Accessibility Compliance For Businesses:

"Myths and Misconceptions"

May 2021

INTRODUCTION

The "Myths and Misconceptions" information compiled by the California Commission on Disability Access (CCDA) for businesses and building access requirements is a resource guide. It is the hope of the Commission this information will help to better inform the community about areas where disability access may be confusing.

Please Note: Accessibility involves both physical/architectural accessibility and program accessibility such as reasonable accommodations and service animals.

Myth #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 the Americans with Disabilities Act (ADA) and state law access requirements do not apply to buildings constructed prior to the effective date of these statutes. 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 or had any alterations made to it since January 26, 1992 (under the ADA) or was built or had any alterations made to it since 1970 (under California law), there are obligations to remove barriers at the time of that building or alteration.

An alteration is defined as almost any construction, repairs or renovation that affects or could affect the usability of the building or facility or any part of it; it includes tenant remodels. There are some exceptions, such as purely cosmetic changes like paint and carpet replacement. If an alteration is made, then barriers must be removed in the path of travel and restrooms serving the area of alteration, as well as the area of alteration itself.

Even if your building has had no alterations, 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. This is an ongoing obligation, meaning you are required to periodically evaluate the barriers in your facility 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.

Even if no physical changes are readily achievable, you must establish a modification of your policies and procedures or some other alternate means of providing access to the greatest extent possible. If you cannot determine what

barrier removal obligations you have, or whether creating more accessible environments is readily achievable, you should hire a Certified Access Specialists (CASp) or another expert.

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

Unfortunately, even with building department oversight, it is common to find construction shortcomings that constitute violations of the ADA regulations or the California Building Code (CBC). (As we know, the ADA is a civil rights law not enforced by the local building department.) Shortcomings may be attributed to any number of issues, and it is difficult to be specific. However, some potential causes can be linked to errors in design, engineering, construction or inspection; poor specifications for furnishings and fixtures; or even 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. To learn more about CASp, visit www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx.

Myth #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 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 is 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 have never submitted for permit review by the building department.

In addition to physical/architectural access, "program" access is also required by ADA, Unruh Civil Rights Act, California's Disabled Persons Act (CDPA), and California Government Code (GC) 11135. This includes allowing access with service animals and providing reasonable accommodations such as American Sign Language interpreters when necessary to ensure accessibility to a person with a disability.

Myth #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 at the time an alteration is made. There is no such thing as a retroactive waiver. 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 the United States Department of Justice. Such an evaluation is a decision that a business must make based on the cost of barrier removal and the resources of the business, and may require the expert assistance of a CASp, a design professional, an attorney, and/or an accountant.

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

If you see clients at your facility, or if the public is able to access your facility to obtain access to your goods and services, your business is 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 ADA contains a list of businesses and operations that are considered to be "public accommodations." However, state law more broadly requires equal access for people with disabilities or medical conditions "to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other places' (see following link):
http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=54.&lawCode=CIV

Please note: if your facility 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.

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

This is a flawed idea. It is illegal to violate civil rights laws. 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 your own legal fees and costs, the plaintiff's legal fees and costs, and any damages that are awarded. This is in addition to the costs of making the required improvements to correct violations. In many cases, lawsuit-related expenses and costs 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.
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 more vulnerable if an injury on your property is caused by a civil rights violation. Many insurance policies do not cover ADA violations.

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

The ADA is directed to businesses, not just property owners. Nearly all ADA lawsuits are filed against both the operating business owner (tenant) and the property owner (landlord).
Compliance is not only the landlord's responsibility. Both the lessor and lessee are responsible and liable for the accessibility of the facility. 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.
Under California law, lease and rental agreements must state whether the property was inspected by a CASp and, if so, whether or not the property is compliant with all applicable construction-related standards. The landlord must share the CASp report of the facility with you prior to execution of your lease. Unfortunately, often the first-time tenants learn that their lease agreement shifts onto them all the costs of ADA violations, including lawsuits - is after they get sued. The lease may require the tenant to indemnify the landlord for all the landlord's expenses, including the landlord's legal fees and costs of remediation. This expense can be devastating to a tenant business. The best time to have a conversation with your landlord is before a problem arises.

Myth #8: A condominium (or apartment) development must comply <u>only</u> with CBC Chapter 11A.

The California Fair Employment and Housing Act (FEHA) requires all "covered multi-family 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 FEHA.

The FEHA 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. In addition to physical accessibility, the Federal Fair Housing Act and the FEHA also require that housing providers make reasonable accommodations to provide equal access to people with disabilities. A common example of a housing accommodation is to waive a no-pets policy to allow a person with a disability to live with an assistance animal. 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.

In addition, facilities that are open to the public, such as rental offices, must comply with the ADA and CBC Chapter 11B.

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. A helpful resource for additional information on other access and reasonable accommodations requirements is the California Department of Fair Employment and Housing: www.dfeh.ca.gov.

Myth #9: I do not need to provide access to my rental office because I do not have disabled tenants in my housing facility.

All common use areas serving covered multifamily dwellings are also subject to the accessibility requirements in Chapter 11A, and the accessibility and reasonable accommodations requirements in the ADA, the Unruh Act, and the Disabled Persons Act. Most multifamily dwellings are also covered by the Federal Fair Housing Act, the FEHA, and the CBC, Chapter 11A. Public use areas that are part of a residential project, including a rental and/or sales office, are required to comply with all of these laws.

Myth #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. If you did fix the issue, you may still be responsible for accessibility or reasonable accommodations problems that the individual who filed the lawsuit did not identify as an ADA violation, then you are still at risk.

Myth #11: Fixing my business will be too expensive; therefore, I am unable to do anything to reduce my risk.

