

NEW ADA REFORMS HELP CURB SHAKEDOWN LAWSUITS

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Demand Letters - Effective January 1, 2013

The Legislature established strict standards for letters sent by claimants and attorneys alleging an ADA violation and an interference with equal use and access of a place of public accommodation. Each of these requirements is designed to ensure that the claimant's allegations are meritorious and not designed to extort the property owner or landlord. Any pre-litigation letter regarding an alleged violation now must contain the following:

- A statement of facts sufficient to allow a reasonable person to identify the basis of the alleged violation;
- A plain language explanation of the specific access barrier the individual encountered or that caused the individual to be deterred, with sufficient information about the location of the barrier to enable a reasonable person to identify the access barrier;
- An explanation of the way in which the barrier interfered with the person's full and equal access;
- The date(s) on which the alleged interference occurred; and
- No requests or demands for money or an offer or agreement to accept money+, as the letter may only state that the property owner, landlord or tenant "may be civilly liable."

Additionally, attorneys sending demand letters must also submit a copy of their letter to both the California State Bar and the California Commission on Disability Access. The State Bar will review these letters to ensure compliance with the new standards. The CCDA will review the nature of claims being asserted, including publishing a top-10 list of violations.

Unfortunately, the Legislature did not require notice prior to the filing of a complaint; in lieu of demanding payment, plaintiffs can simply file a lawsuit and then go to the landlord or property owner with their demands. However, in filing a new lawsuit, the plaintiff must provide an

advisory to the property owner which clearly sets out the owner's rights, including the new limitation on damages and the procedural protections that owners can invoke to quickly stall these claims.

Procedural Safeguards - Effective Immediately

The new litigation procedures are intended to expedite the process of reviewing ADA claims and help landlords dismiss unsupported lawsuits with minimal time, effort and expense. In particular, landlords and property owners who qualify are entitled to seek an immediate, mandatory stay of any lawsuit filed against them and an "Early Evaluation Conference" in which the plaintiff must present its entire claim. This essentially stops the lawsuit (and the plaintiffs' attorneys' fees) from proceeding and forces the plaintiff to show the merits of its case before the court, an obligation which should weed out unmeritorious claims. To qualify for these procedural protections, the landlord or property owner must fall within one of four categories:

1. The property has been CASp-inspected or meets applicable standards, has a CASp determination pending or has been inspected by a CASp; there have been no modifications or alterations that would affect compliance with the ADA standards; and a CASp inspection report has been issued;
2. The property's new construction or improvement after January 1, 2008, was approved pursuant to the local building permit and inspection process; there have been no modifications or alterations that would affect compliance with the ADA standards; and all violations have been or will be corrected within 60 days;
3. The property's new construction or improvement after January 1, 2008, was approved by a local public building department inspector who is a CASp; there have been no modifications or alterations that would affect compliance with the ADA standards; and all violations have been or will be corrected within 60 days; or
4. The defendant is a small business (employs 25 or fewer employees and has gross receipts of less than \$3,500,000) and all violations have been or will be corrected within 30 days.

Upon the filing of an application for stay and early evaluation conference by a qualified

defendant, the court will immediately grant a 90-day stay of the proceedings and order an early evaluation conference within 50-70 days, at which all parties must personally appear. Evidence is then presented by each side, permitting the court to conduct an early evaluation of the case and ensure that the plaintiff's claims are substantially supported with evidence.

Standard of Proof and Damages - Effective Immediately

Under the new laws, the plaintiff must now prove that the violation denied the plaintiff full and equal access to the place of public accommodation on a particular occasion, which can occur in two ways. The first method is to show that the plaintiff personally encountered the violation and experienced difficulty, discomfort or embarrassment because of the violation. The second way is to show that the plaintiff was deterred from accessing the place of public accommodation, which requires that the plaintiff show that she had actual knowledge of the violation and that the violation would have actually prevented full and equal access for the plaintiff.

If plaintiff meets these requirements, plaintiff may only recover damages based on each particular occasion that the plaintiff was denied full and equal access, not on the number of violations that exist. This means that even if there are multiple ADA violations at a given property, the plaintiff can only recover once per occasion that these violations denied the plaintiff full and equal access. Moreover, if a plaintiff claims that she was denied full and equal access on multiple occasions (which plaintiffs often allege to increase their claimed damages), the plaintiff must now prove that she acted reasonably in visiting a particular location multiple times when they were aware of a known barrier to their access. We expect this requirement will result in plaintiffs being prevented from recovering duplicative damages for the same ADA violation, as a plaintiff will face a higher burden to show why it was necessary to return to a public place of accommodation that the plaintiff knows has an ADA violation.

The new laws also establish lower minimum damage limits, which should reduce overall liability for landlords and property owners. In particular, damages are now reduced to \$1,000 (from \$4,000) for each offense if the defendant shows that the ADA violation has been remedied within 60 days and one of the following:

1. The property has been inspected by a "Certified Access Specialist" (CAsp), deemed to "meet

applicable standards” and have no modifications or alterations that affect compliance with the ADA standards;

2. The property is in the process of being inspected by a CASp and the defendant has implemented reasonable measures to correct the alleged violation or was in the process of remedying any violation at the time the plaintiff was denied full and equal access.

3. The property was a new construction or improvement and inspected and approved by the legal building department permit and inspection process on or after January 1, 2008, and have no modifications or alterations that affect compliance with the ADA standards; or

4. The property was a new construction or improvement that was approved by and passed inspection by a local building department official who is a CASp, and has no modifications or alterations that affect compliance with the ADA standards.

Additionally, a special damages limitation applies and is available to small businesses that are liable for a construction-related accessibility claim. Specifically, where a small business corrects all construction-related violations within 30 days of being served with the complaint, the minimum amount of damages will be reduced to \$2,000 (from \$4,000). Small businesses qualify where the business has employed fewer than 25 people, on average, over the past three years and has averaged annual gross receipts of less than \$3,500,000.

Commercial Lease Terms - Effective January 1, 2013

Finally, the new law requires that any lease of commercial property executed on or after July 1, 2013, must state whether the premises have been inspected by a CASp and/or whether any violations were found. Landlords and property owners should begin preparing these clauses and incorporating these new requirements into their forms immediately to ensure compliance with this new obligation.

New Tax - Effective January 1, 2013

A \$1 tax will be required for any application for a local business license or equivalent license or permit. This revenue will be used to fund the expanded CASp program required by this bill.