



# Best Defense Against Disability Lawsuits

## Compliance With Americans With Disabilities Act and State Disability Laws

The Americans with Disabilities Act (AwDA) became law in July 1990. The AwDA and related state and federal laws prohibit discrimination on the basis of disability in employment, government, public accommodations, education, commercial facilities, telecommunications and transportation. The laws also help guarantee access to places of public accommodation for persons with disabilities. Dental offices are considered places of public accommodation. Therefore, compliance with these laws in dental practices can take several forms including:

- Removal of barriers that may impair patient or employee access when it is “readily achievable.”
- Proper design of office spaces to accommodate the needs of employees and patients in the case of new offices and some remodeling projects.
- Offering communication in forms that are readily understood by employees and patients. This includes the obligation to provide sign language interpreters at no cost to the patient.
- Application of patient management and financial policies that are not discriminatory.
- Responsible hiring practices that prohibit discrimination against those with physical or mental impairment coupled with reasonable accommodations for employees.

### *Who is considered disabled under the AwDA?*

In general, the group includes those with a physical or mental impairment that substantially limits one or more of life’s major activities, those who have a record of such an impairment and those who are regarded as being disabled. Some disabilities are obvious and others are not. In the time since the AwDA became law, the courts have deliberated on cases where the questions revolve around whether a particular “disability” is indeed a disability under the law. When dealing with someone who claims a disability, it is best to act in compliance with the law even if you are uncertain about the law’s applicability in the individual case.

### **Physical Accessibility Standards**

California’s disability access guidelines were in place before the AwDA access regulations were adopted. Trying to comply with both sets of detailed standards has been difficult for many businesses. It is not unusual for a building to meet local building code standards while still leaving the building owner or operator vulnerable to disabled access lawsuits. California law allows private enforcement of accessibility regulations, that is, private parties may sue entities to force compliance with regulations, to recover costs of litigation and to have punitive damages assessed.

Detailed information on complying with both state and federal accessibility standards is now available for building and business owners. A reference manual for compliance with physical accessibility standards is available on the Division of the State Architect website at [www.dgs.ca.gov/dsa/Programs/progAccess/accessmanual.aspx](http://www.dgs.ca.gov/dsa/Programs/progAccess/accessmanual.aspx). Local building departments use these standards and have the authority to interpret and enforce state building codes to best fit community needs.

If planning new construction or a facility remodel, take a close look at the most commonly used public areas — the parking lot, walkway, entrance, lobby and bathrooms. Be sure to consider including appropriate signage. If you have concerns about the accessibility of your office, experts recommend you hire a consultant who specializes in both state and federal

disability access laws and regulations to inspect your office. Certified Access Specialists (CASps) are certified by the Division of the State Architect, and a list of them can be found at [www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx](http://www.dgs.ca.gov/dsa/Programs/programCert/casp.aspx). State law provides some protection from lawsuits for businesses that follow through on CASp recommendations to make their businesses accessible.

*The facility I practice in was built before the AwDA was enacted, so it's grandfathered in, right?*

No. Facilities constructed prior to the AwDA taking effect are not grandfathered in. The grandfather clause is a common misconception among small-business owners. Facilities constructed before Jan. 26, 1992, must still remove architectural barriers that impede accessibility if the removal is readily achievable.

*What are the accessibility obligations for an existing facility versus a newly built or remodeled facility?*

For existing facilities, architectural barriers must be removed if doing so is "readily achievable." Readily achievable is broadly defined as being easily accomplishable and able to be done without much difficulty or expense given the size and nature of the business, such as replacing doorknobs with lever handles and creating designated accessible parking spaces. The Department of Justice recommends addressing external barriers first such as parking areas, curbs and doors.

Newly constructed or remodeled facilities must fully comply with the AwDA's Standards for Accessible Design. The Department of Justice released updated regulations for accessible design standards in November 2010. The compliance date was March 15, 2012. When removing architectural barriers, building a new facility or altering a facility after March 15, 2012, the 2010 standards must be followed. An alteration is defined as remodeling, renovating, rehabilitating, reconstructing, changing or rearranging structural parts or elements, changing or rearranging plan configuration of walls and full-height partitions, or making other changes that affect (or could affect) the usability of the facility.

*I'm leasing a suite. Isn't AwDA compliance the property owner's responsibility?*

If the facility is leased, check the lease agreement for language on whether the owner or tenant is responsible for AwDA compliance. If there is no specific language, talk to the property owner. Often, landlords and tenants agree to share the responsibility. The bottom line is that the owner of the noncompliant business may be held responsible, regardless of whether the facility in which the business operates is owned or rented.

