

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 585 (Niello)

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Fiscal: No

Urgency: No

ME

SUBJECT

Disability access: construction-related accessibility claims: statutory damages:
attorney's fees and costs

DIGEST

This bill prohibits a construction-related accessibility claim for statutory damages from being initiated in a legal proceeding against a defendant unless the defendant has: 1) been served with a demand letter specifying each alleged violation of a construction-related accessibility standard; and 2) the alleged violations have not been corrected within 120 days of service. This bill provides that a defendant is not liable for statutory damages, costs, or plaintiff's attorney's fees for an alleged violation that is corrected within 120 days of service of a demand letter.

EXECUTIVE SUMMARY

This bill contains nearly identical provisions to SB 1142 (Moorlach, 2016) which failed passage in this Committee.

California's disability access laws have long operated to ensure that people with disabilities can utilize businesses and places of public accommodation in the state. In spite of their important civil rights functions, these laws have sometimes generated controversy due to high-volume claims made by a relatively small group of litigants and law firms. One way the Legislature has addressed this issue is through the California Certified Access Specialist Program. Under this program businesses can request a trained inspector to examine their establishment and point out any changes that are needed to ensure compliance with disability access standards. If the business proceeds to undertake necessary upgrades, the business receives temporary immunity from disability access lawsuits.

If passed, this bill will radically shift disability access law in California. There would be no incentive for a business to ever make their businesses accessible to disabled people. Business owners could deny access to disabled people and know they will not be held accountable until a disabled person prepares a letter specifying each alleged violation of a construction-related accessibility standard. At this point, and not before, the business owner would be incentivized to just fix the alleged violation and not fix anything beyond the alleged violation. The business owner would have 120 days to fix the issues. If the listed violations are fixed within 120 days then the disabled plaintiff would have no right to attorney fees, statutory damages, and costs.

This bill is author sponsored and supported by the Civil Justice Association of California and other business organizations. The bill is opposed by disability rights groups, including Disability Rights California, and others.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, pursuant to the federal Americans with Disabilities Act (ADA), that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or leases to, or operates a place of public accommodation. (42 U.S.C. § 12182.)
- 2) Pursuant to the Unruh Civil Rights Act (Unruh), provides that all persons, regardless of sex, race, color, religion, ancestry, national origin, disability or medical condition, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind; provides that a violation of the ADA also constitutes a violation of Unruh; and subjects a person or entity in violation to actual damages incurred by an injured party, treble actual damages but not less than \$4,000, and any attorney's fees as the court may determine to be proper. (Civ. Code § 51 *et seq.* All further statutory references are to the California Civil Code, unless otherwise indicated.)
- 3) Provides that, pursuant to the Disabled Persons Act, individuals with disabilities or medical conditions have the same rights as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, and medical facilities including hospitals, clinics, and physicians' offices, public facilities, and other public places, and also provides that a violation of an individual's rights under the ADA constitutes a violation of state law. (Civ. Code § 54.)
- 4) Entitles individuals with disabilities to full and equal access to public accommodations, subject only to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons. (Civ. Code § 54.1.)

- 5) Establishes the Construction-Related Accessibility Standards Compliance Act which, among other things, requires the Department of the State Architect (DSA) to establish the Certified Access Specialist Program and develop the specified criteria to have a person qualify as a Certified Access Specialist (CAsp). Requires a local agency to employ or retain building inspectors who are a CAsp to provide consultation to local agency, permit applicants, and members of the public on compliance with state construction-related accessibility standards with respect to inspections of a place of public accommodation that relate to permitting, plan checks, or new construction, as specified. (Gov. Code § 4459.5; Civ. Code §§ 55.51, 55.52.)
- 6) Provides that a business, as defined, 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 CAsp for a period of 120 days following the date of the inspection if the defendant demonstrates compliance with each of the following:
 - (a) 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.
 - (b) The structure or area of the alleged violation was the subject of an inspection report indicating "CAsp determination pending" or "Inspected by a CAsp."
 - (c) 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.
 - (d) 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. (Civ. Code sec 55.56(g).)
- 7) Requires a city, county, or city and county to provide to an applicant for the issuance or renewal of a business license or equivalent instrument or permit, the following information relating to obtaining information about the legal obligation to comply with disability access laws: "Under federal and state law, compliance with disability access laws is a serious and significant responsibility that applies to all California building owners and tenants with buildings open to the public. You may obtain information about your legal obligations and how to comply with disability access laws at the following agencies ..." (Gov. Code § 4469.)
- 8) Defines a "high-frequency litigant" (HFL) as a plaintiff who has filed 10 or more complaints alleging violations of construction-related accessibility standards in the

