



Making public accommodations accessible to people with disabilities

SB 1608 holds problems for compliance to disability laws



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Senate Bill 1608 is a well-intentioned measure that responds to a growing backlash against the rights of people with disabilities not just in California, but nationwide. The bill passed unanimously in the Senate and is working its way through the Assembly.

It exists to calm the outrage of business owners who have failed to comply with architectural access standards that have been federal law for nearly two decades, and state law for 39 years. They object to being sued for violating the law, and SB 1608 allows them some peace of mind – though not a guarantee – against access lawsuits.

Pleasing both sides

SB 1608 attempts to please both sides of the access wars. It offers business owners the opportunity to hire a state-certified access specialist to inspect their building or construction/remodeling plan for adherence to architectural access requirements. If modifications are needed, the specialist would recommend ways the business owner could meet access standards.

Once the specialist decides the building complies with state and federal law, the owner could request a certificate to that effect to post in a window or other conspicuous location. By broadcasting that his building has already passed inspection, the owner would discourage lawsuits from a handful of litigants who have fueled the disability rights backlash in California by bringing multiple lawsuits for access violations.

Special treatment

Business owners who take this voluntary step to protect themselves would not be immune from access



lawsuits. However, they would qualify for special treatment under California law. Such defendants would be entitled to request a 90-day stay to litigation and, within 35 days of that stay, an early settlement conference at which the parties must appear in person.

The judge presiding over the early settlement conference would not be bound by the access specialist's determination that the building is in compliance with access requirements. If the case doesn't settle, the judge may lift the stay and allow litigation to proceed, order additional settlement conferences, or extend the stay by an additional 90 days.

SB 1608 also imposes a notice requirement on attorneys who represent plaintiffs in access lawsuits. Plaintiff attorneys must accompany complaints and/or demand letters with written advisories about the defendant's rights and obligations, including the right of defendants who have used the services of state-certified access specialists to request a stay and an early settlement conference. These notice requirements don't apply to plaintiffs who sue in *pro per* (without an attorney).



Dealing with a backlash

But the more fundamental question is why a disability rights backlash has been steadily growing in California and across our nation. Until this question is answered and the backlash is addressed, the access wars will continue. Many store owners will continue to resent access requirements, and some will refuse to take steps to ensure that their store complies with the law. Absent broad societal pressure that leads to widespread voluntary compliance with access standards, people with disabilities will be forced to settle for laws that erode their right to accessible public accommodations.

Ultimately, it's not about enforcing laws, although without a doubt they are a necessary ingredient and perhaps a precondition to social justice. Profound, sustainable change happens from the bottom up, and it happens via a change in culture.

Our goal as advocates is to make discrimination on the basis of disability morally reprehensible. Only then will true change occur – change that will be embraced and perpetuated by all of us. SB 1608 appears to be on a fast track to enactment, but the work required to fundamentally change our culture will require years, and it has hardly begun.

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The bill specifies that monetary damages are available only for access violations that personally and actually deterred the plaintiff. For example, advocates who drive by only to check whether a business establishment includes disabled parking spaces would not be able to win money damages against business owners who opted to ignore the law by providing no parking to customers with disabilities.

The bill would also phase-in five required hours of continuing education on disability access as a condition of license renewal for California architects. And it creates the California Commission on Disability Access, an independent state advisory body, that monitors compliance with and disseminates information about access requirements, recommends legislative reforms, and collaborates with the Building Standards Commission to develop a master checklist building inspectors can use to check for compliance with access requirements.

It all sounds reasonable – so much so that the bill passed the Senate without a single vote against it. It had the support of many well-respected disability rights organizations.

Some dissenters

But not everyone in the disability community thinks it's fair. Some complain that people with disabilities should not be singled out and burdened with notice requirements that don't apply to other protected classes. They point out that if a restaurant discriminates against a customer on the basis of race, the customer can proceed with a lawsuit without the need to tell the restaurant owner about their rights, and without a stay on litigation.

Others see nothing wrong with those who file frequent access lawsuits. They say

that business owners have had years to comply with the law. An owner who bargains that he won't be caught deserves to be sued until he brings his store into compliance with state and federal access laws. Critics of SB 1608 complain that business owners have persuaded the Legislature to draft a law to fix a problem that doesn't exist, and they resent the threat of less favorable legislation or a state ballot initiative to blackmail disability rights advocates to support the bill.

These points are valid, and there's another problem with this bill: if it's not carefully implemented, it could weaken the right to accessible public accommodations. Although the bill states that judges are not bound by determinations made by access specialists, judges typically exhibit deference to experts with specialized technical knowledge in fields such as medicine and architecture – especially when experts are state-certified. If that happens, early settlement conferences could turn into pro forma proceedings, where judges routinely rubberstamp the findings of specialists.

And although the Commission on Access is a great idea, it is an advisory body that can be ignored if its recommendations prove too burdensome for a legislature motivated by budget crises to skimp on protecting the rights of people with disabilities.

Finally, the law misses an opportunity to put the access burden on building inspectors who approve building permit applications. If they were sufficiently trained and motivated to check for compliance with access requirements before issuing permits for construction and renovation, an ever-decreasing number of buildings would be inaccessible to people with disabilities.