

## Legal Notes

### Addressing ADA Accessibility Issues in the Public Sector

January 2009

by Nikki Hall

Nikki Hall is a senior counsel with Renne Sloan Holtzman Sakai LLP, a law firm that represents public entities almost exclusively and has offices in San Francisco and Sacramento. She can be reached at [nhall@publiclawgroup.com](mailto:nhall@publiclawgroup.com).

Although the Americans with Disabilities Act (ADA) of 1990<sup>1</sup> has been in effect for nearly two decades, many public entities are not yet in compliance with its accessibility requirements. It is well understood that ADA prohibits discrimination against disabled workers who are able to perform essential job functions with or without reasonable accommodation.<sup>2</sup> But many public agencies have not fully recognized and taken steps to abide by ADA's affirmative mandate that requires public facilities and services to be accessible to people with disabilities.<sup>3</sup>

ADA claims inflict a particularly painful financial sting on public agency defendants. Attorneys' fees in such a case can easily approach \$1 million. What's more, unlike other forms of civil rights litigation, ADA requires defendants to pay plaintiffs' attorneys' fees not only if plaintiffs win but also if they *settle* without a win. This article provides an introduction to ADA accessibility requirements and suggests steps public agencies should take to begin addressing this potential liability.

#### Core ADA Accessibility Requirements

Under ADA's accessibility provisions, public entities must ensure that their facilities, services, programs, activities and communications when "viewed in their entirety" are accessible to people with disabilities.<sup>4</sup>

This accessibility requirement applies unless an agency can demonstrate that compliance would result in a "fundamental alteration" in the nature of a service, program, activity or facility or in undue financial and administrative burdens.<sup>5</sup> The decision regarding whether or not compliance would result in a fundamental alteration or undue burden must be made *in writing* by the head of a public agency or that person's designee after considering all of the agency's resources.<sup>6</sup> Furthermore, even if an agency can demonstrate that compliance would result in a fundamental alteration or undue burden, the agency must nevertheless take whatever action it can that does not result in a fundamental alteration or undue burden, but still ensures that people with disabilities receive the benefits and services provided by the public entity.<sup>7</sup>

To comply with ADA accessibility requirements a public entity must:

1. Conduct a thorough self-evaluation of its facilities, services, policies, communications and practices to determine whether any modifications are required to make them accessible to people with disabilities;<sup>8</sup>
2. Adopt a transition plan, after the self-evaluation process is complete, describing the alterations that will ensure accessibility and the timeline for completing such changes.<sup>9</sup> Many ADA consultants are available to assist an agency with its self-evaluation and transition plan;
3. Obtain public input during the self-evaluation and transition plan processes, particularly from disabled individuals and organizations that represent them;<sup>10</sup>
4. Designate at least one employee to act as its ADA coordinator to monitor compliance with ADA's non-discrimination and accessibility requirements<sup>11</sup>. That person (or persons) must promptly investigate and respond to ADA complaints; and
5. Adopt and publish a grievance procedure for promptly resolving complaints alleging ADA violations.<sup>12</sup>

Training employees regarding accommodation and accessibility under the ADA is also recommended to ensure that employees are aware of the entity's legal obligations.

#### Recent Lawsuits

In recent years, many public entities have faced arduous ADA lawsuits.

In 2004, a class of disabled people sued the City of Sacramento, alleging that its public sidewalks were inaccessible to those with disabilities. A settlement agreement requires Sacramento to allocate 20 percent of its Transportation Fund *annually for 30 years* to ensure disabled access to pedestrian rights of way. The settlement also requires the city to submit semiannual ADA compliance reports to an outside monitor for three years. As part of the settlement, the city had to pay \$800,000 in attorneys' fees to the plaintiffs.<sup>13</sup>

