



**NFIB**  
The Voice of Small Business.®

## ***Responding to Americans With Disabilities Lawsuits***

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# About NFIB

The National Federation of Independent Business is the leading small business association representing 350,000 small and independent businesses nationwide, including 23,000 in California.

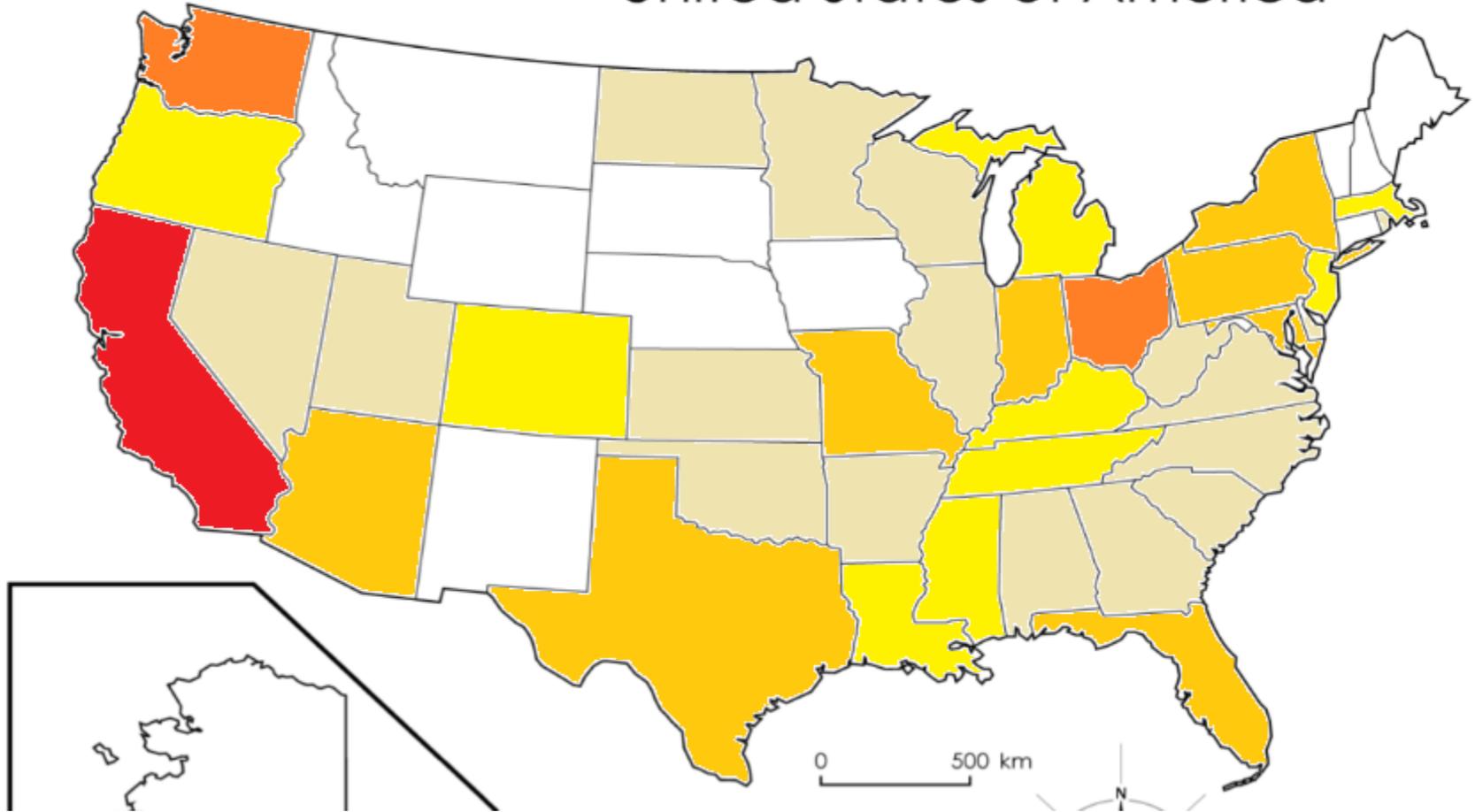
## About NFIB Small Business Legal Center



The NFIB Small Business Legal Center is the voice for small business in the nation's courts and the legal resource for small business owners nationwide.



