KOUMAS LAW GROUP

Legal Update

July 2009

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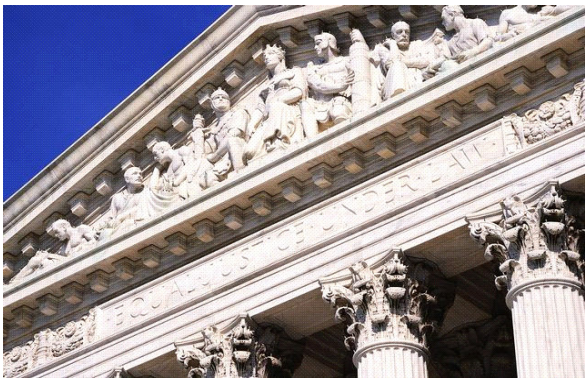

INSIDE THIS ISSUE:

ATTENTION: PUBLIC BUSINESS OWNERS– INCREASED DAMAGES RECOVERABLE FOR DENIAL OF EQUAL ACCESS

Does your disabled parking signage comply with the new law passed in July 2008 (amending California Title 24), requiring the International Symbol of Accessibility (ISA) and verbiage of "Minimum Fine of $250" displayed below the symbol (in addition to others details for a standard accessibility sign)? Does it take no more than 5 lbs. of pressure/force to open any facility door accessed by the public (*e.g.,* entrance, exit, restroom)? Are the soap, paper towel and toilet seat cover dispensers mounted at a height such that the operable part is no greater than 40" above the floor surface?

If the answer is "no" to any of these questions, as of June 11, 2009, you could be held liable for an increased amount of damages as a result of the California Supreme Court's holding in *Munson v. Del Taco*. In *Munson*, plaintiff, a restaurant patron who used a wheelchair, brought action in state court against Del Taco alleging that the restaurant discriminated against him on the basis of his disability, because architectural barriers denied him access to the parking area and restrooms, in violation of the Americans with Disabilities Act (ADA), and the California Unruh Civil Rights Act. The court in *Munson* held that a plaintiff who seeks damages under *Cal. Civ. Code §52*, claiming the denial of full and equal treatment on the basis of disability in violation of California's Unruh Civil Rights Act, *Cal. Civ Code §51*, and the Americans with Disabilities Act of 1990, *42 U.S. § 12101. et seq.*, **need not prove intentional discrimination.** *Munson v. Del Taco*, 2009 WL 1619783 (Cal.), 09 Cal. Daily Op. Serv. 7253.

The *Unruh Civil Rights Act*—technically, *California Civil Code* § 51—provides in pertinent part, "All persons within the jurisdiction

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of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Furthermore, section 52 establishes a *minimum* damages award of $4,000, plus attorney's fees for a violation.

The Disabled Persons Act—technically, *California Civil Code* § 54—another statutory scheme designed to protect disabled persons, provides in pertinent part, "Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places." A violation of this section will yield at least a $1,000 award of damages, plus attorney's fees. See *California Civil Code* § 54.3.

California Civil Code §§ 51 and 54 both protect disabled persons, as well as persons with a medical condition. So the issue becomes, if you are found to violate a disabled person's civil rights, are you subject to the $1,000 or $4,000 minimum damage award?

The answer under the old rule (*pre-Munson)* was relatively simple: if the plaintiff could satisfy his burden of proving the discriminatory act of denying equal access was *intentional*, then you would be subject to the $4,000 minimum per discriminatory act of denying equal access; if the plaintiff failed to meet that greater standard of proof, the violation was deemed *unintentional*, and you would only be subject to $1,000 minimum for each discriminatory denial of access. See *Gunther v Lin*, 144 Cal.App.4th 223 (2006), overruled by *Munson*.

However, the new rule is not so straight forward. A brief history of the statutory amendments help clarify the reasoning and new rule set forth in *Munson.* In 1992, the legislature amended Civil Code section 51 by adding (what is now) subdivision (f), which specifies, "A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section." The legislative intent behind the 1992 amendment (as set forth by the California Supreme Court in *Munson v. Del Taco*) was to "make a violation of the ADA a violation of the Unruh Act, thereby providing persons injured by a violation of the ADA with the remedies provided by the Unruh Act (e.g., right of private action for damages …)." Sen. Com. on Judiciary, Rep. on Assem. Bill No. 1077 (1991–**1992** Reg. Sess.) Civil Code Section 54 now also contains a similar provision.

Although a previous requirement to recover the greater $4000 amount of statutory damages, intentional discrimination need not be shown any longer to establish a violation of the public access requirements set forth in Civil Code section 51. Although the Attorney General of the United States may seek damages on the aggrieved person's behalf, in a private action for violation of title III, no

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damages—only injunctive relief—are available. Therefore, according to the California Supreme Court in *Munson,* section 52 authorizes a private right of action for damages against any person who "makes any discrimination … contrary to section 51." By adding subdivision (f) to section 51, making all ADA violations—whether or not involving intentional discrimination—violations of the Unruh Civil Rights Act as well, the Legislature included ADA violations in the category of "discrimination" prohibited by section 51, thus making them remediable under section 52, *regardless of intent*.

