

Real Estate Alert

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SB 1186 Update: California Legislature Attempts to Promote Compliance with Accessibility Standards and to Curtail Vexatious Litigation

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In September 2012, the California State Legislature enacted SB 1186 in an effort to cut back on opportunistic litigation and encourage compliance with disability access laws. The new law imposes additional notice, procedural and pleading requirements on attorneys asserting claims based upon construction-related accessibility laws. In addition, SB 1186 adds California Civil Code Section 1938, which requires the owner or lessor of a commercial property to state on every lease form or rental agreement (1) whether the property being leased or rented has undergone an inspection by a Certified Access Specialist (“CASp”), and (2) if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards under California Civil Code Section 55.53. This new disclosure requirement must be included in all leases executed on or after July 1, 2013. While technical compliance with the disclosure requirement is relatively simple, building owners and lessors must be prepared to negotiate the issues raised by the disclosure itself or by a CASp inspection. Additionally, owners and lessors must review their portfolios and determine whether a voluntary CASp inspection would be appropriate based on a cost-benefit analysis for each building.

[A “Must Do” for all Owners and Lessors: Update Your Lease Forms](#)

Starting on July 1, 2013, language similar to the following should be added to all commercial leases or rental agreements in California:

If the property being leased or rented *has* undergone inspection by a CASp:

“As of the date of this Lease, the [Premises/Building] has been inspected by a Certified Access Specialist, and the [Premises/Building] [was/was not] determined to meet all applicable construction-related accessibility standards under California Civil Code Section 55.53.”

If the property being leased or rented *has not* undergone inspection by a CASp:

“As of the date of this Lease, the [Premises/Building] has not been inspected by a Certified Access Specialist.”

Note that the statute specifies that the disclosure must be included in “every lease form or rental agreement,” without exception and the disclosure cannot be qualified to be “to the knowledge” of the lessor or owner. Additionally, the law imposes the disclosure requirement on each owner or lessor of “commercial property;” however, no definition of “commercial property” is provided. Therefore, we recommend that the disclosure be included in every lease of property leased or rented for profit, regardless of the property’s type of use (i.e., whether or not it qualifies as a place of public accommodation) or the length of the rental agreement, to ensure compliance.

[Lease Issues Arising from CASp Disclosure](#)

The Legislature's goal in mandating "CASp" disclosure in every lease form and rental agreement is to bring accessibility compliance issues to the forefront of lease negotiations and to thereby promote compliance with accessibility laws. In addition, the prophylactic benefits in the event of litigation are the "carrot" to encourage having an inspection performed. If the lease form states that the property has *not* been inspected, a potential tenant may either demand the inspection be performed (and any non-compliance remedied at landlord's cost) prior to signing the lease, or request indemnity from the landlord on accessibility-related issues. Alternatively, the landlord may require that the tenant obtain a CASp inspection in connection with construction of any tenant improvements. Either way, the disclosure will effectively force a discussion on an issue that many lessors and owners try to avoid. In addition, tenants are able to order a CASp inspection and it is unclear what the implications would be if the CASp report identifies legal compliance upgrades required in the common areas. It may be preferable to add to the lease form that if a tenant orders a CASp inspection, they will be responsible for all legal upgrades identified in that report, including any common area upgrades.

A different issue will arise between the building owner and a master lessor (i.e., a sublandlord). The owner will be required in its lease with the master lessor to make the CASp disclosure (only if the lease is entered after July 1, 2013). The master lessor will subsequently be required to make the disclosure in each of its subleases; however, this disclosure will be based upon the owner's representation (if any), not the master lessor's actual knowledge. If a CASp report was done, the master lessor likely will not have seen the report (which is usually kept confidential) and, absent such personal knowledge, the master lessor may not be able to make the required representation.

