

FAQ 4.04.3: Questions and Answers about 2008 California Senate Bill 1608

SB 1608 was approved by Governor Arnold Schwarzenegger 28 September 2008 and is now law. Although it has been the subject of considerable public discussion, because some of its provisions are not immediately effective, many business owners want to know what SB 1608 means to them. While the following questions and answers may not be relied upon as legal advice or guidance, it is hoped that they will help businesspeople confer with their own legal advisors about the impact of this long-awaited reform.

Q: What does SB 1608 mean to me?

A: SB 1608 provides a number of important changes, some with an almost immediate impact:

- **No more “dollars per item” damage claims for most businesses:** Prior to SB 1608, many claimants in ADA/access lawsuits were tallying up thousands of dollars in minimum damage claims for each of the items they noticed at a property, whether or not those conditions actually interfered with their particular disabilities; in other cases, the financial demands were based on conditions they could never have personally experienced (such as the multi-million dollar “dollars per doorknob” demands made based on every guestroom in some hotels). SB 1608 clarifies that damages, if appropriate, are calculated on a per-visit basis, rather than some multiple of the total number of issues which may have existed at a site. For purposes of this calculation, some commercial properties, such as resorts and shopping centers, may be considered multiple separate businesses for damage calculations under the new provisions.

While it is true that SB 1608 has a provision which could allow a claimant to recover damages for more than one visit to a property, it also re-confirms the affirmative obligation of claimants to mitigate their damages, so many believe it could also help the cases where claimants seek multiplied damages for repeat visits to a business without ever having informed the responsible parties of problems.

- **Claims limited to conditions which would actually deny the particular claimant full and equal access:** Countless cases have been reported in which claimants have sought financial damages for conditions on properties which were either not reasonably related to their particular disabilities or would not reasonably have deterred someone with similar disabilities (such as someone with perfectly good eyesight seeking financial

damages for a failure to provide Braille). SB 1608 requires that both: (i) the conditions would actually deny the claimant full and equal access to the goods and services a business provides, and (ii) the plaintiff actually intended to use the public accommodation on the date represented. The latter requirement can help reduce the risk of the many improbable claims which have been reported; for example, a claimant who relies on public transportation exclusively but seeks financial damages for a lack of disabled parking.

- **Towards a “safe harbor”**: Defendants in California ADA/access lawsuits have long complained that these actions can often take on their own existence; tens of thousands of dollars in fees can be run up before a defendant even learns of a problem. While California has been making slow progress toward a system of statewide accessibility inspectors (“Certified Access Specialist program” or “CASp” for short), SB 1608 accelerates that and provides a special benefit for businesses who hire CASp inspectors in that if a business is sued which has been certified by a CASp inspector as accessible (or is even awaiting determination), the defendant business may be entitled to an automatic 90-day stay of proceedings in the lawsuit and a special court conference to discuss the issues. Just what happens in that preliminary evaluation conference will depend on a number of factors, but it presents an opportunity for a business which meets applicable standards to present evidence and get a better understanding of the plaintiff’s claims; a judge can also issue orders and create arrangements to streamline the litigation to prevent abuse and limit unreasonable positions by either side.

Even a business which passed a CASp inspection can make physical changes (such as rearranging interior displays) or take other actions which could interfere with accessibility (such as denying access to a person who requires a service animal); so while there can never be a fix which will prevent a business from being sued, the new measures in SB 1608 can allow a resourceful defendant to significantly reduce lawsuit risk and potential protection if sued unreasonably. While the best way to avoid access litigation is to comply with applicable laws and standards, SB 1608 can provide essential help to deter opportunists and inappropriate claims.

- **Standards commission and inspection program**: While California has a significantly higher standard for accessibility than the ADA (i.e., here, “any discrimination or distinction” in the way a business provides products and services to people with disabilities can lead to liability while the ADA only requires those changes which can be made “without much difficulty or expense”), many have criticized this standard as too broad, allowing litigation to proceed for almost any claim without much limitation or guidance to deter opportunists. SB 1608 creates the California Commission on Disability Access, which is believed will help clarify the specific standards California businesses need to meet to avoid accessibility litigation.

