The Disabled Persons Act: The Rules Have Changed, But the Game Remains the Same

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While employers have to contend with many issues under the Americans with Disabilities Act concerning their employees, they are also challenged by the accessibility of the buildings in which their employees work. In 1990, Congress enacted Title III of the American’s with Disabilities Act (“ADA”) in an attempt to eliminate “barriers” to disabled individuals’ access to places of public accommodation (all public business affecting commerce, regardless of size). Under the ADA, all existing places of public accommodation, and any new construction, must comply with the technical requirements of the ADA Standards for Accessible Design. However, existing structures must only make alterations that are “readily achievable” to comply with the law. To determine what is “readily achievable,” courts have adopted what is essentially a cost-benefit analysis.

Although the goals of Title III of the ADA are laudable, the ADA was quickly seized upon by enterprising plaintiffs’ lawyers, and career plaintiffs, as a way to make money by forcing quick settlements. Critics of Title III of the ADA cite the damage scheme under the law as creating an incentive for filing suits by allowing for the recovery of attorneys’ fees. In California, the problem is exacerbated by the fact that, while the ADA only allows for injunctive relief and attorneys’ fees, most complaints in California couple ADA claims with a violation of the Unruh Civil Rights Act, which allows plaintiff to claim compensatory damages of at least $4,000.

The Unruh Civil Rights act has been recently amended by the passage and enactment of the “Disabled Persons Act” (“DPA”) in January 2009. The DPA applies to “construction related accessibility claims.” In essence, the DPA is the California Legislature’s attempt to balance what it perceives to be the valuable function of a private right of enforcement of the ADA, with the reality of how the law was being exploited. The DPA makes several key changes in the law that has effected how facilities cases are litigated:

THE DISABLED PERSONS’ ACT HAS HAD AN EFFECT ON HOW CASES ARE LITIGATED, BUT...

(1) The Standard for Statutory Damages: The test for determining whether an individual plaintiff has been damaged has changed. Under the old law, plaintiffs could allege a $4,000 statutory penalty for each violation they encountered. Under the DPA, the standard is that a statutory penalty can be assessed based on the number of “particular occasions” an individual “actually” encountered a barrier to accessibility and was either deterred from access or suffered embarrassment and harassment because of the barrier. Civil Code § 55.56. This new standard has led to increased litigation, as several defendants have been successful in asserting that while a violation may have existed, it did not deter plaintiff or cause him or her any embarrassment or harassment.

(2) Attorneys’ Fees: Because the DPA awards fees to the “prevailing party” it has been argued that the attorneys’ fees provision in the DPA is “bilateral” meaning that either a successful plaintiff or defendant can recover attorneys’ fees. Several courts have disagreed concerning the interpretation and application of the DPA’s fee provision, and the issue remains an open question. See Jankey v. Poop Deck, 537 F.3d 1122 (9th Cir. 2008) (holding that a party who settles a case under the ADA is the prevailing party and is entitled to attorneys’ fees); see generally Sceper v. Trucks Plus, 2009 U.S. Dist. LEXIS 102445 (applying the “new” Unruh Civil Rights act and allowing full attorneys fees where three violations were discovered). What is certain is that if a plaintiff is able to establish even a technical violation of the access laws, the defendant can and will be held liable for plaintiff’s attorneys’ fees regardless of whether statutory damages are appropriate.

(3) Certified Accessibility Specialists: The final significant change brought about by the DPA is the creation of a new state agency, and certification for access specialists (a “CASp”). Civil Code § 55.51 et seq. Simply put, a business can now elect to have a certified access specialist do an audit of its place of public accommodation, and certify it is compliant with the ADA and applicable state laws and regulations. Once the certificate is issued, it can be displayed by a business as a deterrent to potential plaintiffs.

Additionally, a certification provides a business with certain rights if it is sued, including a stay of proceedings until an early evaluation of the case can be conducted by the Court. These measures are meant to minimize the cost of any litigation to a business that has been certified. It does not, however, make a business immune from suit.

...THE GAME REMAINS THE SAME

While the DPA has certainly provided businesses with a potential new defense to statutory damages, it really has not changed the volume or nature of the lawsuits. Plaintiffs have simply shifted their allegations to allege multiple visits to a business. One change that we have noticed is the rise in pro per lawsuits. Given the uncertainty surrounding the issue of attorneys’ fees, several career plaintiffs seem to have severed ties with their attorneys and are now directly filing suits against businesses.

As a result, even with the new defenses available to businesses, the cost-benefit analysis still does not typically favor defending a case to trial. The primary deterrent is attorneys’ fees. Even if no statutory damages are ultimately awarded, if there are violations of the ADA, or other applicable California accessibility laws, in a business requiring remediation, the plaintiff can still be the “prevailing party” and be awarded his her attorneys’ fees.
In every instance, because of the relatively low damages sought in most Title III claims, an effective and efficient strategy in managing such claims is necessary to address any problems with the property in question and to resolve the case as cost-effectively as possible. To that end, below are three actions that a business entity should take if faced with a Title III or DPA claim (or both).

1. **Assess Where and When the Complaint was Served**
   Accessibility claims are filed in both State and Federal Courts. Regardless of where the matter is filed, it is important to get it to counsel quickly. In most cases, a responsive pleading to a complaint must be served within 20 to 30 days of service. Further, many defendants try to settle Title III or DPA complaints before answering. To do so without additional expense, it is necessary to obtain an extension of time to respond to the complaint. If you receive a complaint alleging a violation of Title III of the ADA or the DPA, the first thing to do is find out when it was served, and then get it to counsel.

2. **Investigate the Claims**
   The next step after sending the complaint to counsel is to determine the nature and extent of the alleged violations. There are two general areas for claims: the interior and exterior of the building, including the parking lot.

   **Interior Violations:** Typically, these violations will involve a public restroom or other accommodation. Other common claims involve the front door, including the type of handle used and the force necessary to open the door, or whether the business displays the International Symbol of Accessibility (“ISA”) This is the small blue square sign with a white wheelchair in the middle. In addition to the more common claims, there are also industry-specific regulations, most notably, the food service and banking industries.

   **Exterior Violations:** Here, the main issues involve the accessibility of the building itself, including safe “paths of travel” from the parking lot or sidewalk to the building. Where a business location is leased, the business must check its lease carefully to see who is responsible—the business or the lessor—for the exterior of the building and parking lot. Where the landlord is responsible, the business may wish to assert a claim against the landlord for indemnity and/or defense as to those allegations. In some cases, a claim for indemnity and/or defense is mandatory where the lease precludes the business from making structural changes to the exterior of the building (such as re-stripping the parking lot or making “curb-cuts” in a sidewalk). In those cases, the landlord or lessor becomes a necessary party in the suit.

3. **Determine What Remediation, if Any, Needs to Be Done**
   If violations are found at a place of public accommodation, a decision should be made as to what remediation needs to be done. A business owner should then discuss the timing and extent of the remediation. Not every case requires a defendant to wait until the matter is resolved before making necessary changes, even if the matter ultimately goes to trial.

While the above points represent only a few issues to look at when a complaint is filed against your business, we hope that they will assist you in dealing with Title III or the DPA claims while minimizing related costs.

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