

FAQ 4.04.2: About the New CASp Accessibility Inspections

As of 31 October 2008, California has finally certified a number of inspectors under the new Certified Access Specialist inspection program (“CASp”); go to www.CASpInspections.com for the list and more information; prior to this, there was no formal certification program for inspectors and the reliability of the information businesses received varied considerably. There are important benefits under the new legislation ([2008 SB 1608](#)) which prompted this certification, which are discussed in greater detail in our FAQ 4.04.3; among other things, businesses which pass a CASp inspection may receive special advantages in court proceedings in the less-likely event they are ever sued.

If you have a business which is open to the public in California, we recommend that you arrange for an inspection by a CASp inspector as soon as reasonably possible; however, we suggest that you consider the following factors before doing so:

1. Contract your inspector through an attorney representing you:

While you should certainly speak with a number of CASp inspectors to compare the rates, availability and experience of those in your area, when you reach a final decision, the CASp inspector should be **retained through an attorney who is representing you**. By retaining the CASp inspector through an attorney, their observations and conclusions may be protected by the “attorney work product privilege”; if their work and observations are not protected, they could be used against you in any current or future litigation.

Remember that a lawsuit can be filed for as much as two years or more after someone experiences some accessibility problem at your property, even if you fix the problem today. If you decide you cannot afford to make some changes the CASp inspector considers appropriate, need permits or have other conditions which could delay your ability to make all appropriate changes quickly, you don’t want the CASp inspector to be called as a witness in any proceedings against you.

When we suggest that you retain your CASp inspector through your attorney, what do we mean? Basically, the attorney retains the inspector to review your property and the report is addressed and sent directly to the attorney (because many of these reports are sent by email, they can be forwarded to you almost immediately). Most CASp inspectors are not lawyers and cannot be expected to advise you about the legal considerations of hiring them through an attorney. Many attorneys will not charge an existing client extra to obtain a report in this manner, but check to be sure; you may be

able to reduce or eliminate legal expense with a simple agreement confirming the attorney's responsibilities (or limitations thereof) in reviewing the report.

2. Beware of inspectors who are not CASp-certified:

Many highly qualified and experienced individuals have provided valuable information to businesses about improving accessibility for people with disabilities; others are self-taught and have prepared reports which missed conditions that could lead to lawsuits. While there is a chance that you could get a great deal of useful information from an inspector who is not CASp certified, there is one important difference— only a certification by a CASp-certified inspector can require a court to briefly suspend any lawsuit filed against you relating to disabled accessibility at your property.

Because accessibility inspections may cost hundreds, or even thousands, of dollars, you may not receive the important protection a CASp inspection can provide if you hire someone who is not CASp-certified by the State of California. While a number of organizations have developed certification programs (i.e., many inspectors who are not CASp-certified may nevertheless describe themselves as “certified”), only a CASp clearance will provide the new statutory benefits described above.

California has seen 14,000+ ADA/access lawsuits in just the past few years, and a small group of plaintiffs have demanded more than one billion dollars from California's small businesses. While there are many good reasons for improving disabled access (including a potential increase in customers, tax credits, safety, etc.), a single condition which leads to an accessibility claim could require more than an entire year's net income if you are sued. This is serious business— before you pay good money for an inspection, be sure you get all the protection California's legislature intended; it probably costs about the same as you'll pay for an inspector without CASp certification.

3. Make as many access improvements as you feel comfortable making before the inspector visits:

Many businesspeople want to be “told” by an expert what changes need to be made at their premises; indeed, if you have a CASp inspection of your property, you will almost certainly be given a list of any conditions on your property which do not meet applicable standards. But in California's highly-litigious accessibility environment, do you really want formal documentation of conditions at your property when you can probably find many of the basics for free on the Internet (for example, at www.ADA.gov¹)? If you are sued, such a list could be Exhibit “A” in the case against you. Worse still, many businesses do their best to implement changes from the lists they're given by inspectors but, all too often, fail to make one change or another perfectly, and never get re-inspected, so their properties continue to be “sitting ducks” for potential access claims.

Many think a better approach is to make as many changes as you feel comfortable making before the access inspector gets there; you may be able to make relatively minor adjustments on the spot. What you'd really like from such an inspector is a report

¹ **Important:** California has a much higher standard than the Americans with Disabilities Act of 1990 (“ADA”); Federal and State standards conflict in a decreasing number of important respects. While considerable helpful information can be gained from Federal sources, many California businesses which only made changes to comply with the ADA have been sued.

which confirms that no accessibility changes are necessary. That report will probably cost the same as one which identifies all the problems at your location, but you can probably imagine how valuable an “all clear” report is in litigation, leasing, financing and/or selling your property.

4. **Remember that a CASp inspection may not identify every condition which could lead to claims:**

California is one of the most litigious states in the Union, and the United States is one of the most litigious countries in the world; new legal theories emerge every day in California courts, and it is impossible for any single inspection or review to identify every possible condition or issue at your business which could someday lead to a lawsuit. But a CASp inspector will have information from one of the most authoritative sources in California on disabled access issues— the new California Commission on Disability Access. If you are sued in a lawsuit claiming that your business discriminated against people with disabilities because it was not accessible, what will you show the judge? Rest assured, the plaintiff will have photographs of conditions which probably should have been changed in 1992, and without a CASp clearance, you may have little more than stories of others with disabilities who have come and gone over the years without problems. If you can show a California judge a report from an access inspector certified by the State of California confirming that your property meets California standards for accessibility, now you will have something to work with.

5. **A CASp inspection will not, *necessarily*, resolve a current lawsuit or prevent a future one**

Even passing a CASp inspection with 100% compliance will not, *necessarily*, prevent or resolve an ADA/access lawsuit, but it is thought that it will make such claims much less likely and expedite their resolution.

6. **Periodically consider reinspection:**

New legal theories emerge every day; businesses move fixtures and change operations. No single inspection can ever identify every condition at a property which could eventually lead to claims. The CASp inspection program is new and can provide important protection, but the state of accessibility litigation in California is constantly changing. While we can think of few reasons not to get a CASp inspection just as soon as reasonably possible, the evolution of accessibility standards in California makes getting periodically re-inspected (possibly by a completely different inspector) worth considering.

Nothing in this FAQ is intended, nor may be relied upon, as legal or tax advice, for your particular situation. Readers are advised to consult an attorney highly experienced in ADA/access litigation in California for all matters of legal significance.

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