Accessibility Compliance for Businesses –

“Myths and Misconceptions”

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Myths and Misconceptions

1. My business does not need to be compliant because the building is old and therefore is grandfathered.

There are no "grandfathering" provisions. "Grandfathering" is the notion that ADA access requirements do not apply to buildings constructed prior to the effective date of the ADA. This, however, is not true. Regardless of the age or historical importance of a building, if it is open to the public, you must provide access to your goods and services in order for your facility to be considered compliant. If your facility was built prior to January 26, 1992, the ADA requires that an owner or operator of a public accommodation make changes that are "readily achievable" in order to improve access to goods and services. If you can't determine whether creating more accessible environments is readily achievable, you should hire a CASp or other expert.

2. My facility was built with a permit and should be fine.

Unfortunately, even with building department oversight, it is common to find construction short-comings that constitute violations of the Building Code. (As we know, ADA is a civil rights law not enforced by the local building department.) Short-comings may be attributed to any number of issues, and it is difficult to be specific. However, some potential causes can be linked to design, engineering, construction, inspection and product selection problems as well as simple wear and tear or maintenance procedures. Each situation is different and our best suggestion is to obtain a CASp inspection to identify any such violations as soon as possible.

3. If I comply with the California accessibility requirements, am I in compliance with ADA?

Not necessarily. It is the sole responsibility of the business owner and/or the landlord to make sure that the facility is in compliance with the most restrictive requirements of both the California accessibility requirements AND the federal requirements under the ADA.

Remember that the accessibility requirements in the California Building Code (CBC) are reviewed by the building department only when a project is submitted for permit (meaning when you design, construct, alter, remodel, add, or change the use of or structurally repair a building or facility). Under the CBC, however, if you change the use of a room or space without submitting for a permit, the accessibility requirements of the CBC still apply. Though the ADA contains similar construction and use requirements, it's important to remember that the ADA is a civil rights law; not a building code. The ADA applies to all the goods and services you offer to the public and this means that you have to address access to your goods and services even though you haven't submitted for permit review by the building department.

4. I understand that a waiver from accessibility requirements may be obtained?

It is possible that a particular degree of accessibility in an alteration might be found to be an “unreasonable hardship”, “disproportionate”, or “technically infeasible”. Such findings have specific meaning and must be approved and recorded by the building department when undertaking an alteration. For facilities that were built prior to January 26, 1992, the federal requirement is to remove barriers to the extent that it is “readily achievable”, and evaluations to determine if removing a barrier is readily achievable should follow the technical guidance provided by United States Department of Justice. Such an evaluation may require the expert assistance of a certified access specialist (CASp), a design professional, an attorney, and/or an accountant.

Additionally, deciding that removing a barrier is not "readily achievable", does not grant a ‘waiver’ from providing access to your goods and services, and will require establishing a *modification* or *alternate means* to provide access to the greatest extent possible. Furthermore, federal regulations require that facilities built prior to January 26, 1992 have a "continuing obligation to remove barriers", which means that in you are required to periodically evaluate those barriers that are not "readily achievable" to determine if barrier removal can be accomplished in the future, and to plan for the time when barrier removal can be achieved if it is not also determined to be technically infeasible.

5. I am not open to the public, so I am not liable for accessibility.

If your see clients at your facility, or if you the public is able to access your facility to obtain access to your goods and services, you provide a "public accommodation". Because it is the determination of “public accommodation” that triggers physical access requirements, it is important to consult a knowledgeable professional before assuming that your building is exempt. In many cases, the assumption turns out to be incorrect, leaving the building owner and tenants at risk of violating the ADA. The list of businesses and operations that are considered to be “public accommodations” under the ADA includes the following:

1) Places of lodging (e.g., inns, hotels, motels) (except for owner-occupied establishments renting fewer than six rooms);

2) Establishments serving food or drink (e.g., restaurants and bars);

3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);

4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);

5) Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);

6) Service establishments (e.g. , laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);

7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);

8) Places of public display or collection (e.g., museums, libraries, galleries);

9) Places of recreation (e.g., parks, zoos, amusement parks);

10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);

11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and

12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).