past 12 months; or an attorney who has represented 10 or more such plaintiffs in the past year. (Code of Civ. Proc. § 425.55 (b).)

- 9) Requires an HFL to pay a supplemental filing fee of one thousand dollars (\$1,000) and imposes the following pleading requirements on HFLs who file new claims:
 - a) Whether the complaint is filed by, or on behalf of, an HFL.
 - b) If the HFL is a plaintiff, the number of complaints filed by the plaintiff in the past 12 months.
 - c) If the HFL is a plaintiff, the reason why the HFL was in the geographic area of the defendant's business.
 - d) If the HFL is a plaintiff, the reason why the individual desired to access the defendant's business, including the specific commercial, business, personal, social, leisure, recreational, or other purpose. (Code of Civ. Proc. § 425.50 (a), § 425.50 (b); Gov. Code § 70616.5.)
- 10) Allows a court, after notice and a reasonable opportunity to respond, to determine whether the requirements above, have been violated and, if so, impose sanctions. (Code of Civ. Proc. § 425.50 (d).)
- 11) Requires an attorney who sends or serves a complaint alleging a construction-related accessibility violation to do both of the following:
 - a) Send a copy of the complaint to the California Commission on Disability Access (CCDA) within five business days of sending or serving the complaint.
 - b) Notify the CCDA about how the claim is resolved, including whether the violations were remedied and whether the defendant applied for an early evaluation conference and stay. (Civ. Code § 55.32 (b).)
- 12) Entitles any business that is served with a complaint by an HFL to obtain a stay of the proceedings and an early evaluation conference. (Civ. Code § 55.54 (b)(2)(D).)
- 13) Allows a court to declare an unrepresented litigant, after providing notice and a hearing, to be a vexatious litigant, require them to post security, and prohibit them from filing new claims without court permission, including in a case where the litigant "repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (Code of Civ. Proc. § 391 *et seq.*)

This bill:

- 1) Prohibits a construction-related accessibility claim for statutory damages from being initiated against a defendant unless: the defendant has been served with a demand letter specifying each alleged violation of a construction-related accessibility

standard; and the alleged violations have not been corrected within 120 days of service.

- 2) Provides that a defendant is not liable for statutory damages, costs, or plaintiff's attorney's fees for an alleged violation that is corrected within 120 days of service of a demand letter alleging the violation.
- 3) Provides that a plaintiff shall not be permitted to circumvent the requirements of this bill and the limitations on liability by claiming that they are seeking general discrimination damages based on a violation of the Americans with Disabilities Act of 1990 (ADA), and not damages for a construction-related accessibility claim, if the underlying basis of the claim is the defendant's alleged failure to comply with physical accessibility standards.

COMMENTS

1. Stated need for the Bill

According to the author:

Since the pandemic there has been a surge in ADA lawsuits filed across California, typically by very few repeat plaintiffs. Two plaintiffs filed more than 1,000 combined ADA lawsuits across California from 2020-2021 and are some of the most frequent filers in Northern California, according to an NBC Bay area analysis. In 2021, California had more disability access lawsuits filed than the remaining 49 states, combined.

Across the state, businesses are being targeted for failing to be in compliance with the ever-changing disability access guidelines, resulting in lawsuits that cost the business thousands, and put money in the pockets of serial plaintiffs without ever actually improving accessibility to people with disabilities. Amongst the suits filed are those for a bathroom mirror being one and a half inches too high, the handicap sign on a restroom being the wrong shape, and the color of the handicap parking space sign not being the specified shade of blue.

