

JUNE 1, 2016 | STATE & LOCAL TRENDS

California Takes Another Stab at Disability Access Reform But Again Falls Short

✘ On May 10, 2016, California Governor Brown signed into [law](#) a measure aimed at encouraging small businesses to come into compliance with construction-related access requirements. The law takes effect immediately. The authors of Senate Bill 269 recognized that lawsuits are regularly brought by plaintiffs for personal financial gain, not out a desire to improve access for disabled individuals. This certainly is not news to the state's hospitality and retail businesses that have been routinely targeted by serial plaintiffs, with financial incentives to pursue multiple suits based on the availability of minimum statutory damages and attorney's fees. Yet, SB 269 does not go far enough in addressing the business community's concerns and taming the surge in litigation in recent years.

As background, California sought to curtail abusive disability litigation in 2012, by amending the disability access laws to create a number of protections for small businesses that prior to a claim being filed, sought out an inspection by a certified access specialist (CASp). These protections included reduced minimum statutory damages, early evaluation conferences and mandatory stays of court proceedings while the violations were corrected. That amendment also limited the stacking of multiple claims to increase damages, banned pre-litigation demands for money and increased data collection regarding alleged access violations.

SB 269 takes prior legislative efforts one small step further by exempting businesses within 50 or fewer employees from liability for minimum statutory damages where the structure or area at issue was inspected by a CASp. To qualify for this exemption, the defendant must have corrected all construction-related violations noted in the CASp report within 120 days of the inspection date and disclosed the date and findings of the report to a plaintiff if relevant to the claims. This exemption, however, may end up having limited value in defending against litigation since the exemption is available only during the 120-day correction period, following the CASp inspection date.

Another key change concerns the burden of proving liability for certain technical violations. Existing law specifies that a violation of construction-related accessibility standards personally encountered by a plaintiff in a public accommodation may be actionable if the plaintiff experienced "difficulty, discomfort or embarrassment" because of the alleged violation. As of its effective date, SB 269 creates a rebuttal presumption, for the purpose of an award of minimum statutory damages, that certain technical violations do not cause a plaintiff to experience difficulty, discomfort or embarrassment. The technical violations at issue primary concern signage, striping of parking spaces and accessible aisles, and detectable warnings on ramps. Significantly, this rebuttal

presumption is only available to a “small business” that corrects the technical violations within 15 days of service of the lawsuit or written demand. Because access litigation alleging signage issues will usually include allegations relating to other access barriers such as paths of travel and restrooms, it is unlikely that this change will have any significant impact for defendants. Additionally, because this rebuttal presumption is only available to small businesses with 25 or fewer employees and annual gross receipts under \$3.5 million on average over the previous three years, it excludes larger employers similarly faced with predatory lawsuits.

The new law also requires that the State Architect publish and regularly update lists of businesses that have been inspected by a CASp. The availability of this information publicly should be a consideration for any business in deciding whether to conduct a CASp inspection, especially where there are numerous access violations that cannot be timely corrected.

Interestingly, the new law requires local agencies to expedite review of projects for which the applicant demonstrates that the project is necessary to address violation of a construction-related access standard or a violation noted in a CASp report. This is certainly a positive development to ensure that businesses have the support of their local building and planning departments in completing remediation, whether as a voluntary effort or in connection with the resolution of disability access litigation.