In addition, the CBC defines a public accommodation a bit differently and more broadly than the ADA, which means that the accessibility provisions of the CBC may be required for an alteration of a facility that is not included in the above list.

Please note that if you are a facility that was built after January 26, 1993, the accessibility provisions in the ADA Accessibility Guidelines apply, and there is no alternative to provide a lower level of access than that which is stipulated by the accessibility guidelines and regulations under the ADA. The ADA's construction standards apply to additional areas in the new construction of a facility, or to the altered area of an existing facility, including "path-of-travel" upgrades.

6. Why should I comply, no else does. Besides I can fix issues once I get sued.

This is a flawed idea. First off, it is illegal to violate civil rights laws, and the "waiting to get sued approach" is a very costly strategy. If your business is sued for violations of the ADA, you are likely to incur substantial legal fees, because if a claim is substantiated you will be responsible for the plaintiff's legal fees and costs as well as statutory damages. This is in addition to the costs of making the required improvements to correct violations. In many cases, lawsuit-related expenses and costs usually exceed

the construction costs for achieving compliance with the law. Additionally, if a person with a disability is injured because a business failed to meet its access obligations, the results can be catastrophic for all parties involved, and prior to making a conscious decision to ignore your responsibility to provide access, you should check with your insurance company to determine if you are left further vulnerable if an injury on your property is caused by a "civil rights violation."

7. I do not own the building, so I am not liable for accessibility.

The very nature of the ADA is directed to businesses, not property owners. Nearly all ADA lawsuits are filed against both the operating business owner (tenant) and landlord.

Compliance is not only the landlord's responsibility. Both the lessor and lessee are responsible and liable for the accessibility of the overall facility's shared areas. If you lease or rent a facility, it is advisable to have an agreement with your landlord that sets forth who is responsible for providing and maintaining the facility's accessible features. According to California law, lease and rental agreements must stipulate whether the property was inspected by a CASp and, if so, whether or not the property is compliant with all applicable construction-related standards. California law also requires the landlord to share the CASp report of the facility with you prior to execution of your lease.

8. A condominium (or apartment) development has to comply only with CBC Chapter 11A.

The Fair Housing Act requires all "covered multifamily dwellings" designed and constructed for first occupancy after March 13, 1991, to be readily accessible to and usable by persons with disabilities. Under Chapter 11A, condominiums with four or more dwelling units and apartments with three or more dwelling units must comply with accessibility provisions of the CBC. Discrimination based on disability in housing is also prohibited by the California Fair Employment and Housing Act.

The Fair Housing Act covers many different types of residential buildings and facilities, including private housing, housing available for public use, projects receiving federal funds to provide housing, social service center establishments that provide housing of a non-transient nature, and more. The specific accessibility requirements based on funding, ownership and/or type of use may trigger different regulatory requirements under both the state and federal standards and regulations. When covered multifamily dwellings are subject to the requirements of more than one jurisdiction or law, compliance with each law is required. Where federal, state, or local laws differ, the more stringent requirements apply.

The best resource for additional information regarding the scope and application of California and federal accessibility standards are the California Housing and Community Development Department and the Division of the State Architect.

9. I do not need to provide access to my rental office because I do not have disable tenants in my housing facility.

All common use areas serving covered multifamily dwellings are also subject to the accessibility requirements in Chapter 11A. Public use areas that are part of a residential project, including a rental and/or sales office, are required to comply with Chapter 11B and the ADA Standards.

10. I have already been sued, so I am clear.

False! If you have been sued or paid a settlement and did not fix the issue, then you are still at risk.

