



Don't Fall Victim to Drive-By Lawsuits: What Landlords, Tenants, and Property Managers Need to Know About the Americans with Disabilities Act

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In recent years, there has been a proliferation of “drive-by lawsuits” involving the Americans with Disabilities Act (“ADA”). Such actions typically involve a plaintiff’s lawyer cruising around town with a disabled individual in search of retail properties whose premises are in violation of the ADA. Indeed, these lawsuits are so prevalent that *60 Minutes* recently dedicated a portion of its Sunday night program to the topic.

Each year, drive-by lawsuits result in the filing of *thousands* of civil actions by a relatively small number of individual plaintiffs. Ironically, oftentimes, these individuals have suffered no actual harm whatsoever. Nevertheless, landlords, tenants, and property managers may be required to undertake costly remediation efforts. The lawyers filing such suits recover attorney’s fees (presumably with a kick-back to the individual plaintiffs as compensation for their time).

Even worse, these lawsuits—or even the mere threat of a lawsuit—may constitute nothing more than “shake-down” operations and are frequently resolved with the plaintiffs receiving a quick monetary settlement without the requirement that any remediation actually be undertaken. Currently, there is a push in many jurisdictions to pass legislation requiring notice and an opportunity to cure before the commencement of legal proceedings. Unfortunately, such efforts have thus far been largely unsuccessful.

Compounding matters is the fact that the consequences of non-compliance with the ADA can be severe. Potential outcomes might include mandatory injunctive relief (*i.e.*, a court order requiring a property owner or tenant to fix the problem), the defendant’s payment of attorney’s fees—both its own *and* the plaintiff’s—civil penalties, and negative publicity. Further, because ADA lawsuits frequently involve no actual harm to the plaintiff, general liability insurance policies likely will not cover these expenses.

Fortunately, ADA compliance problems are preventable. Violations usually result not from an intentional indifference to the needs of disabled persons but, instead, from the lack of proper policies, procedures, and practices regarding accessibility. Having effective policies in place can go a long way toward avoiding the expense associated with ADA lawsuits. Further, implementing effective policies doesn’t have to be difficult; it simply requires being conscientious about identifying barriers to access to parking, entrances, restrooms, etc.

So, what does the ADA require?

Businesses that are “public accommodations” (*e.g.*, restaurants, shopping centers, office buildings) must provide accommodations and access to persons with disabilities that is equal or similar to that available to the general public. Owners, operators, lessors, and lessees of commercial properties are all responsible for ADA compliance.

New construction and elements of buildings altered after January 26, 1992, must comply with ADA standards to the maximum extent feasible. But this does *not* mean that older buildings that haven’t been recently renovated are “grandfathered in.” Indeed, even for existing facilities, landlords, tenants, and property owners must remove “architectural and communication barriers” that are structural in nature when it is “readily achievable” to do so. Examples of such modifications include widening doorways to ensure wheelchair accessibility, retrofitting restrooms, and the addition of

access ramps. A modification is “readily achievable” when it is easy to accomplish without much difficulty or expense. This standard will often depend on the nature of the proposed modification and the resources of the party responsible for implementing it.

Who is liable for ADA violations?

Owners, landlords, and tenants can be jointly and severally liable in the event of non-compliance. Significantly, a landlord may *not* shift liability for ADA compliance to its tenants. Certainly, the parties’ lease may shift the *cost of remediation* to the tenant, but such a provision does not serve to exculpate the landlord from *liability*. Landlords, as owners of “public accommodations,” have an independent duty to comply with the ADA and can therefore be liable for ADA compliance on property leased to and controlled by its tenants. Further, tenants are not subject to liability for violations in areas that are not under their exclusive control, such as common areas. Additionally, some courts have held that landlords cannot shift the financial responsibility for ADA compliance to architects and builders because to do so defeats the purpose of the ADA.

How does this affect property managers?

Although property managers may not have direct liability for ADA compliance, their actions, as agents of the landlord, can have significant consequences. For example, in a recent Pennsylvania case involving the Cracker Barrel restaurant chain, the court certified a *national* class action lawsuit covering *any* person who had visited any Cracker Barrel location nationwide and who had encountered barriers to access. Certainly, there had been no finding that *every* Cracker Barrel location suffered from ADA violations, but the court nevertheless found that Cracker Barrel’s property managers had evidenced a systemic failure to inspect accessibility standards overtime. Thus, the acts and omissions of property managers can have far-reaching ramifications for landlords.

What about landlords who acquire existing properties?

Landlords in the business of acquiring existing properties should take ADA compliance seriously. Due diligence should focus not only on the financial aspects of the transaction but on ADA compliance, as well. Failure to do so risks buying not only the property, but a lawsuit, as well. To minimize the risk of purchasing a non-compliant property, purchasers could (a) require that sellers correct any ADA violations as a condition of closing, (b) demand that a portion of the purchase price be placed in escrow until ADA compliance can be confirmed, or (c) negotiate a reduction in the purchase price so that the purchaser can implement remediation efforts itself.

As noted above, ADA compliance is of critical importance. By recognizing the risks associated with non-compliance, and by implementing policies and procedures designed to ensure equal access to all, owners, landlords, tenants, and property managers can minimize the risk and expense associated with preventable violations.

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