As of June 1, 2013, Compliance Required for New Disabled Access Local Rules for Non-Residential Properties, Under San Francisco Administrative Code Section 38

by Kurt A. Franklin

As of June 1, 2013, property owners of certain non-residential space in San Francisco should be aware that on September 4, 2012, the San Francisco Board of Supervisors voted to approve new disability/access legislation. The City declared there was "strong public interest in protecting 'Small Business Tenants' from unforeseen expenses and liabilities arising out of required disability access improvements." Certain landlords' obligations to implement the legislative mandates started soon thereafter, but the final stage of implementation started June 1, 2013, as further described below. The new law is entitled "Obligations of Landlords and Small Business Tenants for Disability Access Improvements." Its stated aim is to reduce the number of ADA lawsuits in San Francisco, by means of making it more likely that commercial landlords will inform small business tenants about the disability-access condition of commercial spaces. Under the ordinance, a "small business" is one that is leasing 7,500 square feet of space or less.

The enactment of this ordinance provides us with a good opportunity to remind readers that the issuance of an alteration permit or building permit by the City and County of San Francisco only indicates compliance with City and State disabled access laws and not compliance with federal law such as the American's with Disabilities Act (ADA).

The ordinance requires commercial landlords leasing properties used as public accommodations to do the following:

(1) Ensure that existing public restrooms, ground floor entrances, and ground floor exits are accessible by removing all architectural barriers to disability access, to the extent that such improvements are required and are "readily achievable", i.e., "easily accomplishable and able to be carried out without much difficulty or expense" within the meaning of any applicable provisions of Title 28, Sections 36.304 and 36.305, of the Code of Federal Regulations; **or**,

(2) Provide written notice to any prospective Small Business Tenant that the property may not currently meet all applicable construction-related accessibility standards, including standards for public restrooms and ground floor entrances; and

(3) Before entering into or amending a lease, provide tenants with written and signed notice in a form prescribed by the City (Disability Access Obligations Notices), and provide the tenant with a copy of the City's "Access Information Notice," which is a pamphlet prepared by the City's Small Business Commission; and

(4) Include in each lease an express provision detailing the obligations of the landlord and tenant for making the space comply under disability access laws; and

(5) Include in each lease a provision in which the landlord and tenant agree to use reasonable efforts to notify one another if later alterations to the leased property might impact accessibility under state and federal laws.

The requirements for landlords were phased in during 2013. As of January 1, 2013, the ordinance applied to any new or amended leases for 5,001 to 7,500 square feet of commercial space. New or amended leases for 5,000 square feet or less of commercial space became subject to the new requirements as of June 1, 2013.

The ordinance lets landlords and tenants determine their respective obligations to make space comply when they are actually negotiating the lease or lease amendment. The ordinance requires the City to give priority to building permit applications for work consisting primarily of disability access improvements.

Disability access laws are unique among civil rights laws because construction-related barriers are tied to building codes and permitting. A person with a disability can actually receive excellent service from a public accommodation, yet claim a barrier caused him or her difficulty, discomfort, or embarrassment. For more than 20 years, this has caused confusion for property owners.

Whether a commercial property complies with disability access laws requires a detailed analysis of federal, state, and local laws and regulations, along with a review of a commercial property's business and permitting history. Unfortunately, as mentioned above many commercial landlords and tenants erroneously believe that because they have a renovation permit approved by the City, or even a certificate of occupancy, it proves that their commercial space complies with the ADA and other access laws. Not so. Indeed, assuming that "the building department approved my plans" as a defense to an ADA lawsuit is one of the most common myths among ADA defendants.

New California Lease Disclosure Requirements — California Civil Code Sections 54 – 55 and 1938 (SB 1186)

At the State level, without regard to the size of the property, new lease disclosure requirements have also been mandated for landlords. Effective July 1, 2013 (and assuming no privileges apply exempting disclosure), if a landlord had a licensed Certified Access Specialist (CASp) evaluate the commercial property and the CASp pointed out areas needing access improvement under the ADAAG or Title 24, then the landlord must disclose to the tenants and prospective tenants in the leases (a) that a CASp has inspected the property, and (b) the specific improvements the CASp believes are needed to make the property comply with state and federal access laws.

What Happens if a Commercial Property Owner Fails to Comply with the Notice Requirements Under San Francisco Administrative Code Section 38 or Civil Code Section 1938?

The new City law and Civil Code Section 1938 do not identify the consequences for a landlord's failure to

provide written notice of known accessibility deficiencies or to provide the required information in a commercial lease. A tenant might, for example, seek to rescind a commercial lease (or resist a lease indemnity provision) if it is sued for failing to comply with disability access laws and the lease does not expressly comply with the requirements of Administrative Code Section 38 or Civil Code Section 1938. Alternatively, a tenant might assert a claim by way of a cross-complaint that the landlord's failure to comply with state law exposed the tenant to damages for which the landlord should be responsible.

Consider Your Insurance

Frequently, an Employment Practices Liability Insurance (EPLI) policy will cover the defense of third-party civil rights claims like a disability-access lawsuit. Many wouldn't think to look here for coverage on an ADA case. These policies are the most frequent "claims made," meaning if a claim is not made on time you can lose coverage. The definition of "claim" and "timely" are policy specific. Thus, if you receive an ADA claim, demand letter or lawsuit, make sure you speak with your insurance broker and that you tender your claim to the insurance carrier right away. Even if a claim is denied or if there is a high self-insured retention, keep your insurer updated on the case and any settlement discussion.

Preventative Strategies and Conclusion

Our observation is that barrier-related disability-access lawsuits are the most common type of lawsuits initiated against businesses. One commentator concludes that there have been between 25,000 and 35,000 ADA accessibility lawsuits filed in just the last several years—with at least 10 ADA lawsuits filed each day in California. While these cases can be expensive to defend, in the Bay Area fewer than 1% make it to trial. Preventative strategies include preparing responses to informal complaints, coordinating with architects and CASps, reviewing agreements with architects and contractors, reviewing lease and franchise agreements, reviewing purchase agreements, developing due diligence checklists, system wide evaluations and surveys, and reviewing insurance policies that might cover disability-access claims. When multiple defendants are sued by the same plaintiff, Hanson Bridgett's extensive litigation background in this area of the law gives us unique experience assisting with large defense-side group representations to help clients minimize attorney's fees and costs.

When this occurs, our attorneys work with the most experienced disabled access consultants and other experts. Statewide, Hanson Bridgett civil rights defense and real estate lawyers have counseled, defended, and advised hundreds of clients in individual and class action disability-access lawsuits and in a Department of Justice inquiry.

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