

Addressing ADA Issues in Commercial Leases in California

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Recently, California courts have been overwhelmed with lawsuits brought under the Americans with Disabilities Act (ADA) and Unruh Civil Rights Act. Unfortunately, many commercial leases are drafted without addressing the critical issue of how the parties will comply with the ADA or who will absorb the cost of an ADA lawsuit. It is up to Landlords and Tenants to secure competent [real estate lawyers](#) to assist them with these issues. Although there are bipartisan attempts in Sacramento to reduce rampant ADA lawsuits, the most recent proposed legislation, [SB-1186](#), has been modified and does not appear to have sufficient substance to provide relief for small businesses in the near future.



Addressing ADA Issues in Commercial Leases. The [ADA](#)

obligates anyone who "owns, leases (or leases to), or operates" a "place of public accommodation" to make sure that place or premises complies with ADA guidelines. The question then becomes, who will have the burden of paying for compliance? It is important to allocate the burden in the lease. If it is a "gross" lease, the landlord will probably be responsible for the structure and building, however, if there are issues that are solely within the tenant's control (such as placement of furniture), the tenant should still be responsible. Nevertheless, if the lease does not clearly allocate responsibility, problems will arise. At a minimum the lease should include a statement as to whether the property and the project in which it is located complies with the ADA, who will be responsible for retrofitting if it is required, and how the cost of compliance will be allocated. If the lease calls for Tenant Improvements and includes a Work Letter, ADA issues should be addressed in the Work Letter.

Who Can Be Sued in an ADA Action, the Landlord or the Tenant? The answer to this question is: both landlord and tenant will be liable to a third party plaintiff under the ADA. In [Botosan v. Paul McNally Realty](#) the landlord argued that it could not be liable under the ADA because contractually it was the tenant's responsibility to comply with the ADA. The court rejected this argument and ruled allocation of liability between the landlord and tenant is a private matter between them but with respect to third parties, either can be liable. It is for this reason that commercial leases should include appropriate indemnification provisions so that liability can be allocated between the parties.

What Types of Changes must Be Made to a Property Under the ADA? The ADA impacts both commercial landlords and tenants. In many cases the ADA requires "barrier removal" for existing

structures and prevents modifications or new construction that can impede access by the disabled. (42 U.S.C. §§ [12182](#) & [12183](#)). This Barrier Removal process includes installing ramps and cutting out sidewalks and entrances, creating specially designating and accessible parking spaces for the disabled, widening doors, installing special door hardware, installing grab bars in toilet stalls and raised toilet seats, repositioning shelves, adding raised markings on elevator buttons and signs, and removing certain types of carpeting. Information on these requirements is contained in the [Department of Justice's ADA Regulations and Technical Assistant Manuals](#).

Recommendations. Because of the recent proliferation of ADA lawsuits, we recommend that all of our clients, whether they are landlords or tenants, have the premises inspected by an ADA expert. Indeed, under the new proposed legislation, landlords will need to disclose in their leases whether the property has been inspected by a Certified Access Specialist under the California Certified Access Specialist Program (CASp).

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