Because California law provides that the plaintiff is entitled to a minimum damages that can start as high as \$4,000 per violation, triple the damages, and may be awarded attorney's fees, mom-and-pop businesses are finding themselves fixing a \$10 mirror, but owing tens of thousands of dollars to the plaintiff's attorneys for their fees.

The average settlement can be as much as \$14,000, but the cost of litigating will easily cost hundreds of thousands of dollars in legal fees. This leads to

businesses settling out of court for far more than what it would cost to repair the violation. As such, this problem is putting many small businesses out-of-business, and its further adding to the stigma that California is a bad place to open a business and create jobs. Balance must be struck to protect both our disabled population, as well as business owners being targeted from untoward use of the law. SB 585 strikes this balance by placing the emphasis on increased access through curing an alleged violation.

The Civil Justice Association of California, the California Chamber of Commerce, the California Business Properties Association, the California Restaurant Association, and the California Hotel & Lodging Association write:

Due to California's current statutory framework for construction-related accessibility claims, businesses have been targeted by a limited group of attorneys to leverage extortion-type settlements for technical construction-related standards, which do not actually impede physical access to the facility for disabled patrons. Alleged violations for something as simple as not having the appropriate signage or symbol can prompt a claim, but do not necessarily impede physical access to a facility and can be quickly resolved. Unfortunately, businesses are pressured into paying settlements for these lawsuits instead of focusing their financial resources on improving access at their place of business.

SB 585 would address this problem by providing businesses with an opportunity to fix all the alleged violations within 120 days of receiving a demand letter, which will encourage improvement of access in California and allow businesses to avoid high pricetag shakedowns.

2. Efforts to provide relief to small businesses

The Legislature enacted bills to better protect small businesses from abusive disability access lawsuits. SB 269 (Roth, Ch. 13, Stats. 2016), was enacted to protect businesses with 50 or fewer employees from liability for minimum statutory damages in a construction-related accessibility claim for the 120-day period after the business has obtained an inspection of its premises by a CASp, allowing the business to identify and correct violations during that period. SB 269 also established a presumption that certain "technical violations" of construction-related accessibility standards (such as faded paint on parking spaces or missing signage) do not constitute grounds for a complaint under Unruh as long as those violations are corrected within 15 days of the business owner being notified about them. AB 2093 (Steinorth, Ch. 379, Stats. 2016), was enacted to require a commercial property owner to disclose on every lease form or rental agreement, whether or not the property being leased has undergone inspection by a CASp. AB 1521 (Committee on Judiciary, Ch. 755, Stat. 2015) was enacted to provide additional information and legal resources to small business owners to help them minimize their liability for

ADA violations. It also limited the practice of high-volume lawsuits motivated by quick settlement with business owners, rather than correction of ADA violations. As explained in the Assembly Judiciary Committee analysis of AB 913 (Gray, 2017):

[AB 1521(Committee on Judiciary, 2016)] limited the practice of high-volume lawsuits motivated by quick settlement with business owners, rather than correction of ADA violations, by enacting special procedural requirements—including payment of a \$1,000 filing fee--and post-settlement reporting requirements on HFLs. AB 1521 requires an HFL who files a new claim to do the following, in addition to paying the higher filing fee: (1) comply with special pleading requirements, including an explanation of why he or she was on the premises of the accommodation; (2) certify that, among other things, the complaint is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (3) provide a notice and answer form to the defendant upon service of the complaint; and (4) meet the defendant, upon the defendant's request, at the site of the accommodation to jointly inspect the premises, and review any programmatic or policy issues, that are claimed to constitute a violation of a construction-related accessibility standard. All of these provisions in AB 1521 were intended to deter lawsuits by HFLs; inform unsophisticated owners about their legal rights *and* responsibilities; and assist those business owners take self-help measures to limit their liability for violations.