## United States of America



# Americans with Disabilities Act

- Enacted in 1990 by President George H.W. Bush
- Landmark civil rights law; guarantees equal opportunity for individuals with disabilities
- ADA Defines a covered disability as a physical or mental impairment that substantially limits one or more “major life activities”

# ADA Basics

- Major Life Activities include:
  - Walking; Standing; Sitting; Reaching; Lifting; Bending; Working;
  - Seeing; Hearing; Eating; Sleeping; Learning; Reading; Concentrating; Thinking;
  - Communicating; Interacting with others
  - Caring for one's self; Breathing

# ADA Basics

- Title I – Employment
  - Reasonable accommodations
- Title II – Public Entities
- Title III – Public Accommodations
  - Duty to remove barriers to access
- Title IV – Telecommunications
- Title V – Prohibition on Retaliation

# ADA Abuse

- California accounts for **40% of all Title III ADA lawsuits**
  - There have been over 12,000 Title III lawsuits in the US, **8,000 alone in California since 2004**
- Hit and run plaintiffs:
  - 4,215 cases filed by plaintiffs who had filed 30 or more cases
  - One plaintiff filed over 1,000 cases;
  - After filing 300 ADA lawsuits, one plaintiff was barred from filing new cases

# Public Accommodations

- Private entities owning, leasing or operating places of public accommodation must remove architectural barriers that may deny disabled persons full and equal enjoyment of goods, services, and facilities.
  - Places of lodging;
  - Establishments serving food or drink;
  - Places of exhibition or entertainment;
  - Public gathering places;
  - Sales and service establishments;
  - Exercise and recreation

# Public Accommodations

- All Post-1992 construction, modifications and alterations must be fully compliant with ADA Guidelines
  - New ADA Guidelines were released in 2010;
  - Safe harbor if constructed in compliance with 1991 standards prior to March 15, 2012
  - California Imposes Heightened Standards

# Older Buildings

- Older facilities are not “grandfathered”
- Businesses are **deemed to “discriminate”** against disabled persons **if they fail to remove barriers**
  - The duty to remove applies whenever the removal is deemed “readily achievable”
  - Defined as “easily accomplishable” and able to be carried out without much difficulty or expense

# Older Buildings

- Requires a case specific analysis
- Whether something is “readily achievable” depends on the cost of the action, and the size, type and financial state of your business

# Older Buildings

- The Department of Justice lists 21 action items that are usually going to be deemed readily achievable:
  - E.g. Creating accessible parking spaces;
  - E.g. Installing ramps;
  - E.g. Repositioning shelves;
  - E.g. Widening doors;
  - E.g. Rearranging toilet partitions;
  - E.g. Installing raised toilet seat.

# Older Buildings

- When removal is not readily achievable, public accommodations should seek to make the facility fully and equally available through alternatives readily achievable:
  - E.g. Serving beverages at a table for persons with disabilities where a bar is inaccessible, or relocating services to accessible locations
  - E.g. Meeting disabled persons at the door to conduct business if necessary

# Anatomy of an ADA Lawsuit

- **Action Under Title III of ADA – 42 U.S.C. 12182, et seq.**
  - Remedies include
    - Injunctive relief
    - Attorneys' fees and litigation costs
    - Damages for governmental enforcement – not for private litigants



# ADA in California

- **Unruh Civil Rights Act**, Civil Code Sections 51, et seq.
  - Up to 3x the amount of actual damages but in no case less than \$4,000 minimum statutory damages **for each offense**
    - *Hubbard v. Twin Oaks Health and Rehabilitation Center* (Plaintiff awarded 60K - \$4,000 for 15 visits)
    - +Attorneys fees & litigation fees
- **The Disabled Person Act**, Civil Code Sections 54, et seq.
  - Allows minimum statutory damages \$1,000 per offense

# 2012 CA-ADA Reforms

- **Reduces Minimum Damages under Unruh Act** from \$4,000 per violation to \$2,000 or \$1,000 for unintentional violations
  - Reduction available only for small businesses
  - \$1,000 per violation if remedied within 60 days of demand letter
    - To qualify the owner must show:
      - (a) The property was certified by an access specialist; or
      - (b) The construction was approved by local authorities on or after January, 2008
  - \$2,000 per violation if remedied within 30 days of demand letter

