



PRAGMATIC APPROACH TO DETERRING ADA LITIGATION

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Introduction: The Flood of ADA Litigation Is Bound to Continue

In the 10 plus years since the enactment of the Americans with Disabilities Act (“ADA”),¹ retailers across the country have tried to ensure that their existing and newly constructed stores comply with the ADA and its “building code,” the ADA Accessibility Guidelines (“ADAAG”). Yet, the flood of ADA litigation continues, even with respect to stores constructed since the enactment of the ADA.

A variety of factors have contributed to this phenomenon. While the ADA does not entitle a private plaintiff to recover any damages, it does allow the prevailing plaintiff to recover its reasonable attorney fees.² ADA plaintiffs, thus, have nothing to lose. Generally speaking, a quick tour of most retail establishments by a disabled shopper will reveal one or more ADA violations. Once the lawsuit is filed, if there is any truth to the allegations, the defendant feels compelled to settle quickly in order to keep its attorney fees and the plaintiff’s attorney fees to a minimum. Even in cases where the ADA violations are *de minimis*, the defendant, at a minimum, ends up spending several thousand dollars investigating the merits of the complaint, paying its own attorney fees and paying the plaintiff’s attorney fees.

The ADA does not require that defendants be given notice of an alleged violation and an opportunity to cure before a lawsuit can be instituted. Thus, there is nothing in the ADA’s statutory scheme that acts as a deterrent to those “professional plaintiffs” who are, in effect, “in the business” of filing ADA lawsuits.

- Even *de minimis* violations are actionable. Thus, if a doorway is required to be 324” wide, but, as constructed, is only 314” wide, or if the grab bar in the toilet stall is 14” closer to the back wall than the ADAAG requires, the defendant cannot successfully defend the complaint on the basis that those minor deviations do not have a substantive effect on the accessibility of its premises. Unfortunately, without strict oversight of the work in the field before the work is accepted for turnover, at least some minor deviations from the plans and specifications are apt to occur.
- Many architects either still do not have a complete grasp of what the ADAAG requires, or they simply neglect to incorporate all of the ADAAG’s requirements. For example, while the ADAAG requires that accessible parking spaces be located on the “shortest accessible route” to the building’s entrance, many post-ADA stores have been (and continue to be) designed and constructed with many of the standard size parking stalls situated considerably closer to the building entrance than the accessible parking spaces.
- Some retailers have been slow to educate their employees on even the basic ADA requirements. For this reason, we still see new checkstands that do not satisfy ADAAG requirements, shopping carts that block accessible parking spaces or accessible checkout aisles, floor mats in front of doorways that are either too high or not securely attached to the floor, and employees imposing unpermitted conditions on shoppers seeking entry to the store with a service animal. As a result, retailers continue to defend ADA lawsuits that could have been avoided altogether if their employees had a better grounding in some of the basic tenets of the ADA.

Many retailers bemoan the prevalence of ADA claims and feel relatively helpless to do anything about them. Some seem to think that their only option is to undertake a “top to bottom” ADA compliance review that examines *each* area, space and element of each of the retailer’s stores to determine whether *each* of the ADAAG requirements is satisfied. Many retailers conclude that it makes more sense to adopt an *ad hoc* approach – to hunker down and respond to each lawsuit as it comes.

Over time, however, as regional and national retailers are forced to defend one ADA lawsuit after another, they discover that the *ad hoc* approach is not a very cost-effective way to manage ADA liabilities. Indeed, each time an ADA lawsuit is filed, the retailer ends up spending substantial monies on investigation costs, attorney fees for both sets of lawyers, compensatory damages (sometimes) and corrective work. Moreover, as word travels that the retailer regularly settles ADA cases, the retailer finds itself defending additional ADA lawsuits as other plaintiffs are encouraged to get on the ADA litigation merry-go-round. The retailer’s public image may even suffer within the disabled person’s community with corresponding untold economic consequences.

Many retailers understandably feel caught between the proverbial rock and a hard place – between an expensive, time-consuming and complex audit program that, in the end, does not provide a shield against future litigation, and an *ad hoc* approach that can be equally time-consuming and expensive, and may even

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increase the number of ADA lawsuits that the retailer must defend.

All hope is not lost, however. There is a way to address the problem of the too-frequent ADA complaint/lawsuit, and it is cost effective and easy to implement.

