

**Is Your Store, Shopping Center, Restaurant, Office or Other Place of Public
Accommodation Ripe for Suit Under the ADA?**

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A. The Public Accommodations Law

Title III of the American with Disabilities Act (“ADA”) provides people with disabilities with “full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation.” 42 U.S.C. § 12812(a). Public accommodations include public and private venues open to the public such as shopping centers, hotels, offices, hospitals, campgrounds, parks, theaters and sporting arenas, among other areas. The ADA went into effect in 1992 and has been implemented through the Americans with Disabilities Act Accessibility Guidelines 28 CFR Part 36 or what is commonly referred to as the “ADAAG”. The ADA and its implementing regulations are enforced by the United States Department of Justice or through private lawsuits, generally filed in Federal Court. There are very few exemptions to the ADA.¹ In addition, many states have adopted accessibility standards similar to the Federal Standards.

B. Who Does the ADA Apply To?

The ADA applies to entities that own, lease, operate or lease to places of public accommodation. Thus, for example, if a tenant space in a shopping center is not accessible to an individual with a disability, suit may be brought against the owner or the tenant, or both. In essence, the ADA is designed to benefit the person with the disability without concern for who bears the cost of the required changes to the premises.

C. Attorneys’ Fees and Increasing Number of Suits.

Although the relief afforded by the ADA is primarily injunctive relief that could result in a Court Order to make modifications or alterations to the property, the ADA also provides for the plaintiff to recover its attorneys’ fees. That provision for the recovery of attorneys’ fees creates incentives for attorneys to handle the matters and in some instances, can provide motivation to litigate a matter that could otherwise be resolved by negotiation. Indeed, as noted by some Federal Courts, ADA public accommodation suits have been proliferating. In the Middle District of Florida alone, 579 ADA cases were filed by only five organizations during the past three years. *Rodriguez v. Investo, LLC* 305 F. Supp.2d 12788 (M.D. Fla. 2004). *See also, Charlie Footman v. Wang Tat Cheeney*, 18 Fla.L.Weekly Fed. D143(a) (August 30, 2004). It appears that Florida, California and Texas are the most prolific centers of ADA litigation.

¹ Certain religious entities, state and local governments and some private membership clubs can claim certain limited exemptions.

D. Does the ADA Apply to Me? Myth v. Reality

1. Myth: My building was built prior to 1992 so I am grandfathered in.

Reality: Even pre-ADA buildings are required to make certain accommodations for accessibility for people with disabilities and they are not exempt from the law.
2. Myth: Because the modifications are too expensive, I don't have to make them.

Reality: The ADA provides a defense to full compliance with the law in those cases where the building was constructed before 1992 and the modifications would be cost prohibitive. This "not readily achievable" defense is based on a case-by-case comparison of expenses to profits. If you assert the defense, you must be willing to reveal the financial condition of the business. Furthermore, a financial inability does not exempt compliance but merely modifies it.
3. Myth: It is the tenant's responsibility to make its bathrooms accessible so an owner or landlord can't be sued.

Reality: The ADA applies to "owners, tenants, sub-tenants and operators of a public accommodation". Although one may contractually shift the ultimate responsibility for payment of the cost to make the accessibility accommodations, that contractual agreement cannot serve as a defense to the disabled plaintiff or the plaintiff disability organization.
4. Myth: The City or County gave me a Certificate of Occupancy so I must have met all of the ADA obligations.

Reality: Issuance of a Certificate of Occupancy by a local building official is no defense in a lawsuit under the ADA. Indeed, the local requirements may not be the same or as stringent as the Federal guidelines.
5. Myth: I won't be sued until after I get notice that a customer had trouble at my store, office, restaurant, etc.

Reality: There is no notice requirement under the ADA. In most instances, the first notice is service of a summons and complaint in Federal Court.

F. Can I Protect Myself Before I am Faced with a Federal Court Lawsuit?

While one may never be able to avoid being sued, one can take steps to minimize the likelihood and to ensure the defenses are available to you if you have been sued.

1. Review current properties with an experienced ADA consultant/architect. In addition to contracting or architectural experience, inquire as to whether they have served as an expert witness in any litigation as this may make the expert more aware of issues likely to be raised by a plaintiff.
2. Fix the most obvious and easy targets that can be seen at a drive-by of the location or a look in the door. These include parking space signs, proper striping of the parking access aisles, door thresholds and counter height, and door width for access to bathrooms.
3. Consider the use of unisex bathrooms to accommodate a larger wheelchair and to avoid having to modify more than one restroom.
4. Put a compliance plan in place now rather than waiting for a suit.
5. Include provision in tenant leases clearly stating obligations for modifications and legal fees if a claim is brought.

G. What if I am Served with a Suit?

1. Retain counsel with experience in the defense of ADA public accommodation matters as quickly as possible. The sooner an inspection and discussion with plaintiff's counsel starts, the lower the legal fees that will be incurred. Remember, if there are only a few items that need to be changed, you still may be responsible for both the plaintiff's attorneys' fees and your own attorneys' fees. As such, you want to take any possible steps to mitigate both.
2. Do not refer the suit to human resources or an employment attorney. Although similar concepts from the employment discrimination arena apply, these suits are more suited for counsel with a real estate or construction litigation perspective. The complainant is a customer or member of the public, not an employee.
3. Although the Complaint filed in Court is likely to only seek injunctive relief to get the changes made, plaintiffs are likely to be entitled to attorneys' fees and costs so acting fast to minimize those fees, particularly with all of the requirements in Federal Court for prompt disclosures and scheduling reports, will save those fees. It generally makes better business sense to expend resources to fix a potential problem than to fight over it. While this is not always the case, and there are some valid defenses to ADA claims, often had a defendant been aware of the problem, it could have avoided the lawsuit in the first place.

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