

**What you need to know about ADA lawsuits—
*how to reduce your risk of being sued, and
what to do if you already have been***

by

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If you are concerned about being sued under the Americans with Disabilities Act you are not alone. Thousands of businesses just like yours across the country have been sued, and thousands more will be before the law is changed. Considerable information about ADA access lawsuits is posted at www.ADALawsuits.com, and this article is not intended to duplicate that. Instead, the purpose of this article is to provide guidance about only the two following topics:

1. How to reduce your risk of being sued over ADA access claims, and
2. Things you need to know if you are sued

ADA access lawsuits have been described by lawyers as one of a group of “turbocharged” lawsuits in that you may not be able to avoid liability, and even if you could, it might not be cost-effective to try. Instead, until the law is changed, most defendants quickly discover that their efforts are best spent trying to reach the quickest, cheapest settlement possible. The purpose of this article is to provide guidance about exactly how to do that.

Unfortunately, the legal community has been less than effective in dealing with this issue—cases often go to a trusted family lawyer or friend, which often proves to be the most costly and ineffective way of handling them. Instead, because these cases are usually filed in relatively high volume, often on behalf of “professional plaintiffs,” special strategies and techniques are required, which will rarely be known to attorneys who have only handled just a few ADA cases.

1. **Before you are sued:** You have a precious opportunity to avoid an ADA lawsuit—before one is filed. If you have not already been sued, you may be

able to avoid thousands, or even hundreds of thousands of dollars in unnecessary expense by taking immediate action:

- a. **Get compliant**: Ultimately, there is no substitute for being 100% ADA compliant, or as close as possible. That was the objective of the ADA, and that is not likely to change, even if the law is improved. Additionally:
 - i. **Being ADA compliant is good business**—20% of Americans are disabled and the number of roving “professional plaintiffs” will only grow. An ADA access lawsuit could cost you \$10,000-\$100,000 or more (settlements average \$45,000+ in some areas); why risk that exposure?
 - ii. **Don’t try to figure out the ADA for yourself**—it is well known that the ADA Accessibility Guidelines conflict with the California Building Code in certain respects. The compliance manuals are extremely technical and are sometimes subject to limitations and reasonableness standards. A compliance survey from a qualified ADA consultant can cost as little as \$1,000 and could provide an important defense in the event of a lawsuit.
 1. **Many businesses are not required to make certain ADA repairs**: A qualified consultant will probably know the least expensive means of satisfying a requirement (i.e., instead of investing \$20,000 lowering a counter, widening a doorway and broadening an aisle, would installing a doorbell at a designated entrance and instructing staff on exactly what to do when it rings achieve the same result?)
 2. **Fix the “Red Flags”**: Many businesses believe they cannot afford full ADA compliance, even with the considerable tax breaks available to make ADA repairs. While any failure to be 100% compliant can lead to a lawsuit (and if you make some repairs and fail to make others, you could actually face stiffer penalties), businesses should be reminded that there are certain obvious “red flags” which make any site a prime target:
 - a. **Parking**: Perhaps more than any other source of lawsuits, a lack of properly configured and signed van-accessible disabled parking invites further scrutiny. It is a known fact that many attorneys use “scouts” to look for non-compliant properties to sue. Because so many lawsuits involve allegations of a lack of compliant parking (and little else), one

wonders if these scouts would simply have driven on to look for other locations if they had a fully compliant parking area. Making the parking area compliant is often one of the least expensive renovations a business can make. Obviously, be sure a wheelchair accessible path to the front entrance is clearly marked and kept free of obstructions.

- b. **Entrances:** Again, this is a drive-by “Red Flag”; aside from the fact that the entrance should be accessible, it should also look accessible. Be sure there are no impediments to access; have employees check throughout the day to make sure nothing has been set in public paths which could impede access. You can walk around a moving palette, but could a wheelchair? Can you imagine anything more frustrating the needing to use a restroom or attend an important event or meeting and not being able to enter the facility?
 - c. **Restrooms:** If you provide restroom facilities to the general public, they need to be fully accessible. Certainly, the access door is a major red flag, but there are a host of other compliance issues as well. You could demolish and completely rebuild a restroom for what you might have to pay an attorney just to begin defending an ADA case. Don’t ask whether you can afford it, ask whether you can afford not to do it.
3. **Use Common Sense:** You should not assume that the findings in an ADA compliance survey are the only things you need to consider to make your facility truly compliant. For example:
- a. **What if you were disabled?** Wheelchair access is not the only ADA consideration. Imagine if you were blind, deaf, wheelchair bound or otherwise disabled. Try to do everything a customer might need to do in your facilities (and on your website). Practice with employees so they will be able to handle a situation cheerfully and without embarrassment.
 - b. **Video monitoring:** Invest in a large number of tapes, date them, and retain them for at least one year. Many defendants indicate that the plaintiff never

visited their facilities; in other cases, we've heard plaintiffs remove prosthetic devices which could help them do whatever it is they claim they can't do; in still others, we've heard of a remarkable lack of diligence/resourcefulness (i.e., not asking if there are arrangements for disabled access, claiming to have been injured, but not completing an accident report, etc.). Employees should take careful notes after any apparent incident for future reference.