Practical Suggestions for Deterring ADA Lawsuits

Develop a Targeted ADA Compliance Audit Program

The ADAAG comprehend hundreds of separate accessibility requirements. Yet, an examination of most retailers' ADA complaint experience will probably reveal that only a handful of the ADAAG's requirements repeatedly pose a problem. Therefore, much can be gained by identifying these discreet problem areas and developing a targeted audit program that, at a minimum, is designed to address those areas. By so doing, the retailer should experience a significant drop in the number of ADA complaints it receives, as well as in the number of ADA lawsuits it must defend.

1. *Use Your Head.* Experience and

common sense reveal that a significant amount of ADA litigation would be eliminated even if less than 100% compliance with the ADAAG is achieved as long as certain *basic features* of the exterior site and the interior of the store are accessible. This is not to suggest that less than full compliance with the ADAAG is necessary to ensure that a retail establishment is fully accessible to disabled shoppers. Rather, the premise here is that the vast majority of disabled shoppers simply want to be able to visit such establishments without encountering unnecessary difficulties. The majority of disabled shoppers do not enter a retail store with a copy of the ADAAG and tape measure in hand, seeking out possible departures from the ADAAG. Rather, they are there to shop and more than likely will not feel put upon as long they can easily get to and inside the store; maneuver around the store and get to the store's merchandise; use the restroom, if any is provided for the public; pay for any goods purchased; and get out of the store.

Thus, they are more apt to be irked by the lack of accessibility in some features

than in others. For example, it is easier to imagine a disabled customer being upset because the only accessible checkstands are closed when he proceeds to pay for his goods than he would be if the slope of the sidewalk slightly exceeds the ADAAG's requirements. While there is no scientific way to determine how to winnow down the ADAAG to its bottom-line basics, a common-sense look at your store through the eyes of the disabled shopper will go a long way toward bringing into focus where a targeted compliance audit should be aimed.

2. *Use Your Experience.* Examine each of your past and pending ADA lawsuits and informal complaints, and create a chart of each of the alleged ADAAG violations. Group the alleged violations into those that affect the exterior of the site and those that affect the interior of the store. Tally how many times a particular area, space or element has been identified as allegedly violating ADAAG. This chart will enable you to identify particular areas, spaces or elements of your locations where you are having the most difficulty in complying with the ADAAG, and will "shrink" the ADAAG down to a size that will allow your own personnel to conduct a compliance audit without the assistance



of an outside ADA consultant. Bear in mind, however, that the creation of this chart should not be viewed as static. Rather, it is part of an evolving process. Therefore, continue to monitor your ADA experience and add to your chart as other problem areas emerge.

Other Suggestions

1. *Respond promptly and politely to customer complaints.* Many ADA lawsuits are filed by genuinely disgruntled customers whose pre-litigation complaint to the retailer was never answered by the retailer. Failure to respond may have been wholly inadvertent. Nevertheless, a customer who might have been appeased by a prompt, courteous and thoughtful response from you has ended up filing suit, demanding that you not only correct the problem complained of, but that you reimburse him for his attorney fees, which could be a five-figure number, even where the case is settled at the earliest stages of the litigation, and may, depending upon the jurisdiction, even include a demand for damages.

Bear in mind, too, that many, if not most, ADA lawsuits are brought by plaintiffs who genuinely feel they have been wronged by a retail establishment's lack of accessibility and not by "professional plaintiffs" who actively seek out ADA violations. Therefore, in many cases, a customer's ADA complaint can easily be settled before the filing of a lawsuit simply by promptly and thoughtfully addressing the grievance when it is first made.

It is good practice (and good public relations), therefore, to take each letter, e-mail and phone call that alleges an ADA violation seriously and respond to it promptly in writing. Be sincere. Let your customer know that you are very mindful of your ADA obligations and that you earnestly endeavor to ensure that your store is fully accessible to and usable by all of your customers, including those who are disabled. Apologize to your customer for the problem he experienced and thank him for bringing the matter to your attention. Let him know that you will investigate the matter and will get back to him. By all means, provide your customer with your definitive response as quickly as possible.

Ultimately, if your investigation reveals that your customer's complaint has merit, let him know that you will

promptly correct the problem and thank him again for helping you to ensure that all disabled people enjoy shopping at your stores.³ Of course, if it turns out that the customer's complaint is without merit, then let him know that with a courteous and detailed written response.

In all events, do not delay in responding to a customer's complaint and remember that ignoring a complaint is more likely to lead to, rather than deter, the filing of a lawsuit.

