Responding to ADA Lawsuits

You may have heard about the American’s with Disabilities Act and wondered how it might affect your business. Perhaps you heard about predatory plaintiffs using the ADA to extort small businesses in ‘drive-by’ lawsuits. Even if you haven’t heard of the ADA, the reality is that you likely have obligations to make your small business accessible for the disabled. Instead of waiting for a lawsuit to hit you, consider now what you can do to proactively protect your business.

ADA Basics

Enacted in 1990 by President George H.W. Bush, this landmark civil rights legislation guarantees equal opportunity for individuals with disabilities. The ADA requires that facilities and businesses that are open to the public be accessible for people with disabilities.

Since the passage of the ADA, small business owners have spent hundreds of millions of dollars on their businesses to remove barriers and provide accessible public accommodations. Unfortunately, these investments do not immunize businesses from abusive lawsuits. The complexity of the law makes it difficult for small businesses to understand what modifications are required and makes small businesses easy targets for predatory plaintiffs and attorneys.

Barrier Removal

Since many small-business owners rent space in buildings and facilities that were constructed decades ago, they are subject to the ADA’s barrier removal requirement. The theory behind barrier removal sounds simple: remove barriers where the removal is “easily accomplishable without much difficulty or expense.” The reality is that barrier removal is both difficult and expensive; the lack of useful guidance on what kind of barrier removal is readily achievable further complicates compliance.

Small businesses may be paying the highest price for the ambiguities in the ADA. Taking advantage of the uncertainty surrounding the term "readily achievable", vexatious litigants have filed hundreds of lawsuits against small-business owners.

To help ensure your business has removed barriers, contact your city to find out if there is a certified access specialist who might assist with surveying your business to determine whether any changes are needed. And post a no photography sign indicating that photography is prohibited without written approval of management. This might help deter plaintiffs trolling for a lawsuit.
Responding to an ADA Complaint

The instinct for many small business owners hit with an ADA complaint is to settle as quickly as possible. But experts urge caution in defending against a claim. You want to avoid paying too much or paying too little (and facing the same or similar claim next week if the accessibility issue isn’t corrected).

1. First and foremost, take the complaint or demand letter seriously. Read it and don’t fail to respond. Immediately contact your insurance carrier to see if the carrier will provide defense counsel, if not, contact an attorney. If your attorney isn’t comfortable handling an ADA case, find one who is comfortable.

2. Thoroughly photograph all areas of your property. You can be sure that the plaintiff has likely done the same. Because changes are sometimes made, it’s important to have nearly identical images. But make sure you take pictures of the entire business since there may have been alternatives available to the plaintiff that pictures can document.

3. If you rent, contact the landlord and tender a demand for a defense. The longer you wait to do so, the less likely you’ll be able to recover your legal defense costs.

4. Talk with your attorney about whether it’s appropriate to make immediate modifications to your business property. It may be possible to get a lawsuit dismissed if a correction has been made, and some plaintiffs may voluntarily dismiss a case if barriers are removed promptly.

5. Do not jump into a settlement with the plaintiff by agreeing to remedy only the items identified in the demand letter or complaint; the claim probably hasn’t identified all issues that might be out of compliance. Fixing only the parking lot might lead to a complaint next week that covers interior issues. If possible, have a survey done of your business by a qualified ADA specialist who can identify all barriers that need to be remedied.
IRS Incentives

While the ADA is far from perfect, most small business owners want to do the right thing and comply with the law. The federal government has taken some measures to assist small businesses with compliance. The cost of alterations may entitle a business to an income tax credit, as well as the usual business-related expense deduction.

Congress amended the Internal Revenue Code to provide business tax incentives for removing barriers or increasing accessibility:

- The "Tax Deduction to Remove Architectural and Transportation Barriers to People with Disabilities and Elderly Individuals" allows a deduction for qualified barrier removal expenses not to exceed $1500 for any taxable year.
- The "Disabled Access Tax Credit" is available to eligible small businesses. It provides a tax credit of 50 percent of eligible access expenditures that exceed $250 but do not exceed $10,250, made for the purpose of complying with the ADA.

Other Incentives

Your state may also offer additional tax incentives for making your business more ADA compliant. In addition, if you want to go the extra mile, there are federal tax credits for hiring disabled individuals of certain targeted groups. For example, hiring individuals who receive SSI or vocational rehabilitation referrals may mean a tax credit up to $2,400 a year.

Warnings

Unfortunately, there are unsavory businesses out there who may entice you to buy their products while claiming the purchase would benefit from one of the tax breaks above. This may or may not be the case and you still need to examine the ADA guidelines and speak with your attorney or accountant to make sure you'll get the credit or deduction.

Also, there is no 'safe harbor' provision for businesses and ADA compliance. This means there is no guarantee that modifications will completely guard your business against an unscrupulous plaintiff. That being said, if you do make concerted efforts to be ADA compliant, those who really need accessibility are likely to notice and give you the benefit of the doubt.

This NFIB alert does not constitute legal advice, and you should consider consulting an attorney about any laws and regulations that are applicable in your state, locality or particular type of business.

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