*Don't I have some legal protection if I make a "good faith" effort to comply with the AwDA?*

Yes, if it is done the right way. The California Legislature passed Senate Bill 1608 in 2008. Under the statute, business owners can voluntarily hire a certified access specialist to inspect their facility for AwDA compliance. The specialist will provide an inspection report as proof that the facility was inspected by a certified specialist. Once the appropriate modifications are made, a specialist can also issue a window sticker letting passersby know that the facility is in compliance. In addition to the specialist's report outlining exactly where AwDA vulnerabilities exist, the inspection also provides some legal protection. If a business is sued after having an inspection, a 90-day stay of the lawsuit and an early evaluation conference can be requested. SB 269 was passed in 2016 to provide further protections to small businesses. It added that a disabled access plaintiff is not presumed to have experienced difficulty, discomfort, or embarrassment if the defendant is 1) a small business (25 or fewer employees or gross annual receipts of less than \$3.5 million for the past three years; 2) the small business has corrected all technical violations asserted in a complaint within 15 days of receipt; and 3) the technical violation is based on one of the following:

- a) Interior signs, other than directional signs or signs that identify the location of accessible elements, facilities or features, when not all such elements, facilities or features are accessible.
- b) The lack of exterior signs, other than parking signs and directional signs, including signs that indicate the location of accessible pathways or entrance and exit doors when not all pathways, entrance and exit doors are accessible.
- c) The order in which parking signs are placed or the exact location or wording of parking signs, provided that the parking signs are clearly visible and indicate the location of accessible parking and van-accessible parking.
- d) The color of parking signs, provided that the color of the background contrasts with the color of the information on the sign.
- e) The color of parking lot striping, provided that it exists and provides sufficient contrast with the surface upon which it is applied to be reasonably visible.
- f) Faded, chipped, damaged or deteriorated paint in otherwise fully compliant parking spaces and passenger access aisles in parking lots, provided that it indicates the required dimensions of a parking space or access aisle in a manner that is reasonably visible.
- g) The presence or condition of detectable warning surfaces on ramps, except where a ramp is part of a pedestrian path of travel that intersects with a vehicular lane or other hazardous area.

SB 269 also states that certain smaller businesses are not subject to statutory minimum damages if:

- 1) The business has employed 50 or fewer employees on average over the past three years or since its existence if shorter.
- 2) The property was CASp inspected prior to the filing of the complaint.
- 3) The business has corrected all construction-related violations identified in the CASp report that are the basis of the claim within 120 days of receipt of the complaint.

A business may only claim the protection from liability for minimum statutory damages once for each structure or area inspected by a CASp.

*How much does an inspection cost and where can I find a certified access specialist?*

The cost of an inspection varies depending on the hourly rate of the specialist, the size and complexity of the area being inspected and any travel expenses if the specialist is not local. A ballpark cost estimate for a full proactive inspection (external areas, signage and internal areas) can range from \$1,000 to \$2,000.

A longtime CDA member who hired an access specialist was very satisfied with the decision. Having heard from peers who had been hit with noncompliance allegations demanding upward of \$15,000, the dentist decided that the inspection was a good idea and the cost would be justified. The inspection did not affect business as the specialist spent only a few hours on-site. Because the cost was shared between several partner dentists, it was quite manageable. The dental practice received a window sticker stating that it had been inspected as well as a very detailed report indicating specifically which changes needed to be made to achieve full compliance with the AwDA Standards for Accessible Design.

The Division of the State Architect's website lists all of the certified specialists in the state. However, the website provides only the name, phone number, certification number and expiration date of the specialists. It would be wise to speak with other

dentists and small-business owners in the area to identify a competent and trustworthy specialist. It may also be a good idea to contact the local building department for more information and guidance.

In addition to the specialist inspection program, the statute created by SB 1608 contains several other technical provisions that may help business owners. These provisions relate to building owner/tenant's legal rights, what damages may be recovered and the fact that plaintiffs must show that harm or injury occurred due to a facility's AwDA violations. The statute also created the California Commission on Disability Access, a 17-member advisory commission made up of appointees from both the disability and business communities. The commission evaluates disability access issues impacting both communities and provides recommendations for appropriate solutions.

CDA has been reaching out to the disabled community to stay abreast of accessibility issues, to work toward equitable solutions that take into account the needs of both the disabled community and businesses and to work toward reducing frivolous lawsuits. CDA would like to hear from members who have had AwDA issues so that we can appropriately tailor our outreach efforts.

