Governor Brown Signs a Law to Help Small Businesses Defend Against State Disability Access Lawsuits

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On May 10, 2016 Governor Brown signed Senate Bill 269 (SB 269) which amends certain California statutes dealing with disability access in public accommodations and business establishments. SB 269 is not a new law, but rather, an effort by the Legislature and Governor Brown to amend existing law in order to address the significant financial hardship that "drive-by" and "technical non-compliance" lawsuits are having on small businesses in California. Both federal and state court dockets in California are inundated with lawsuits filed against small businesses by professional plaintiffs and their attorneys who have created a cottage industry by filing lawsuits for technical violations of federal and state disabled access standards.

California Disability Access Laws – Not the ADA – Allow for Damages.

In addition to Title III of the federal Americans with Disabilities Act (ADA), a disabled individual can bring a claim under California law for denial of full and equal access to a business' establishment. Existing state law prohibits discrimination on the basis of various specified personal characteristics, including disability. California's Construction-Related Accessibility Standards Compliance Act establishes standards for making new construction and existing facilities accessible to persons with disabilities and provides for construction-related accessibility claims for violations of those standards. Existing law specifies that a violation of construction-related accessibility standards personally encountered by a plaintiff may be sufficient to cause a denial of full and equal access if the plaintiff experienced difficulty, discomfort, or embarrassment because of the violation. Unlike under the ADA which permits the plaintiff to seek only injunctive relief, under California law, a defendant is liable for actual damages plus minimum statutory damages for each instance of discrimination relating to a construction-related accessibility standard. In addition to damages, a successful plaintiff can also recover reasonable attorney's fees. It is often these statutory attorneys' fees that are the "tail that wags the dog" and motivate plaintiff's attorneys to file lawsuits over very technical non-compliance issues.

A Brief Summary of the Key Elements of SB 269.

1. Rebuttable Presumption that Plaintiff did Not Experience Difficulty, Discomfort, or Embarrassment by Technical Violations.

Among other things, SB 269 provides that for any claim filed after its May 10, 2016 effective date there shall be a rebuttable presumption, for the purpose of an award of minimum statutory damages, that certain technical violations do not cause a plaintiff to experience difficulty, discomfort, or embarrassment, if specified conditions are met.

Specifically SB 269 amends Civil Code section 55.56 to provide as follows:

"55.56 (e) (1) **The following technical violations are presumed to not cause a person difficulty, discomfort, or embarrassment** *for the purpose of an award of minimum statutory damages in a construction-related accessibility claim, as set forth in subdivision (c), where the defendant is a* **small business, as described by subparagraph (B) of paragraph (2) of subdivision (g),** *the defendant* **has corrected, within 15 days of the service of a summons and complaint** *asserting a construction-related accessibility claim or receipt of a written notice, whichever is earlier, all of the technical violations that are the basis of the claim,* **and the claim is based on one or more of the following violations:**

(A) Interior signs, other than directional signs or signs that identify the location of accessible elements, facilities, or features, when not all such elements, facilities, or features are accessible.

(B) The lack of exterior signs, other than parking signs and directional signs, including signs that indicate the location of accessible pathways or entrance and exit doors when not all pathways, entrance and exit doors are accessible.

(C) The order in which parking signs are placed or the exact location or wording of parking signs, provided that the parking signs are clearly visible and indicate the location of accessible parking and van-accessible parking.

(D) The color of parking signs, provided that the color of the background contrasts with the color of the information on the sign.

(E) The color of parking lot striping, provided that it exists and provides sufficient contrast with the surface upon which it is applied to be reasonably visible.

(F) Faded, chipped, damaged, or deteriorated paint in otherwise fully compliant parking spaces and passenger access aisles in parking lots, provided that it indicates the required dimensions of a parking space or access aisle in a manner that is reasonably visible.

(G) The presence or condition of detectable warning surfaces on ramps, except where the ramp is part of a pedestrian path of travel that intersects with a vehicular lane or other hazardous area.

(2) The presumption set forth in paragraph (1) affects the plaintiff's burden of proof and is rebuttable by evidence showing, by a preponderance of the evidence, that the plaintiff did, in fact, experience difficulty, discomfort, or embarrassment on the particular occasion as a result of one or more of the technical violations listed in paragraph (1)."