In 2006, the City of Vacaville settled a similar lawsuit regarding pedestrian rights-of-way access. For up to 30 years, Vacaville must dedicate the equivalent of 5 percent of its annual gas tax revenue set-aside for capital projects --- a minimum of \$50,000 --- to an ADA fund that will be used exclusively to install compliant curb ramps and remove barriers to make pedestrian rights of way accessible to disabled individuals.<sup>14</sup>

In 2005, the state Department of Parks and Recreation settled an ADA lawsuit alleging denial of access to state parks. Under the settlement agreement, the department committed to a comprehensive remedial transition plan. The settlement requires ongoing

reporting of ADA compliance and monitoring by an outside source over a period of 11 years. Plaintiffs' attorneys' fees totaled \$650,000.<sup>15</sup>

In 2007, the counties of Kern and Santa Cruz settled lawsuits related to alleged inaccessible polling sites brought against them by the state Attorney General's Office. The settlement agreement, which remains in effect through March 2011, requires the counties to improve accessibility to polling places, employ an architectural consultant to assist with upgrading polling facilities and train employees who select and set up polling sites on election days.<sup>16</sup>

A lawsuit is pending against the California Department of Transportation to improve sidewalk access throughout the state for people with mobility and/or vision disabilities. This lawsuit is the first of its kind to challenge sidewalk access barriers on a statewide basis.<sup>17</sup>

The City of Oakland has been sued for allegedly failing to adequately plan to meet the mass care and shelter needs of people with disabilities during an emergency.<sup>18</sup>

Given the concern over the emergency preparedness of cities that followed such natural disasters as Hurricane Katrina, disability rights groups are focusing on whether cities are adequately prepared to address the needs of disabled people during an emergency. For example, Disability Rights Advocates, an advocacy group based in Berkeley, is currently soliciting public input regarding emergency preparedness for cities throughout the state with respect to accessibility for people with disabilities.<sup>19</sup>

### **Moving Forward**

ADA is one of the most important federal statutes governing employment and public accessibility. To fully comply with the letter and spirit of ADA and to avoid litigation, make sure that your agency is abiding by the core ADA accessibility requirements discussed here.

---

### **Footnotes:**

1 42 U.S.C. section 12101 et seq.

2 Id., §12112 et seq. (Title I of the ADA).

3 Id., §12131 et seq. (Title II of the ADA).

4 28 CFR Part 35, §§ 35.150, 35.160 (regulations implementing Title II of the ADA).

5 Id., §35.150(a)(3).

6 Ibid.

7 Id.

8 Id., §35.105.

9 Id., §35.150(d).

10 Id., §§35.105(b); 35.150(d).

11 Id., §35.107(a).

12 Id., §35.107(b).

13 Details regarding Barden v. Sacramento can be viewed at: [http://www.dralegal.org/cases/public\\_entities/barden\\_v\\_sacramento.php](http://www.dralegal.org/cases/public_entities/barden_v_sacramento.php)

14 Details regarding Nystrom v. Vacaville are located at: [http://www.dralegal.org/cases/public\\_entities/Nystrom\\_v\\_Vacaville.php](http://www.dralegal.org/cases/public_entities/Nystrom_v_Vacaville.php)

15 For information regarding Tucker v. Cal. Dept. of Parks and Recreation, see [http://www.dralegal.org/cases/public\\_entities/tucker\\_v\\_ca\\_parks\(1-26-06\).php](http://www.dralegal.org/cases/public_entities/tucker_v_ca_parks(1-26-06).php)

16 See <http://ag.ca.gov/newsalerts/release.php?id=1475&year=2007&month=10>

17 See [http://www.dralegal.org/cases/public\\_entities/CDR\\_v\\_Caltrans.php](http://www.dralegal.org/cases/public_entities/CDR_v_Caltrans.php)

18 See [http://www.dralegal.org/cases/public\\_entities/CFILC\\_v\\_Oakland.php](http://www.dralegal.org/cases/public_entities/CFILC_v_Oakland.php)

19 [http://www.dralegal.org/investigations/emergency\\_prep/](http://www.dralegal.org/investigations/emergency_prep/)