### **Lifting an individual with a mobility disability**

Modern dental-unit chairs are equipped with moveable armrests and can be adjusted to allow an agile wheelchair-bound patient to move to the chair for treatment. However, some patients may require assistance in moving from wheelchair to patient chair. That assistance can include dental office staff lifting the patient (see the NIDCR guide linked below) or use of a lift, such as a Hoyer lift. Staff should be trained in the appropriate patient-lifting procedure in order to prevent injury to both staff and patient. If staff are unable to do lifting due to concerns about injury, then you must utilize a lift or other aid to facilitate the transfer of the patient. Refer to "Access to Medical Care for Individuals with Mobility Disabilities" (link below) for more information on lifts and other aids.

### **Service animals**

A service animal is any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. The work or tasks performed by a service animal must be directly related to the individual's disability. Places of public accommodation may not prohibit or limit an individual with a service dog from entering solely due to the animal's presence. A dental operatory is not considered a sterile environment and infection control regulations do not include limitations on service dogs, therefore a service dog may accompany its owner to the treatment area.

*How can staff determine whether a dog that a patient has brought is a legitimate service animal?*

California requires a service dog, or a service dog-in-training, to be on a leash and tagged as a guide dog, signal dog or service dog by an identification tag issued by the county clerk, animal control department or other authorized agency. However, AwDA states there is no requirement for documentation that the service dog has been certified or licensed as a service dog. Only dogs are recognized as service animals under federal law.

If the need for a service animal is not obvious, staff may ask two questions regarding the need of a service animal: (1) Is the service animal required because of a disability and (2) What work or task is the animal trained to perform. The office does not have to accommodate an animal who provides comfort to the owner and has not been trained to provide a specific response for a certain action. The U.S. Department of Justice has information on service animals available at [www.ada.gov/service\\_animals\\_2010.htm](http://www.ada.gov/service_animals_2010.htm) and [www.ada.gov/regs2010/service\\_animal\\_qa.html](http://www.ada.gov/regs2010/service_animal_qa.html).

The owner of a service dog is liable for any damage done by the dog to property or injury to individuals. Service animals are addressed in California law under Civil Code Section 54.1–54.7.

*Is a service dog-in-training allowed the same access to a dental office as a certified service dog?*

Yes, according to California Civil Code Section 54.2, an individual who is licensed or otherwise authorized to train guide dogs, signal dogs or service dogs has a right to be accompanied by a dog-in-training in public places without being required to pay an extra charge or security deposit. The individual shall be liable for any damage done to the premises or facilities by his or her dog.

### **Communicating with the hearing-impaired**

You are required to communicate with a deaf or hearing-impaired patient so that the patient is able to understand what you are telling him or her. The options for communicating to a hearing-impaired patient include using:

- Printed or written instructions, questions, responses via paper and pen, computer or other device.
- Lip reading.
- Sign language.

It is best to ask the patient for his or her preferred method of communication. Not all hearing-impaired patients ask a dental practice to provide a sign language interpreter. Be prepared, however, to provide an interpreter if requested. You may not charge the patient for the cost of providing the interpreter or for any other cost associated with ensuring you and your patient are able to communicate. If the patient has dental benefit coverage, contact the plan and inquire about the availability of an interpreter. Denti-Cal also will provide interpreters for its beneficiaries with advance notice.

*A deaf patient insists I use a specific sign language interpreter. One of my staff knows sign language and I prefer to use my staff to interpret for this patient. Do I have to use the patient's preferred interpreter?*

No, you do not. Below is an excerpt from the U.S Department of Justice Technical Assistance Manual ([www.ada.gov/taman3.html](http://www.ada.gov/taman3.html)) which addresses the situation:

*Who decides what type of auxiliary aid should be provided?*

Public accommodations (such as dental practices) should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication. In many cases, more than one type of auxiliary aid or service may make effective communication possible. While consultation is strongly encouraged, the ultimate decisions as to what measures to take to ensure effective communication rests in the hands of the public accommodation, provided the method chosen results in effective communication.

Illustration: A patient who is deaf brings his own sign language interpreter for an office visit without prior consultation and bills the physician for the cost of the interpreter. The physician is not obligated to comply with the unilateral determination by the patient that an interpreter is necessary. The physician must be given an opportunity to consult with the patient and make an independent assessment of what type of auxiliary aid, if any, is necessary to ensure effective communication. If the patient believes that the physician's decision will not lead to effective communication, then the patient may challenge that decision under Title III by initiating litigation or filing a complaint with the Department of Justice (see III-8.0000).

### *Sign Language Interpreters*

Below is a list of agencies that provide interpreters or referrals to interpreters. Most interpreters require two weeks' notice prior to the appointment. If the patient has dental benefit coverage, contact the plan and inquire about the availability of an interpreter. Denti-Cal also will provide interpreters for its beneficiaries with advance notice.