As stated above, existing law provides certain protections to businesses who actively seek out a CASp inspection prior to being sued for construction-related accessibility violations. These businesses are entitled to a 90-day stay and an early evaluation conference. They also qualify for reduced minimum statutory damages of \$1000 per violation if the violations are corrected within 120 days. In addition, existing law extends similar protections to small businesses that have not had a CASp inspection. These small business qualify for minimum statutory damages of \$2000 per violation if the violations are cured within 30 days.

Under current law, the potential threat of these statutory penalties and attorney fees creates an incentive for business owners to make their buildings accessible and thus provide access to disabled people. If their buildings are accessible then the business owners are protected from liability. By eliminating a plaintiff's ability to file suit and be awarded damages, this bill would also eliminate this powerful incentive for business owners to proactively make improvements to their properties. Under this bill, businesses would have a financial incentive to wait until being served a demand letter to fix accessibility violations. They would be incentivized to hold off on accessibility improvements until and unless they actually receive a demand letter. By allowing all potential defendants 120 days to correct any violations, this bill eliminates any benefit for businesses that proactively take action, through a CASp inspection, to comply with access laws and make their businesses accessible.

This bill, by requiring that potential plaintiffs serve a pre-litigation demand letter on businesses, would create a pre-litigation hurdle for people with disabilities who are seeking to enforce their civil rights. In opposition, a number of disability rights groups, including Disability Rights California, writes, “This bill treats people with disabilities as second-class citizens by targeting them for additional procedural and legal barriers other protected classes do not encounter before they can enforce their rights. It shifts the burden to the person with the disability to inform the defendant, of the access violations. Efforts to add notice and cure requirements decrease accessibility and make it more difficult to enforce disability civil rights.”

3. Awards of attorney’s fees, costs, and statutory damages would be eliminated

Under existing law, people who are deterred from accessing a business are entitled to, at the very least, minimum statutory damages ranging from \$1000 per violation to \$4000 per violation, depending on the type of business. In addition, people who are able to demonstrate some type of harm, may be entitled to “actual” damages, although actual damages in access suits are rarely present because they are very difficult to ascertain except in situations involving, for example, hospitals and clinics when the plaintiff needed medical attention. Thus, the law provides for the minimum of \$1,000 in statutory damages so that businesses are deterred from ignoring access standards with regard to their establishments.

While the proponents argue that this bill is necessary to protect small businesses from shake down lawsuits, this bill would in fact also curb meritorious claims by disabled plaintiffs. Other laws relating to the exercise of civil rights (such as discrimination by business establishments based on specified characteristics) provide for similar recovery of actual damages, attorney’s fees and costs, and minimum statutory damages. Denying disabled persons the ability to seek the same recovery under civil rights laws would single out their claims for less favorable treatment.

SUPPORT

California Apartment Association
California Builders Alliance
California Business Properties Association
California Chamber of Commerce
California Hotel & Lodging Association
California Restaurant Association
Civil Justice Association of California
Sacramento Regional Builders Exchange

OPPOSITION

California Council of the Blind

Californians for Disability Rights, Inc.
Consumer Attorneys of California
Disability Rights Advocates
Disability Rights California
Disability Rights Education & Defense Fund
National Federation of the Blind

RELATED LEGISLATION

Pending Legislation: SB 748 (Roth, 2023) requires applicants for business licenses or renewals to be provided with a specified notice by local governments regarding potential liability under state and federal disability access laws and the importance of obtaining inspection services by CASp specialists. SB 748 is scheduled to be heard in the Senate Appropriations Committee on May 1, 2023.

Prior Legislation:

AB 3002 (Grayson, Ch. 680, Stats. 2018) promoted disability access at commercial businesses and places of public accommodation by requiring local government agencies to provide building permit applicants with an advisory about federal and state disability access laws, encouragement to obtain an inspection from a CASp, information about how to contact a CASp, and notice regarding the availability of state and federal programs to assist small businesses with disability access expenditures.