- c. **Signs/advertising:** Many firms advertise "if you can't come to us, we'll come to you" and put signs to that effect outside their premises. Others provide express instructions for the disabled. Obviously, the effectiveness of either of these strategies will depend upon the particular business, and should be discussed with a qualified attorney.
- d. **Employee training:** As stated above, be sure every employee has been trained in how to assist customers with all types of disabilities, periodically review this training, and keep written records. Please keep in mind that this may not have been the first time your disabled guest has faced impassable obstacles, and they may not understand why someone has not taken rather simple measures to remove them, which have been required by law for well over a decade. Imagine how you would feel if you were extremely thirsty and you were not offered a drink, then multiply that frustration hundreds of times. Remember that a disabled visitor could be very uncomfortable and getting to your facility has probably taken considerably more effort than it did you. With all this in mind, employees should never speak in a harsh tone of voice, a condescending manner or make light of a situation.
- e. **Private clubs:** Private clubs are a recognized exception to the ADA. Obviously, turning your business into a private club is not a realistic option for many firms, and not a practical one for others. More significantly, there is a considerable body of law on this issue, and strict compliance is absolutely essential (you can't just say "we're a club" and otherwise do business as usual). By the time you've made a proper study of the law and the arrangements

to fully comply with the requirements of a private club, it might be cheaper simply to comply with the ADA.

2. **If you have already been sued for inaccessibility:** your lawsuit is different from any other you've probably faced. Handling it as you've handled others could be a big mistake. For example:

a. **Speak only with an ADA expert attorney:** The biggest problem we see is that defendants hand these cases to their trusted family attorney, or the practitioner down the street, who usually try to do the best job they can. The first 100 cases we reviewed were handled by 95 different attorneys, most of whom, it appeared, had never before handled an ADA case, or had only handled 1 or 2.

The clients in these cases often pay for an unfair and unnecessary learning curve. Further, this exacerbates the statewide ADA lawsuit crisis because when defendants pay unnecessarily high fees they are using money which could better be spent making their facilities compliant.

You'd most like to speak with at least three attorneys, each of whom have handled at least 20 ADA cases, preferably at least one or two by the plaintiff suing you (this is what ADAlawsuits.com does—we give defendants a list of every attorney who has opposed the party suing them, and guidance on questions to ask, legal fees, experience, etc., to help them select the best attorney for their particular case).

i. **Speak candidly with your attorney about fees:** Our “target fee” to settle a small ADA case in Southern California is \$2,500. Despite this, we've seen business pay \$20,000 or more for the same services.

What does “target fee” mean? First of all, it requires an attorney who has handled approximately 20 other ADA access cases, and at least a few by the claimant suing the particular defendant. The cost to handle the 21st case is much less than the cost to handle cases 1-5, and the attorney should have learned a great deal about litigating ADA cases from his/her previous client matters; s/he should be able to provide information about previous settlements and a very clear picture of what legal fees should be.

This \$2,500 “target fee” is not meant to “box” an attorney “in”—only that we think attorneys and their clients should discuss why a particular ADA access case is expected to, or did, cost more to settle. Many of them will. Often, opposing counsel or a judge will raise certain issues, or certain unique aspects of a case will require it. Other matters, as well, can complicate things, for example:

- Because a number of experienced ADA attorneys are located within walking distance of the courthouses, clients should know in advance if they'll be asked to pay for travel time.
- Because a number of experienced ADA attorneys would be able to competently handle these cases without doing any research, clients should know in advance if they'll be asked to pay for research.
- Because a number of experienced ADA attorneys have most necessary documents (such as answers, settlement agreements, etc.) already on their computers and should have staff sufficiently familiar with ADA access litigation, if clients will be asked to pay for anything more than the time actually required to modify these "form" documents to reflect the details of the client's case, the client should be told this in advance and agree with it.

The legal community has taken a long and costly ride at the expense of ADA defendants, and this costly ride has greatly contributed to the nationwide ADA lawsuit crisis. The more it costs to defend an ADA case, the more defendants will be willing to pay to settle one. The more ADA cases settle for, the wealthier professional plaintiffs and their attorneys can become. The wealthier they become, the more incentive there will be for others to enter the same line of "work."