Deaf and Hard of Hearing Service Center Inc.

(Serving Fresno, Kings, Tulare, Madera, Merced, Monterey, Mariposa, and San Benito counties)

<http://www.dhsc.org>

Deaf Community Services of San Diego

<http://www.deafcommunityservices.org/interpreting>

LiNKS: Sign Language and Interpreting Services

(Serving Los Angeles, San Bernardino, Riverside, and Orange Counties)

<http://www.linksinterpreting.com>

NorCal Services for Deaf & Hard of Hearing

<http://www.norcalcenter.org/>

Northern California Registry of Interpreters for the Deaf

<http://www.norcrid.org>

### **Website Accessibility**

Complaints regarding website accessibility are becoming more common. There are a few steps that dental practices with websites can take to decrease the risk of a monetary demand or lawsuit. One strategy is to add an accessibility link to your website. This is language that tells individuals with disabilities how to seek help if they are unable to access something on your practice's website. The language can instruct individuals to phone the office to have staff read content, provide transcripts of videos or assist them with filling out online forms. It is important to train staff on the language in the link and how to appropriately respond to inquiries. Another approach is to contact your website designer and ask if your website is accessible, and if not, how they can make it accessible. The AwDA standards for website design are known as WCAG 2.0, levels A and AA. You'll want to be sure that your designer can speak to those standards. If you know your website is not accessible, you can take it down temporarily and replace it with a compliant site. Engage a qualified website designer who is familiar with the accessibility standards, and be sure to address compliance with the accessibility standards contractually.

If your practice hired a certified access specialist to inspect your premises that inspection did not necessarily include testing website accessibility. It might be a good idea to check the inspection report. If you're considering hiring an access specialist, you should inquire whether the individual or firm will test your website for accessibility compliance.

The American Dental Association has specific guidance for dental practices on website accessibility and how to appropriately defend yourself against potential complaints and lawsuits. The document "Website Accessibility Claims: Strategies for Dentists," a sample accessibility statement, and a list of technology consultants can be found on [www.ada.org](http://www.ada.org).

## Employment

Employers are prohibited from discriminating against an employee or potential employee because of the individual's disability. Decisions to hire, to terminate employment or to discipline should not be influenced by disability status.

The U.S. Equal Employment Opportunity Commission answers questions about health care workers and the Americans with Disabilities Act at [www.eeoc.gov/facts/health\\_care\\_workers.html](http://www.eeoc.gov/facts/health_care_workers.html). Topics include disability accommodation, "direct threat to safety," job requirements versus employee essential functions and more.

## Other resources

Complying with federal and state disability access laws can be complex. It is important to realize that local agencies also may impose additional requirements. This article and the resources listed below provide you with general information. For assistance in cases related to physical accessibility requirements, you should work with your local building department and your architect or building contractor. An attorney should be consulted in specific cases pertaining to disability discrimination.

*Visit the following websites for more help with AwDA compliance:*

ADA Primer for Small Business

<https://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm>

Reaching Out to Customers With Disabilities

<https://www.ada.gov/reachingout/intro1.htm>

2010 Standards for Accessible Design

[https://www.ada.gov/2010ADASTstandards\\_index.htm](https://www.ada.gov/2010ADASTstandards_index.htm)

Division of the State Architect, Accessibility Frequently Asked Questions

<http://www.dgs.ca.gov/dsa/Programs/progAccess/accessfaqs.aspx>

U.S. Department of Justice ADA Homepage

[www.usdoj.gov/crt/ada/adahom1.htm](http://www.usdoj.gov/crt/ada/adahom1.htm)

U.S. Department of Justice, Access to Medical Care for Individuals with Mobility Disabilities

[https://www.ada.gov/medcare\\_mobility\\_ta/medcare\\_ta.htm](https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm)

National Institute of Dental and Craniofacial Research, Wheelchair Transfer: A Healthcare Providers Guide

[https://www.nidcr.nih.gov/sites/default/files/2017-09/wheelchair-transfer-provider-guide.pdf?\\_ga=2.104033736.93878519.1527264104-608196391.1523312867](https://www.nidcr.nih.gov/sites/default/files/2017-09/wheelchair-transfer-provider-guide.pdf?_ga=2.104033736.93878519.1527264104-608196391.1523312867)

California Disability Access Information

[www.dor.ca.gov/DisabilityAccessInfo](http://www.dor.ca.gov/DisabilityAccessInfo)

California Department of Rehabilitation

[www.rehab.ca.gov](http://www.rehab.ca.gov)