

BEWARE OF EQUAL ACCESS LITIGATION

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Employment Law Reporter, Ervin Cohen & Jessup LLP

The proliferation of employment legislation over the last ten years has given rise to a number of cottage industries. There are, for example, consultants who specialize in making sure that employers have complied with state and federal requirements. There are groups who specialize in providing forms for employment handbooks, offer letters, job applications and other documentation made necessary by various laws. There are persons who specialize in investigating allegations of harassment or discrimination. Insurance companies have recently made efforts to promote employment liability coverage, previously thought to be an obscure coverage rarely purchased by business owners. There are persons who specialize in training administrators to comply with various employment laws. And there are the plaintiffs' lawyers; that ever-expanding group of attorneys who, having tired of auto accident disputes, have moved on to the perceived greener pastures of employment litigation.

Depending upon your point of view, one of the more interesting (or irritating) outgrowths of the well-intentioned efforts of our state and federal legislatures has been litigation filed against businesses to require compliance with the Americans With Disabilities Act (ADA) and its California state counterpart, sections of the Unruh Civil Rights Act and the Health and Safety Code. These are not lawsuits which target employers for alleged discrimination against disabled employees or potential employees. Rather, these cases are filed by disabled *consumers* against businesses who allegedly failed to provide equal access to public facilities.

Equal access lawsuits have not been brought by a large number of disabled persons. On the contrary, most of these cases have been initiated by relatively few individuals; indeed, one individual alone has filed more than 100 lawsuits in the federal court. Under these circumstances, it is not surprising that some businesses and their counsel have accused a few plaintiffs of misusing the laws for profit by filing lawsuits and demanding money in settlement instead of informally requesting that the particular business be brought up to code standards. The disabled litigants have responded by stating that they are protecting their civil rights and making each community a better place to live.

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Regardless of the plaintiffs' motivations, the fact remains that public facilities that do not, for example, have parking for the handicapped, ramp entryways and bathrooms suitable for use by the disabled run the risk of being named in a lawsuit. Both state and federal laws prohibit discrimination on the basis of disability and prohibit denying disabled individuals access to public accommodations. The merits of any particular case will largely be decided upon when the facility was constructed (California laws apply to buildings constructed after September 30, 1973), whether the facility has recently been remodeled and whether the necessary modifications are "readily achievable". Failure to comply with the statutes can expose a business to three times the amount of actual damages suffered by the disabled individual or \$1,000, whichever is greater, plus attorneys' fees and punitive damages. In addition, injunctive relief can be obtained to require the business to make specific modifications. The lawsuit can be brought against both the owner of the business and the owner of the building in question.

The danger of being named in an equal access lawsuit, however, can be minimized. Business operators should examine their premises in light of the anti-discrimination laws and should consult with an attorney or an expert on disabled accessibility compliance to determine what modifications are necessary. Landlords and building owners should do the same. Allocation of the cost of any compliance work may be dealt with in any lease or other agreement. In older buildings, a minimum expenditure, such as creating a handicap parking space, may ultimately discourage potential plaintiffs from filing suit.