# 2012 CA-ADA Reforms

- **Requires Commercial Property Owners to Indicate Whether the property has been CASp-inspected**
  - Must also include the results of any inspection on lease
- **Bans Pre-Litigation Demands for Money**
- **Prevents Stacking of Claims**
  - Requires consideration of reasonableness of plaintiff's conduct
  - Why did the Plaintiff visit your shop 26 times?
- **Requires Letter Explaining the Access Problem Before Suit**
  - Also requires the attorney to send copy to State Bar and the California Commission on Disability Access

# SB 269 – 2016

- **Provides a 15 day grace period for minor technical violations**
  - The clock runs from when you received the notice or complaint
- **“The following technical violations are presumed not to cause a person difficulty, discomfort or embarrassment...”**
  - Certain Interior signs;
  - Lack of exterior signs (other than parking and directional);
  - Color, placement and wording of parking signs;
  - Faded, chipped or damaged paint in parking spaces;
- Originally SB 251 would have allowed for a \$250 refund for renovations to become ADA compliant.

# What to do when hit with a suit?

- Take it seriously! Move quickly!
- Contact your insurance carrier and or attorney;
- Be sure your counsel knows this area of the law;
- Take pictures of the entire business;
- If you rent, contact your landlord and tender a demand for defense;
- See if you can remedy the problem;
- Thoroughly inspect your property for further access issues.

# Common Problems

- Lack of adequate parking for disabled;
  - Lack of proper signs
  - Lack of adequate loading zone
- Lack of access into the building;
  - Slope too steep; lack of ramp and or grab bar;
  - Lack of clearance space for wheel chairs;
  - Lack of signs to accessible doors;
- Doors as barriers;
  - Five Pounds of pressure;
  - Too much of a lip;
  - Space to navigate wheel chairs;



# Common Problems

- Lack of access within the building;
  - Surfaces too high;
  - Appliances too high;
  - Space to navigate wheel chairs;
- Bathrooms;
  - Adequate signage;
  - Stall with enough space for wheelchair;
  - Grab bars non-existent or out-of-compliance;
  - Mirrors, sink, toilet or drier too high;



# Benefits of Access Audit

- **General peace of mind;**
  - Minimizes risk of an ADA lawsuit;
  - Eligibility for reduced penalties if you receive a demand letter;
  - Safeguards against slip-and-fall suits;
  - If an accident happens on site, it helps to demonstrate compliance with all pertinent safety standards;
- **You can certify to renters that the property is compliant;**
- **Its good for business to be inclusive;**
  - U.S. DOJ estimates 18% of population has a disability
  - They will only frequent your business if its accessible
- **Did I mention tax-breaks?**

# IRS Incentives

- The cost of alterations may entitle a business to a tax credit, as well as the usual business-related expense deduction
  - “Tax Deduction to Remove Architectural and Transportation Barriers to People with Disabilities and Elderly Individuals” allows deduction of up to \$1,500 for any taxable year;
  - The “Disabled Access Tax Credit” is available for eligible small businesses; provides tax credit of up to 50 percent of eligible access expenditures between \$250-\$10,250
- California offers additional credits for small businesses
  - <http://hfcdhcp.org/briefs/brief6-tax-incentives/>
- WARNING: Talk to your CPA / Tax Counsel

# Pending Two-Year Bills

- HR 241 (Calvert) – “ACCESS ACT” – Would allow business owner 60 days to respond with an outlined plan for improvements and 120 days to remove the infraction.
- AB 54 (Olsen) – Would allow 60 days to remedy violation within first three years of a change in design-standards.
  - Tax credit for employing CASp to certify compliance
- SB 1230(Gomez) – Would provide \$10 million in fund for loans; and would provide for state tax credits. (Previously \$50 million).
- AB 2093 (Steinorth) – Would enable cities to hire more access specialists to assist with compliance.

# Resources:

- **ADA Update: A Primer for Small Business:**
  - <http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm>
- **ADA Checklist for Existing Facilities:**
  - <http://www.ada.gov/racheck.pdf>
- **California Access Compliance Manual:**
  - <http://www.cdda.ca.gov/guide.htm>
- **California Commission on Disability Access (CCDA):**
  - <http://www.cdda.ca.gov/>
- **CCDA's Top 10 Demand Letter Claims:**
  - <http://cdda.ca.gov/Reports.htm>
- **Find a Certified Access Specialist at:**
  - <http://www.FindaCASp.com>
- **CCDA's Disability Access Tips**
  - <https://www.youtube.com/watch?v=gbCfHWATwhY&feature=youtu.be>

# Thank you!

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