To Inspect or Not to Inspect

Owners and lessors will need to decide whether to commission a CASp inspection. This requires a cost-benefit analysis weighing the cost and likelihood of a lawsuit against the cost of an inspection and the cost to remediate any non-compliant conditions noted in the report. ADA litigation is a profitable business in California, with thousands of lawsuits and threatened lawsuits each year. These lawsuits are expensive for property owners, particularly owners of large portfolios of assets. However, CASp inspections will involve definite costs, and do not guaranty immunity from a lawsuit (but do provide certain litigation risk and cost mitigation benefits as discussed below). The cost of the inspection itself ranges depending upon the size of the premises and the anticipated volume of patrons, but is relatively small (in the few thousand dollar range for a typical commercial property). More importantly, any non-compliance listed in the CASp report must be remediated within a reasonable timeframe. What a "reasonable" timeframe is has not been established yet, but indications seem to favor something in the 3-5 year range, with the ability to request hardship protection for any high dollar items. Voluntarily performing an inspection potentially provides an owner or lessor certain benefits should they be sued under accessibility laws:

- Certain defendants will be permitted to request that the court grant a 90-day stay in the lawsuit, which prevents the plaintiff's attorney from incurring legal fees during the stay;
- Certain defendants can request an early evaluation conference, which is similar to a settlement conference encouraging early settlement of the case before exorbitant costs are incurred;
- Most importantly, the minimum statutory liability amounts available will be reduced if the violations are cured within certain time periods. Currently, the *minimum* fine under the Unruh Civil Rights Act per violation is \$4,000 and under SB 1186, this would be reduced to a minimum of \$1,000 per offense.
- For properties which have been inspected, the CASp inspector will issue a certificate (whether or not there are violations noted) which can be displayed at the building showing that the inspection has been conducted. This notice tells potential plaintiffs (and their lawyers) that the property owner/lessor is fully briefed on accessibility issues and has taken proactive steps to limit its liability.
- A good CASp inspector will track litigation trends and be aware of the "hot items" in the courtroom, which are often items in the "readily achievable" category (fairly fast and inexpensive to fix, e.g., coat hooks in restroom stalls, signage and striping of handicapped parking stalls) so owners/lessors can remedy those problems and take their building out of the crosshairs.

On the negative side, there is a risk that the report will reveal very expensive compliance work which must be

done. The report will typically outline the non-compliant items and provide a range of items which are “readily achievable” and those which are larger cost items and likely to cost more. Owners will have time to correct the non-compliant items (as mentioned above, the exact timing for compliance work is unclear, but so long as the owner is working toward compliance, the certificate remains valid and provides the above protections). Obviously, the age of the building and when the last permit was pulled (which would provide indicia of whether expensive compliance obligations are likely) will factor into the cost-benefit analysis. From a marketing perspective, savvy tenants are likely to lean toward buildings with the least ADA exposure and thus a CASp report showing substantial compliance (or a landlord who is working toward compliance) may be a differentiator between an inspected building and an uninspected competitor’s project.

Other Issues Arising from CASp Disclosure

SB 1186 will have implications for purchase and sale transactions as well. The absolute obligation to disclose in any lease creates a due diligence item for an owner to determine whether CASp inspections have been performed on any property it purchases and to disclose whether an inspection has been performed on each property it sells. Some potential issues to consider are:

- If the property has not undergone an inspection, will or should the purchaser require one?
- If an inspection is performed, which party will be responsible for the cost of the inspection and of any remedial work identified, and could a purchaser use inspection results to request an adjustment in the purchase price or a holdback?
- Will the seller make a representation or warranty regarding the existence or non-existence of an inspection in a purchase agreement?

Enforcement and Remedies for Non-Disclosure

Section 1938 is silent regarding the consequences of owner/lessor failure to make the required disclosure. This leaves open the question of whether a tenant will be able to sue the landlord for failure to disclose and/or terminate its lease. It is also unclear how non-disclosure will come into play should a tenant be sued for failure to comply with the ADA when the landlord failed to make the required disclosure.

In light of this new legislation, prudent property owners and lessors should consider a voluntary CASp inspection. For a more detailed discussion of the issues raised in this article, please contact a member of our California Real Estate group.

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