The most important step is the first one; accept the legal responsibility to make your building or business compliant with access laws just as you do with health and safety laws. You may be surprised that many issues, such as adding signs, restriping parking stalls, lowering restroom mirrors, or changing door hardware, are simple to fix. Each small step you take to improve access to your building or business will reduce your exposure to lawsuits as your building becomes more and more accessible.
There are advantages to taking steps toward compliance. First, most courts look favorably upon proactive businesses 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 lower your financial exposure to damages.

Furthermore, the Construction-Related Accessibility Standards Compliance Act (CRASCA) barrier at the location SB 1186 (Steinberg 2012) reduced statutory damage amount. If a business hires a CASp when the violation is corrected within 60 days, damages are reduced from $4,000 to $1,000. If a small business corrects the violation within 30 days, even without a CASp inspection, damages are reduced from $4,000 to $2,000. Amendments provides small businesses (fewer than 50 employees) a grace period from the liability for statutory damages for 120 days following the date that a structure or area was inspected by a CASp, to allow the business time to remove barriers that the specialist identifies. Businesses may get 180 days to correct violations if a building permit is needed to make the corrections.

SB 269 creates a rebuttable presumption, for the purpose of an award of minimum statutory damages (civil rights damages), that certain technical violations do not cause the plaintiff to experience difficulty, discomfort, or embarrassment. SB 269 states for purposes of the presumption that a small business has 25 or fewer employees. A small business must correct the technical violations within 15 days of the service of a summons and complaint asserting an access claim or receipt of a written notice.
The claim must be based on one or more of the following technical violations: 1) Interior signs, other than directional signs or signs that identify the location of accessible elements, facilities or features when all are not accessible; 2) The lack of exterior signs, other than parking and directional signs; 3) The color of parking signs, provided the background contrasts with the color of information; 4) The

order in which the parking signs are placed or the exact location or wording of parking signs; 5)The color of parking lot striping, provided that its exists and there is sufficient contrast; 6) Faded, chipped, damaged, or deteriorated paint in otherwise fully compliant parking spaces and passenger access aisles; and 7) The presence or condition of detectable warning surfaces on ramps; except when ramp is part of a pedestrian path of travel that intersects with a vehicular lane or other hazardous area.

CCDA has a "top ten" list on its website of the most frequently complained-of access barriers. Looking at the items on that list may be a good way to start. The best way to ensure compliance and reduce the risk of getting sued is by obtaining an inspection report of their facility by a CASp.

Finally, there are tax credits available to you to offset the cost of creating disability access such as: The California Business Portal "Go-Biz" http://businessportal.ca.gov/. You can check with your tax specialist for details.

Myth #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 ADA and CBC requirements.

'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. 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 total project cost. The CBC has a similar limitation, but the limitation does not apply when the cost of the total project exceeds a specified amount, which is adjusted annually; as of January 1, 2016, the amount is $150,244.

Even so, the CBC allows for an "unreasonable hardship exception" in certain circumstances. The building department issuing the permit must make certain specific findings in order for the exception to apply. 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, if your architect or contractor is not a CASp, you may want to hire a CASp separately to review any construction documents for compliance.

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

While it is good business practice to provide assistance to all your customers, and you are required to provide reasonable accommodations to people with disabilities, assisting individuals with disabilities in lieu of providing the necessary improvements is not a solution that is compliant with federal or state law. The ADA and state law require "equal access", which means independent access without assistance. A business that is only accessible to people with disabilities if they have to ask for special help is actually in violation of these laws.

Myth #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 or 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 who are blind or have a vision disability, are deaf or hard of hearing, have intellectual disabilities, and people with mental health disabilities. Chances are that your business has served customers with disabilities but you did not notice 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 equal access, you open your facility to the potential buying power of 4 million additional customers.

Myth #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 not 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.

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.

Please note that you are not allowed to ask a person with a service animal any details about their disability or ask that the animal demonstrate a task that it can perform.
In many cases, it is 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 disabilities 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 living with PTSD Post-Traumatic Stress Disorder (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. Under California law, any animal trained to perform a specific task can be a service animal.

Myth #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 and the FEHA to discriminate in your hiring practices. In fact, this sort of thinking undermines the essential purpose of these laws that persons with disabilities have the opportunity to participate in all facets of public life and employment. Like most civil rights laws, the ADA and FEHA do not mandate an equality of outcome, but they do require an equality of opportunity. This is why these laws require commercial facilities built after passage of the ADA provide physical access to employee and common use areas of the facility and require business owners to provide a reasonable accommodation for employees and job applicants who have disabilities.

Whether or not you have employees with disabilities, you must serve members of the public with disabilities, and you must provide them "full and equal" access to your products, goods and services, and all the benefits of your business.

SUMMARY

Although disability access regulations can seem confusing, if you keep in mind the goal of the ADA and State law is to provide full and equal access to your disabled customers, you have a head start. Thinking of people with disabilities as a source of new revenue, rather than a burden, is another way to approach it. Our best recommendation to ensure that your facilities comply with the physical access requirements is to check with a knowledgeable CASp. The building regulations do not change very frequently, so one baseline CASp inspection will cover the basics.

Short Listing of State and Federal Resources Websites

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

California Building Standards Commission
www.bsc.ca.gov

Division of the State Architect
www.dgs.ca.gov/dsa/home
www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx

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

Reaching Out to Customers with Disabilities
https://www.ada.gov/reachingout/intro1.htm

California Department of Fair Employment and Housing
https://www.dfeh.ca.gov/

Americans with Disabilities Act
https://www.ada.gov/

California Government Code
http://law.justia.com/codes/california/2005/gov.html

INTERESTED IN MORE INFORMATION?

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