AB 1379 (Thurmond, Ch. 667, Stats. 2017) increased CASp funding by requiring, on January 1, 2018 and through December 31, 2023, any applicant for a local business license or equivalent instrument or permit, and any applicant for the renewal of a business license or equivalent instrument or permit, to pay an additional fee of four dollars (rather than one dollar) for that license, instrument, or permit, in order to fund CASp services by the city, county, or city and county that issued the license, instrument, or permit. At the same time, the bill allowed local jurisdictions to retain a larger percentage of the revenue – 90 percent -- generated by the fees for CASp training and disability access purposes. Finally, where the local jurisdiction did not charge for business licenses, AB 1379 imposed a fee on building permits. After five years, the fees were scheduled to revert back to the pre-AB 1379 amount of one dollar and the local rate of retention would return to the pre-AB 1379 amount of 70 percent. The goal of AB 1379 was to increase the availability of CASp services and ultimately improve overall business compliance with state and federal construction-related accessibility standards.

SB 1142 (Moorlach, 2016) was nearly identical to this bill and died in the Senate Judiciary Committee with a vote of 2 to 4.

SB 269 (Roth, Ch. 13, Stats. 2016) protected a business with 50 or fewer employees from liability for minimum statutory damages in a construction-related accessibility claim

during the 120-day period immediately after the business has obtained an inspection of its premises by a CASp. SB 269 also established a presumption that certain “technical violations” of construction-related accessibility standards (such as faded paint on parking spaces or missing signage) do not constitute grounds for a complaint under the Unruh Civil Rights Act or the Disabled Persons Act as long as those violations are corrected within 15 days of notification to the business owner.

AB 2093 (Steinorth Ch. 379, Stats. 2016) increased the information available to the public and to prospective tenants of commercial property about the ADA and a commercial property’s compliance with construction-related accessibility standards and created a presumption that the responsibility for making any repairs or modifications necessary to correct violations of construction-related accessibility standards that are noted in a CASp report is the responsibility of the commercial property owner or lessor, unless otherwise mutually agreed upon by the commercial property owner or lessor and the lessee or tenant.

AB 1230 (Gomez, Ch. 787, Stats. 2015) established the California Americans With Disabilities Act Small Business Capital Access Loan Program within the California Capital Access Loan Program in order to create a self-sustaining program to provide loans to assist small businesses in financing the costs of projects that alter or retrofit existing small business facilities according to certain criteria, to comply with the federal ADA.

AB 1521 (Committee on Judiciary, Ch. 755, Stats. 2015) made various changes to the law as it pertains to construction-related accessibility claims, including creating a new class of plaintiff, a “high frequency litigant,” upon which it imposed additional costs and procedural burdens. Special pre-filing requirements are imposed on “high-frequency litigants” (HFLs) – plaintiffs who file more than 10 or more complaints in one year and attorneys who represent 10 or more high frequency litigant plaintiffs – and post-settlement reporting requirements on all attorneys who file construction-related accessibility claims.

SB 1186 (Steinberg, Ch. 383, Stats. 2012) created a number of protections for small businesses and defendants who had, prior to a claim being filed, sought out a CASp inspection. These protections included reduced minimum statutory damages, early evaluation conferences, and mandatory stays of court proceedings while the violations were corrected. That bill also prevented the stacking of multiple claims to increase damages, banned pre-litigation demands for money, and increased data collection regarding alleged access violations. The bill also required an attorney who sends a demand letter or files a lawsuit alleging a violation of construction-related disability access laws to submit a copy and report specified information about the claim and its outcome to the California Commission on Disability Access and required a \$1 additional fee to be paid by any applicant for a local business license, permit, or similar instrument when it is issued or renewed.

SB 1608 (Corbett, Ch. 549, Stats. 2008) enacted various reforms intended to increase voluntary compliance with longstanding state and federal laws requiring access to the disabled in any place of public accommodation.

SB 262 (Kuehl, Ch. 872, Stats. 2003) required the DSA to establish and publicize the CASp Program for voluntary certification by the state of any person who meets specified criteria as a CASp.