Exceptions to the "target fee": Clearly, the "target fee" is not absolute—it applies in only the smallest, simplest of cases (in our opinion, though, the vast majority of them). Clients need to understand that if a case becomes complex, for any reason, the target fee will or could be exceeded. There needs to be a clear understanding of what should be covered by the "target fee" and what is not. We think the "target fee" should cover initial evaluation, filing an appropriate answer, settlement negotiations, appearance at one Early Neutral Evaluation Conference, if necessary, and concluding matters for settlement.

Qualifications and assumptions: This assumes a fee averaging arrangement between an experienced attorney and an associate or paralegal equivalent to 10 hours of a \$250.00/hour attorney's time.

This attorney will know what's involved, how plaintiff's counsel operates, what the settlement should be, etc. We look at what the cost to this attorney is to handle one additional settlement, rather

than to learn how these cases are best handled. This attorney will have to be committed to resolving these matters inexpensively (rather than making them a “billing extravaganza”) and should have the resources to do so (i.e., most standard forms already on their computer and knowledgeable, low-priced associates).

We’ve been shocked to see attorneys who charge clients several thousand dollars just to draft an answer, when the fact is that we have thousands of answers in electronic form and can provide them free of charge (basically, the answer is one of the least important things in an ADA case; these cases are rarely tried, and it should be billed at no more than 1 hour of attorney time).

- b. **Think outside the box:** There are a variety of strategies and tactics to deal with ADA lawsuits. Many attorneys who do not regularly litigate these cases simply have no clue about how to handle them. It’s only when you’ve handled about 20 cases that some of these strategies and options begin to emerge.
- c. **The saddest part of all:** What we have found most troubling about non ADA specialists handling a case is the number of mistakes made and the potential cost to the client. For example, we have seen a number of case settlements posted publicly. This shows future claimants “hey, so and so just paid \$10,000 to settle an ADA case—maybe we can get a similar settlement.” We have seen others argue pointless matters which, though perhaps technically correct, did little to benefit their client and had to cost a lot in fees. An informal estimate, based only on limited observations to date, is that an ADA case handled by the “casual practitioner” can cost the client 5-10 times more in legal fees, and another 5-10 times more in settlement amount, than one which is handled by a lawyer highly experienced in ADA litigation and genuinely committed to fair and appropriate billing (certainly a rare combination, but not unobtainable).

So why does this happen? There probably are a few lawyers who really want nothing more than to profit from the misfortune of others. We think the majority genuinely want to help, but for a host of valid professional reasons, are reluctant to refer a case to a stranger. We want to have the answers, we want to be the client’s “hero.” If we want learn how to do that “on the client’s dime,” however, I think we have a duty to inform the client that “there are attorneys who handle these cases regularly and inexpensively, and know special strategies we may not; you can make a “business decision” to work with us, as long as you recognize that there are probably more cost-effective alternatives available.”

- d. **Once you have settled:** Too many clients breathe a sigh of relief after they’ve made their settlement payment and do nothing further. The fact is,

the lawsuit against you is a matter of public record; the fact that there is proof that you are on notice of problems makes your firm particularly vulnerable, so please:

- i. **Make the required repairs**: The word among attorneys, statewide, is that a large number of necessary ADA repairs are not made once a settlement is reached. This is a terrible mistake. Your lawsuit is a matter of public record. Once you have been sued on ADA access claims, there is no question that you are aware of potential noncompliance at your facility. If you fail to promptly make repairs, a “copycat” plaintiff can allege that you intentionally discriminated against the disabled and receive heightened damages.
- ii. **Monitor compliance**: Even fully-compliant firms can be sued at any time if a temporary obstruction blocks the path of the disabled, a policy or procedure changes, or new employee is not trained in dealing with disabled customers. Help the investment you have made in ADA compliance pay off by aggressively targeting new impediments to accessibility.
- iii. **Re-evaluate agreements**: A common problem in lease and other agreements developed before the ADA lawsuit crisis is that they do not address the issue of responsibility for ADA compliance. Although issues continually develop and emerge, since ambiguities in a legal document are often construed against the party preparing it, your failure to address, as clearly as possible, who will be responsible for ADA compliance, and the expense of lawsuits relating to it, could be very costly.
- iv. **Avoid other common mistakes**:
 1. Hold property in a Limited Liability Company or Limited Partnership (with a corporate General Partner);
 - a. Never hold property in:
 - i. A living trust (except your home)
 - ii. Your own name (or any other person’s)
 - iii. A General Partnership
 2. Properly insure your property
 - a. Use only California Admitted Carriers

b. Avoid “Master Policies”

3. Avoid significant equity accumulations in your property—these are a matter of public record and can attract lawsuits; borrow against the equity from a bank or a company you set up for this purpose.

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