11. Fixing it will be so expensive; therefore, I am unable to do anything to reduce my risk.

The most important step is the first one: accept the responsibility to make your building or business accessible. Many issues such as adding signs, moving the mirror lower, or changing the door hardware are simple to fix. Each small step in improving access to your building or business will reduce your exposure to lawsuits as your building becomes more and more accessible.

Most courts look favorably upon proactive building owners that have a plan of action to fix their building; even if the plan is not yet finished. So, even if you're sued, you may be exposed to lower financial damages. Civil Code 55.51-55.545, known as the Construction-Related Accessibility Standards Compliance Act, (CRASCA, SB 1608 Corbett), limits minimum statutory damages to $4,000 if the plaintiff is denied full and equal access to a place of public accommodation on a particular occasion or visit, not $4,000 for each violation as previously required under the Unruh Act, Civil Code 52(a). Additionally, amendments to CRASCA under SB269 (Roth) in 2016, provides a grace period from the liability for minimum statutory damages for 120 days following the date that a structure or area was inspected by a certified access specialist. Typically, business and facility owners can still be subject to claims based on a denial of access while making improvements. This grace period does not permit a claim to proceed against a business owner who employ less than 50 people and elects to correct all the violations listed in a CASp report within 120 days.

Businesses can ensure compliance and reduce the risk of getting sued by obtaining an inspection report of their facility by a certified access specialist (CASp).

12. I am doing a small tenant improvement project, but I cannot afford the required accessibility improvements. Can I claim a hardship exemption?

Under the CBC, alteration projects are subject to the following compliance provisions:

Area of alteration: The area of alteration must meet the accessibility provisions in accordance with current CBC requirements. This may require some accessibility improvements to elements that are inside of the area of alteration that were not intended to be addressed by the alteration.

'Path-of-travel improvements': Outside of the area of alteration, accessibility requirements must also be addressed. Both the CBC and the ADA require alteration projects to improve the access required to and within the facility. These improvements, called "path-of-travel" improvements, are improvements that are not part of the area of alteration, but require improved access to the altered area from accessible parking stalls and other site arrival points, and also address improved accessibility of restrooms, signs, and drinking fountains serving the area of alteration.

The 'path-of-travel' obligation requires that these elements be brought up to current building code requirements as part of the alteration project, and a permit will not be issued unless these elements are added to the project scope.

Unreasonable hardship: The ADA limits the improvements to the path-of-travel to 20% of the project cost. The CBC does not limit the required path-of-travel improvements for projects exceeding a specified amount, which is adjusted annually. As of January 1, 2016, the valuation threshold to trigger full compliance of the path-of-travel is $150,244. If alteration projects fall under this amount, then the CBC requires that 20% of the project cost be spent to upgrade the path-of-travel. In addition, the building department can address concerns where the cost of the alteration exceeds the valuation threshold, and the costs of full compliance of the path-of-travel place an "unreasonable hardship" on the owner. In these cases, the CBC requires that 20% of the project cost be spent to upgrade the path-of-travel, and requires the finding of unreasonable hardship to be recorded in the files of the building department. You would need to consult with the building official to determine if this hardship exemption would be applicable to your project.

In assessing the accessibility requirements of an alteration, addition, change in use, or structural repair of a building or facility, you should consult with a competent licensed design professional to understand the scope of work and ensure you are meeting state and federal regulations with regard to accessibility. In addition, you may want to hire a certified access specialist (CASp) to review any construction documentation for compliance.

13. I do not need to fix it because I will help a disabled person get around barriers in my facility.

While it is a good business practice to provide assistance to all your customers, assisting individuals with disabilities in lieu of providing the necessary improvements is not a solution that is compliant with federal law. The ADA requires "equal access", which essentially means independent access without assistance. A business that is only accessible to the disabled if they have to ask for special help is actually in violation of the ADA.