2. *Train your employees.* Oftentimes an otherwise unmotivated litigant feels compelled to bring an ADA lawsuit simply because he did not like the way he was treated by one of your employees, which frequently occurs because the employee (a) was misinformed about the customer's rights or the store's obligations under the ADA, or (b) asked the customer questions that are not permitted by the ADA, such as "What is your disability?" Too often, the foregoing occurrence evolves into an ugly confrontation with the customer, and a lawsuit follows.

Therefore, some basic ADA training for your employees, especially for those who are in contact with your customers, can go a long way toward eliminating many ADA lawsuits. At a minimum, your customer service employees should understand (a) what the ADA says about service animals (e.g., what is and is not a service animal, and what questions can and cannot be asked about the customer's disability and the animal), (b) what your ADA obligations are when it comes to communicating with the hearing or visually impaired customer, (c) generally, how to speak to and interact with disabled customers (sometimes well-intentioned behavior serves only to offend the disabled customer), (d) that accessible parking spaces, accessible checkstands, accessible routes and other required accessible elements must always be open and available for use by disabled customers (e.g., if shopping carts are left to block an accessible parking space, that parking space is not open and available for use by your disabled customers), (e) what to do if some of your merchandise is inaccessible to a disabled customer (e.g., the wheelchair user cannot get to some of the merchandise display racks), (f) what to do when a novel situation involving a disabled customer presents itself, and (g) that they should never allow a situation

to evolve into a confrontation with the customer.

3. *Identify an ADA coordinator.* It is a good idea to have at least one person within your organization who has, or who is charged with developing, a good working knowledge of the ADA and ADAAG. This person should be your point person on all ADA matters, including the following:

- Responding to informal complaints received from customers;
- Assisting with the ADA education of your customer service employees;
- Identifying when a matter requires the assistance of outside legal counsel or an outside ADA consultant;
- Assisting with new construction and remodeling projects to ensure that they will comply with the ADAAG and applicable state and local accessibility requirements, and
- Managing an ADA compliance audit program.

4. *Review all operational policies.* It is also important to examine each of your operational policies to determine if any of them have the unintended effect of discriminating against persons with disabilities. Two typical suspect policies are those that condition a check cashing or other privilege on the presentation of a valid driver's license (this will have a disparate discriminatory impact on blind and other visually impaired persons who do not have a driver's license) and a "no pets allowed" policy or poorly crafted service animal policy. Remember that the ADA requires you to make "reasonable" modifications to policies that disparately and adversely impact persons with disabilities, unless the modification would, in effect, *fundamentally alter* the nature of your business.

5. *Involve your outside architects.* If your investigations reveal that you are frequently violating a particular ADAAG provision, communicate this to your architects so that the error is not repeated on your future new construction and remodeling projects.

6. *Exercise better oversight of ADA work in the field.* Have mechanisms in place that ensure, to the maximum extent feasible, that your new store or remodeling project is constructed as designed. Here, you are seeking to avoid a situation where the plans and specifications for your project have been designed in accordance

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with the ADAAG but, for some reason, someone in the field has decided to deviate from the plans, e.g., specified signage for accessible parking spaces never gets installed or gets installed incorrectly; or the number of van-accessible parking spaces or the location of accessible parking spaces gets changed in the field.

Conclusion

There are certain features of the ADA, including, among others, its attorney fees provision and the lack of a notice and cure provision, that ensure that ADA litigation will continue. Retailers can, however, reduce the number of ADA complaints and lawsuits with which they must contend, in a cost-effective manner, by undertaking a targeted survey of the physical accessibility of their stores, which focuses on their ADAAG problem areas and other core ADAAG provisions, and by heeding a few other easy-to-follow principles, including the provision of basic ADA training for customer service employees. ■

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1. The ADA has five separate titles. Title III contains the provisions that govern, among other things, the physical accessibility of retail establishments and other places of public accommodation to people with disabilities. For ease of reference, whenever this article uses the term "ADA," it means Title III of the ADA.
2. Some states, however, have enacted statutes that do entitle private plaintiffs to sue for damages for violations of the ADA or counterpart state statutes. E.g., in California, each ADA violation entitles the plaintiff to a minimum of \$4,000 in damages, regardless of whether he/she has suffered any actual damage.
3. Where appropriate, obtain a release from your customer in exchange for your agreement to do the work necessary to correct the particular ADA violation.