

Responding to ADA Lawsuits

You may have heard about the Americans with Disabilities Act (ADA) and wondered how it affects your business. Perhaps you've heard about predatory plaintiffs using the ADA to extort small businesses in 'drive-by' lawsuits. Or you may have heard about 'testers' who scour the internet for small business websites to target, filing nearly-identical lawsuits in dozens, if not hundreds, of cases. Even if you haven't heard of the ADA, the reality is that you likely have obligations to make your small business accessible for the disabled. The best way to protect your businesses and defend against ADA lawsuits is to be proactive instead of reactive.

ADA Basics

Enacted in 1990 by President George H.W. Bush, this landmark civil rights legislation guarantees equal opportunity for individuals with disabilities. The ADA requires that facilities and businesses that are open to the public (i.e. public accommodations) be accessible for people with disabilities.

Since the passage of the ADA, small business owners have spent hundreds of millions of dollars on their businesses to remove barriers and provide accessible public accommodations. Unfortunately, these investments do not immunize businesses from abusive lawsuits. The complexity of the law makes it difficult for small businesses to understand what modifications are required and makes small businesses easy targets for predatory plaintiffs and attorneys.

Barrier Removal

Since many small business owners rent space in buildings and facilities that were constructed decades ago, they are subject to the ADA's barrier removal requirement. The theory behind barrier removal sounds simple: remove barriers where the removal is "easily accomplishable without much difficulty or expense." The reality is that barrier removal is both difficult and expensive; the lack of useful guidance on what kind of barrier removal is readily achievable further complicates compliance.

Small businesses may be paying the highest price for the ambiguities in the ADA. Taking advantage of the uncertainty surrounding the term "readily achievable", vexatious litigants have filed hundreds of lawsuits against small business owners.

To help ensure your business has removed barriers, contact your city to find out if there is a certified access specialist who might assist with surveying your business to determine whether any changes are needed. And post a "No Photography" sign indicating that photography is prohibited without written approval of management. This might help deter plaintiffs trolling for a lawsuit.



Website Accessibility

With the growth of the Internet to transact business, an emerging question has become how the ADA applies to business websites. It is not clear whether a website counts as a “place of public accommodation” under the ADA.

Some federal courts have held that a place of public accommodation refers only to physical places, such as brick-and-mortar establishments. Other courts have disagreed, holding that websites fall under the ADA based on their close connection to providing the goods or services of the business. While the U.S. Supreme Court has not weighed in, the recent trend from the Department of Justice (DOJ) guidance and the courts is to include business websites in the ADA's reach.

The World Wide Web Consortium (W3C) establishes Web Content Accessibility Guidelines (WCAG) for making websites accessible to those with disabilities. Courts and the DOJ have cited these guidelines approvingly. Therefore, small businesses should proactively avoid ADA lawsuits by updating their websites to conform with the WCAG 2.1AA guidelines.

For more information on these guidelines and avoiding ADA lawsuits based on website inaccessibility, the NFIB Legal Center offers a free legal guide titled [ADA Website Accessibility: How to Avoid Lawsuits](#).

Responding to an ADA Complaint

The instinct for many small business owners hit with an ADA complaint is to settle as quickly as possible. But experts urge caution in defending against a claim. You want to avoid paying too much or paying too little (and facing the same or similar claim next week if the accessibility issue is not corrected).

1. First and foremost, take the complaint or demand letter seriously. Read it and don't fail to respond. If the claim is based on a physical barrier, contact your insurance carrier immediately to see if the carrier will provide defense counsel. If not, or if the claim is based on website inaccessibility, contact an attorney who is comfortable or experienced in handling ADA cases. In searching for an attorney, be diligent and selective. Unfortunately, there are some attorneys and firms who agree to “help” small businesses, but instead, just push them to settle.
2. Thoroughly photograph or document all areas of your property or aspects of your website. You can be sure that the plaintiff has done the same. It is important to have your own evidence. It will be especially important to take pictures or document other evidence that might establish alternatives available to the plaintiff. Examples could be a ramp located at the side of the building as an alternative to stairs.
3. If you rent your physical space, contact the landlord and tender a demand for a defense. The longer you wait to do so, the less likely you'll be able to recover your legal defense costs.



4. Talk with your attorney about whether it is appropriate to make immediate modifications to your business property or website. It may be possible to get a lawsuit dismissed if a correction has been made, and some plaintiffs may voluntarily dismiss a case if barriers are removed promptly or websites are promptly cured.

5. Do not assume that agreeing to fix only the items identified in the demand letter or complaint is enough. The claim may not have identified all features of a building or website that are out of compliance. Fixing only the identified issues to save on short-term costs, or resolving the immediate complaint, can lead to follow-up lawsuits from the same plaintiffs or attorneys. The NFIB Legal Center has heard from small businesses who were sued multiple times for lack of compliance, and courts may be harsher on those entities who had prior notice of compliance issues.

IRS Incentives

While the ADA is far from perfect, most small business owners want to do the right thing and comply with the law. The federal government has taken some measures to assist small businesses with compliance.

The Internal Revenue Code provides businesses with tax incentives for removing barriers or increasing accessibility:

- The “Architectural Barrier Removal Tax Deduction” encourages businesses to remove architectural and transportation barriers to better improve access for elderly and disabled individuals. Businesses can claim a deduction of up to \$15,000 per year for qualified expenses, and they do so by listing it as a separate expense on their income tax return.
- The “Disabled Access Tax Credit” is a non-refundable credit available to certain small businesses that incur expenses for the purpose of providing access to individuals with disabilities. To be eligible, the business must have earned \$1 million or less and had 30 or fewer employees in the previous tax year. A business can claim the credit by filing [IRS Form 8826](#).

Other Incentives

Your state may also offer additional tax incentives for making your business more ADA compliant. In addition, there are federal tax credits for hiring disabled individuals of certain targeted groups. More information on these incentives can be found on the [IRS's Work Opportunity Tax Credit overview](#).

Insurance Coverage

Beware that most general liability insurance and cyber liability insurance policies do not cover ADA accessibility lawsuit claims. If you have Employment Practice Liability Insurance (EPLI) it might provide coverage for defense costs and legal fees, but not for the expense of making a website ADA compliant. Check with your insurance agent to determine whether coverage is warranted for your business.

This alert does not constitute legal advice, and you should consider consulting an attorney about any laws and regulations that are applicable in your state, locality, or particular industry.