14. There has never been a disabled person in my store; therefore I should not have to make my facility accessible.

If an individual with a disability has not visited your business, it is likely because your facility is not accessible. It is important to recognize that individuals with mobility impairments, those who use a wheelchair or walker, are not the only individuals protected under the ADA. The ADA requires access to all individuals who may have a disability, including individuals with a vision impairment, hearing-impairment, cognitive disabilities, the deaf and the blind. Chances are, your business has served customers with disabilities, but you may not have noticed the disability. Some studies show that 6-9% of individuals under the age of 65 have a disability; approximately 2 to 4 million people. In providing access, you open your facility to the potential buying power of 4 million additional customers.

15. I have always had a clearly posted "no pets" policy at my establishment. Do I still have to allow service animals?

Yes. A service animal is <u>not</u> a pet. The ADA requires you to modify your "no pets" policy to allow the use of a service animal by a person with a disability.

Please note that you are not allowed to ask a person with a service animal about their disability or ask that the animal demonstrate a task that it can perform. In many cases, it's obvious whether or not an animal is a service animal. A person coming into your establishment who uses a wheelchair and is accompanied by a dog, or a blind individual with a guide dog, is likely being accompanied by a service animal. However, you should know that certain people with "invisible disabilities" also rely on service animals. For instance, people with seizure disorders often have a dog that can detect an oncoming seizure so that their human companion can administer medication in advance of the seizure or get to a safe place. Sometimes, people have what are known as "psychiatric service animals." For instance, many wounded warriors suffering from PTSD use service dogs to cue them to whether a situation or area is safe. Under the ADA only dogs (and sometimes miniature horses) are considered to be service animals.

If you don't believe that an animal is a service animal, you are permitted to ask two questions. The first question is "Is your animal a service animal?" The second question

is "What kind of service does the animal provide." If you're informed that the animal is a service animal and does in fact perform work for the person with a disability you are prohibited from asking additional questions. The person should be allowed into your place of public accommodation without any further inquiries.

16. I will never hire a disabled person, so I don't have to comply with any accessibility requirements.

It is illegal under the ADA to discriminate in your hiring practices. In fact, this sort of thinking undermines the essential tenets of the ADA that persons with disabilities have the opportunity to participate in all facets of public life and employment. Like most civil rights laws, the ADA does not mandate an equality of outcome, but it does require an equality of opportunity. This is why the accessibility guidelines of the ADA require commercial facilities built after passage of the ADA to provide physical access to employee and common use areas of the facility, and requires business owners to provide a reasonable accommodation for an individual with a disability that is or may become disabled while employed.

Closing:

Recognizing that it may seem as though the accessibility requirements are ever changing, our best recommendation is to check with a knowledgeable CASp to verify the specific applicable requirements based on your conditions. The ADA has been updated once in 20 years and the California Building Code [Title 24] is updated in 3 year cycles. It is the intent of the CA Legislature that the California Building Code is applicable to new construction work (that requires a permit) as it relates to accessibility for people with disabilities to establish minimum requirements so that the buildings, structures and site improvements are accessible to and functional for every member of the public, so as to provide equal opportunity to access public accommodations. Civil Rights laws have been established through the ADA and the CA Disabled Persons Act which is part of the Unruh Act. The more stringent of Civil Rights laws or the Building Codes apply to all new and existing buildings and site improvements within CA. Our recommendation remains to check with a knowledgeable CASp to verify the specific applicable requirements for your facility.

Short Listing of State Resources Websites

California Commission on Disability Access
www.ccda.ca.gov

California Building Standard Commission
www.bsc.ca.gov

Division of the State Architect:
www.dgs.ca.gov/dsa/home

California Pollution Control Financing Authority (small business ADA loan program)
www.treasurer.ca.gov/cpcfa/calcap

California Department of Rehabilitation
www.dor.ca.gov

California Department of Housing and Community Development
www.hcd.ca.gov

California Governor's office of Business and Economic Development
www.business.ca.gov

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