Many individuals have tried to provide information and guidance to businesses seeking to comply with accessibility laws but there has heretofore been no independent

organization to set the standards or to certify the qualifications of inspectors. Of course, if even one relevant standard is overlooked, liability can result. To date, there is no single website or other resource by which a business can obtain all the information it needs to avoid ADA/access lawsuits under California's higher standard. It is thought that, in time, the California Commission on Disability Access created by SB 1608 will help clarify applicable California standards, giving business greater certainty.

- **Other benefits:** Because many properties with newly constructed buildings have been sued in ADA/access lawsuits, SB 1608 requires California Architects, construction inspectors, plans examiners and building officials to meet certain continuing education requirements on disabled accessibility. SB 1608 will also require most municipal building departments to have at least one inspector who is CASp certified. Because some demand letters and lawsuits have made inappropriate demands, SB 1608 requires attorneys issuing such demands to provide a notice to the recipient to help them get good information before responding; in other words, it helps the recipient understand that just because someone is making an accessibility claim at their location, it is not necessarily meritorious, but should always be evaluated very carefully.

Q: *If I am involved in an ADA/access lawsuit right now, will SB 1608 help me?*

A: It could. While many of its terms will not apply for some time (and while its provisions expressly state that it is not intended to apply to civil actions filed before 1 January 2009), some are already arguing that its provisions reflect the intent of the legislature on the issues to which it applies now; for example, claimants seeking a "dollars per item" recovery in cases filed before 1 January 2009 should be reminded that the legislature has now expressed its position on such claims, even though it did so in a manner intended to provide advance notice to parties. If a claimant contends that SB 1608 should not be considered in a currently pending case, they should be reminded that there is not universally accepted case law on the "dollars per item" claim argument so the legislature is not changing existing law— only clarifying it.

Q: *I'd like to get my business inspected as soon as possible to take advantage of the various protections SB 1608 provides and to reduce the risk of lawsuits; where can I find an inspector?*

A: A list of certified CASp inspectors is posted at www.CASpInspections.com; because this certification is quite new, you may not find any currently licensed CASp inspectors in your area. Many examinees are currently taking the test, so you should periodically check the website again.

But even if you can't find a CASp inspector in your area who is currently licensed there are still things you can do while you are waiting. Considerable online information is posted at www.ADA.gov, though it does not reflect California's much higher access standards. Because of the considerable risk of litigation and the fact that many relevant standards have remained the same for decades, few would advise a business that can't find a licensed CASp inspector to do nothing and wait for a licensee to come along. Many people taking the CASp exams have been inspecting properties for disabled

accessibility issues for years, so if you call a number of unlicensed inspectors, you may well find one who has already taken the test, or will be doing so shortly. Of course, it is more important to evaluate experience, rates and ability with an inspector who is not currently CASp licensed, but if you can't find a licensed CASp inspector in your area, hiring an inspector who is awaiting exam results could expedite your CASp certification if and when they are finally approved. Note that a number of organizations certify inspectors with one designation or another; it is important to keep in mind that you will not be entitled to many of the protections of SB 1608 unless the inspector you retain is, in fact, licensed as a CASp inspector.

Some think SB 1608 goes too far, while others think it does not do enough. One thing's for certain— if you are involved in commercial property in California which is open to the public, you almost certainly have an obligation to provide full and equal access to people with disabilities. No structure is “grandfathered” or exempt from compliance because of its age (which the concept of “grandfathering” may apply to some building codes, the Americans with Disabilities Act of 1990 (“ADA”) was intended to require owners of existing structures to make accessibility changes by 1992; over 14,000 ADA/access lawsuits have been filed in California alone in the past few years, with new filings every day. While it is true that some standards are evolving, and State and Federal standards conflict on some issues, there is relatively little dispute about many of the conditions which are the subject of these lawsuits. Indeed, a remarkable number of these lawsuits involve conditions which could have been eliminated for less than \$100; many small businesses can eliminate nearly every condition which would trigger known claims for less than \$1,000 and a few hours of work. Litigation will almost always cost more than making appropriate changes and tax credits may be available for qualifying renovations (ask a qualified tax advisor). An estimated 20% of Americans are believed to have some disability; can you really afford to exclude 20% of your potential customers?

IRS Circular 230 Notice: Applicable U.S. Treasury Regulations require that we inform you that any Federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.