performed in this category every two years for an architecture license renewal. All of this is why a CASp, someone that specializes in the access provisions of the building code and is required to be impartial, can play an important role on the design and construction team of any project.

A CASp with plan checking, design, and field inspection experience can serve a valuable role during the design and construction of a project and adds a level of review that can relieve project delays, which saves time and money and can pay for itself. It is important to have them review the plans at some point during design and approve the plans for permitting and construction. When the CASp should be onboard as a team member in the design process and to what extent of a role they play is a tricky question and will depend on several factors like the complexity of the project’s conditions, type of project, level of experience of the architect, and whether it is new construction or a renovation. The person in the best place to make such a determination is usually going to be the project architect.



Larger projects may have a construction manager involved in the design process, who can also make that determination. One of the keys is accountability in the design process. If a design progresses too far and there is nobody accountable for accessibility, then it may lead to major design changes.

The best way to assign this level of accountability is to have the architect contract directly with the CASp at the owner's approval. That way, the architect can work with the CASp as a member of their team and hold them directly accountable. There are two potentially very large benefits of having a CASp review permit drawings prior to construction. One is grease in the wheels of the permitting process, since there is someone on the team that can respond to interpretations of the building code made by city and county plan check engineers, and the other is to avoid construction changes in the field that result when a project doesn't pass city inspections after construction. The CASp should at the very least review the Construction Documents before they are submitted for permitting.

Role of Building Officials

Every city in California is required to have a CASp plan check engineer and field inspector on payroll. There is even a more recent provision which requires a city to provide a CASp inspection upon completion of a project when requested. However, the jurisdiction having authority is not required to enforce the ADAS, and even though these standards are now closely aligned with the building code in California, they cannot be held liable for signing off on projects with access violations because that is not how accessibility is enforced under State or Federal Law.

There are as of the time of this publication 941 CASp (including those that are inactive).¹⁷ There are currently 330 who offer commercial CASp inspection services. Out of those who are active, many are architects, contractors, or otherwise not city or county officials. Consider for a moment that there are over 500 building departments in California. That means there would first need to be about two CASp on payroll for each of those jurisdictions for a total of 1,000 CASp. There is simply a shortage of CASp and it is a very difficult certification to achieve and even tougher to implement in an inspection. On top of that, the legal ramifications if a city or county were liable for buildings not meeting accessibility standards would be a burden felt by the tax payers. That is why they are not only exempt from enforcing the ADAS, but they are also specifically prohibited and not authorized to enforce the provisions of this federal civil rights discrimination law.

Recent Developments

In May of 2016, SB 269 implemented the 120 day notice and permit expedition regulations. Any small business (50 or fewer employees) that obtains a CASp report and posts the 120 day notice shall get a stay of court if a lawsuit happens within 120 days of obtaining the report.¹⁸ It also now requires all jurisdictions statewide to expedite review of permit services when an owner furnishes a disabled access inspection certificate, demonstrates the project is needed to correct a violation, and the plans have been reviewed by a CASp for compliance.

Also in September 2016, AB 2093 amended how the disclosure of a CASp inspection report and barriers found in it is handled during the lease or sale of a property. It made it so that if an inspection has not been performed that the two parties of the lease or sale must agree on how costs for a report will be handled. A CASp inspection is still not required at the time of a real estate transaction, but the added language calls more attention to their legal requirements to provide access to the public.

Conclusion

California is the hotbed for accessibility claims and far outpaces the rest of the country with more than 40% of all suits happening in this state, even though it accounts for only 12% of the nation's population.²⁰ There is no "silver bullet" for avoiding access lawsuits. Recognizing the burden the laws



place on businesses, becoming familiar with the responsibilities to provide accessibility, and removing barriers is the best way to avoid becoming the next target for a lawsuit. This is why hiring a CASp to review a property and following CRASCA is so critical to every business owner, and at the same time providing equal access is important for so many people. As critical as accessibility is, there is a balance between what amenities are required to be provided by business owners with “brick and mortar” shops and what the business owner should reasonably be expected to provide in order to facilitate the sale of goods and services to their customers with disabilities. In some instances, there is a group of a few trial attorneys and serial Plaintiffs who are taking advantage of the law. The best way to defend against these serial lawsuits is to have a CASp inspect the property, an architect provide permit drawings, and a contractor remove the barriers.

Citations:

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The contents of this publication are based on the citations and the author’s authoritative knowledge and opinion as a CASp. It is not intended as an interpretive manual or to serve in furthering the interests in any side, including disabled advocacy groups and businesses. Nothing contained herein shall be construed as a warranty or a guarantee. Implement the information given as you see fit and at your own risk. We strongly encourage business owners to use the information given as a framework for forming their own policies, decisions, and conducting further research.

“The DSA does not review for accuracy nor endorse any publications from individuals outside of DSA, or from third-party vendors, that claim to provide interpretive assistance with the accessibility requirements of the CBC. California statute gives weight to the opinion of a CASp in rendering determinations after an inspection; therefore, it is imperative that opinions and interpretations are made by each CASp based on the use of the applicable CBC and the applicable federal standards, and not based solely on an analysis provided by an interpretive manual.”²¹

About the Author:

Robert L. Cooley is a California licensed architect with over fifteen years of design experience. In 2012, he was the project manager for the barrier removal of 35 Whole Foods Market grocery stores in Northern California. As a result of working on this program, Robert became a CASp in December of 2014. In May, 2015 he founded Cooley Architectural Corporation to provide inspections, consulting services, and full architectural services focused on commercial accessibility upgrades.

Appendix:**Americans with Disabilities Act of 1990**

There are five titles of the ADA.²² Title I of the ADA regulates employment practices, for any employer with 15 or more employees. It includes provisions for providing a barrier-free work environment, or what is commonly referred to as making reasonable accommodations in the workplace. Title I is enforced by the Equal Employment Opportunity Commission (EEOC).²³

Title II requires State and local entities to provide services, programs, and activities which are free of discrimination against those with disabilities. It requires that government buildings have architectural changes made in order to achieve program accessibility. It also requires that newly constructed or altered public buildings be built to meet accessibility standards. Title II also regulates public transportation.²⁴

Title III requires that certain places of public accommodation and commercial facilities comply with accessibility standards. It prohibits discrimination on the basis of a disability in the built environment, or requires what is called “barrier free” design. When a place of public accommodation such as a restaurant, supermarket, movie theater, school, church, daycare facility, doctor’s office, or office building is newly constructed, it must fully meet accessibility standards. Furthermore, alterations made to existing buildings shall provide accessibility upgrades for up to 20% of the construction budget, which gets complicated because there is a list of what alterations to make first. Title III also goes one step further and requires the removal of existing accessibility barriers when doing so is readily achievable. In other words, if a business ignores the law and does nothing to provide accommodations for people with disabilities, then they can be held liable for discrimination.²⁵

Title IV regulates Telecommunications, which the FCC sets minimum standards for features such as Text Telephone (TTY) and Closed Captioning.²⁶

Title V contains miscellaneous provisions, one of which allows states such as California to provide greater protections for people with disabilities than afforded under the Federal standards.²⁷