Civil Code section 55.56(g)(2)(B) defines a "small business" as that which employed **25 or fewer employees** on average over the past three years, for the years it has been in existence if less than three years, as evidenced by wage report forms filed with the EDD, **and** has average **annual gross receipts of less than three million five hundred thousand dollars ($3,500,000)** over the previous three years, or for the years it has been in existence if less than three years, as evidenced by federal or state income tax returns.

2. A 120 Day Cure Period to Fix Non-Compliant Issues.

SB 269 also exempts a defendant from liability for minimum statutory damages with respect to a structure or area inspected by a certified access specialist (CASp) for a period of 120 days if specified conditions are met.

Specifically SB 269 amends Civil Code Section 55.56 to provide as follows:

"55.56(g)(3)(A) Notwithstanding any other law, a defendant shall not be liable for minimum statutory damages in a construction-related accessibility claim, with respect to a violation noted in a report by a certified access specialist (CASp), ***for a period of 120 days*** *following the date of the inspection* ***if the defendant demonstrates compliance with each of the following:***

(i) The defendant is a business that, as of the date of inspection, has ***employed 50 or fewer employees*** *on average over the past three years, or for the years it has been in existence if less than three years, as evidenced by wage report forms filed with the Employment Development Department.*

(ii) The structure or area of the alleged violation was the subject of an inspection report indicating ***"CASp determination pending" or "Inspected by a CASp."***

(iii) The ***inspection predates the filing of the claim by, or receipt of a demand letter from, the plaintiff*** *regarding the alleged violation of a construction-related accessibility standard, and the defendant was not on notice of the alleged violation prior to the CASp inspection.*

(iv) The ***defendant has corrected, within 120 days of the date of the inspection,*** *all construction-related violations in the structure or area inspected by the CASp that are noted in the CASp report that are the basis of the claim.*

(B) Notwithstanding any other law, a defendant who claims the benefit of the reduction of, or protection from liability for, minimum statutory damages under this subdivision ***shall disclose the date and findings of any CASp inspection to a plaintiff*** *if relevant to a claim or defense in an action.*

(4) A defendant may **claim the protection from liability** *for minimum statutory damages under paragraph (3)* **only once for each structure or area inspected by a CASp**, *unless the inspected structure or area has undergone modifications or alterations that affect the compliance with construction-related accessibility standards of those structures or areas after the date of the last inspection, and the defendant obtains an additional CASp inspection within 30 days of final approval by the building department or certificate of occupancy, as appropriate, regarding the modification or alterations.*

(5) If the defendant has failed to correct, within 120 days of the date of the inspection, all construction-related violations in the structure or area inspected by the CASp that are noted in the CASp report, the defendant shall not receive any protection from liability for minimum statutory damages pursuant to paragraph (3), unless a building permit is required for the repairs which cannot reasonably be completed by the defendant within 120 days and the defendant is in the process of correcting the violations noted in the CASp report, as evidenced by having, at least, an active building permit necessary for the repairs to correct the violation that was noted, but not corrected, in the CASp report and all of the repairs are completed within 180 days of the date of the inspection.

(6) This subdivision shall not be applicable to intentional violations.

(7) Nothing in this subdivision affects the awarding of actual damages, or affects the awarding of treble actual damages."

Take Away.

The two potential defenses provided for in SB 269 are good for small businesses in California. However, they do not insulate a business from liability and will only be available if all the specified conditions are met. Small businesses in California should still take proactive steps (before being served with a demand letter or a lawsuit) to have their business establishments inspected by a Certified Access Specialists (CASp) inspector to determine whether they meet disability access requirements under the ADA and California law. Working with a CASp inspector to bring a property into compliance can have real benefits if and when a business is sued for disability discrimination under the ADA and California law.

If a business finds itself in the unfortunate position of being sued for ADA and California disability access violations, the attorneys at Weintraub Tobin can help. They have years of experience defending businesses in these types of lawsuits and, where appropriate, can assist in getting the dispute resolved quickly and for the least amount of money and disruption to the business.

A full copy of SB 269 can be obtained at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB269.

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