If a violation—whether intentional or unintentional—violates the ADA, it can reasonably be deemed to violate **either** section 51 or section 54, and a plaintiff will be able to "elect" to recover the either the statutory damages available under section 52 or 54.3. As a result of *Munson*, California business owners, who are sued by individuals asserting denial of equal access in a public accommodation, will undoubtedly now face larger settlements and increased costs as a result of plaintiffs ability to seek and recover greater damages. *[Special "thanks" Michael Miller, a 3rd year law student attending California Western School of Law, for his contributions to this article.]*

ADA ACCESSIBLITY LAWSUITS -- HOW TO PROTECT YOUR BUSINESS

In the past several years, numerous public establishments have been sued in federal and state court for failing to make their facilities accessible pursuant to the Americans with Disabilities Act ("ADA") or the state law equivalent, the Unruh Civil Rights Act. While the ADA has been in existence since 1991, there has been a growth of law firms devoted to filing ADA and Unruh Civil Rights Act lawsuits on behalf of disabled individuals who say they have been denied access to a "public accommodation." Every week, numerous lawsuits are filed by the same two or three law firms, and usually on behalf of the same disabled individuals. If your business has not been sued yet, it is only a matter of time.

Most likely, you will have no idea that a customer had a problem accessing certain aspects of your restaurant until a process server hands you a lawsuit. The lawsuit will allege that the disabled individual (called a "plaintiff") was at your facility on a particular day and was unable to access the parking lot, open the front door, and/or use the restrooms. If you are sued in federal court, it will further allege that the plaintiff is seeking an injunction against your business to stop you from continuing to violate the ADA, and will also seek compensatory and punitive damages under certain California civil rights statutes for the emotional and physical humiliation that the plaintiff endured by frequenting your inac-

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cessible facility.

Common misconceptions include- "But wait. Had the plaintiff told me on the day he was here that he could not access the restrooms or open the front door, I would have gone out of my way to accommodate him (take him to the restaurant next door that does have an accessible bathroom, opened the front door). "Doesn't he have to give me some kind of notice that there's a problem before he can sue me in court?" The answer is effectively "no."

The Certified Access Specialist Program (CASp)- In 2008, landmark legislation was enacted to increase enforcement of disability access laws while providing a measure of relief to businesses that are in compliance or that attempt to comply with federal and state disability access laws. Senate Bill 1608 created the California Commission on Disability Access, an independent state entity created "with a view to developing recommendations that will enable individuals with disabilities to exercise their right to full and equal access to public facilities, and that will facilitate business compliance with the laws and regulations to avoid unnecessary litigation."

What CASp Does and Does Not Do For Business Owners

Services rendered by a CASp certified individual, upon authorization by a facility owner and/or other authorized person, may include the following:

- Review of facility plans and specifications for compliance with state and federal accessibility laws, codes and regulations;
- Investigate a facility for compliance with state and federal accessibility codes and regulations; and
- Conduct accessibility research, prepare accessibility reports, and/or conduct accessibility inspections, as authorized.

Business owners who take the proactive step of hiring a CASp certified individual and following the CASp recommendations will be deemed a "qualified defendant" if they are later sued on a disability access claim. As a qualified defendant, a business can request a 90-day stay of the proceedings and an early settlement conference to possibly resolve the litigation at an early stage and thereby avoid additional damages and costly attorneys' fees and expenses. Senate Bill 1608 does not create a 'safe-harbor.' It does not create a 'right-to-cure' of any duration. It is not a pre-lawsuit notification bill and does not set up constraints on important civil rights laws. Unchanged from existing law, under Senate

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Bill 1608 there are no pre-requisites a disabled person or his or her attorney must meet in order to file a civil rights action for a disability access violation. Also, a CASp inspection and report does not bind a court in any way. A business facility that has been CASp inspected can still be sued if there is, indeed, an access violation on the property. The CASp inspection and report do not prevent a recovery of damages for a person with a disability who is unable to access a place of public accommodation because of an access violation.

July 1, 2009 Requirements for Places of Public Accommodation

Commencing July 1, 2009, all inspections of a privately owned place of public accommodation that relate to permitting, plan checks, or new construction, including, but not limited to, inspections relating to tenant improvements that may impact access, *shall* be conducted by a building inspector who is a certified access specialist. The bill requires local agencies to employ or retain a sufficient number of building inspectors, and in no event less than one, who are certified access specialists. It also allows local governments to charge or increase inspection fees to the extent necessary to offset the costs of complying with this requirement.

Certificates of CASp Inspection

Every CASp who completes an inspection of a privately owned place of public accommodation shall, upon determination that the site meets applicable construction-related accessibility standards pursuant to paragraph (1) of subdivision (a), provide the building owner or tenant requesting the inspection with a numbered disability access certificate indicating that status. The certificate may, and should, be posted on the premises of the place of public accommodation, unless, following the date of inspection, the inspected site has been modified or construction has commenced to modify the inspected site.

Notice to Private Property Owner/Tenant

Civil Code section 55.53(c) provides that every CASp agent who conducts an inspection of a place of public accommodation shall, upon completing the inspection of the site, provide the building owner or tenant who requested the inspection with a notice, which the State Architect also makes available as a form on the State Architect's Internet Web site.

If you become a defendant in a lawsuit that includes a claim concerning property inspected by a Certified Access Specialist, you may be entitled to a stay (temporary stoppage) of the proceeding and

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an early evaluation conference. [*Special "thanks" to Chad Wilson, a 1st year lawyer recently graduating from University of San Diego School of Law, for his contributions to this article.]*

TAKE AWAY TIPS

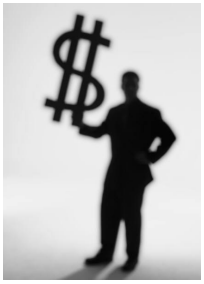
For more information about how to reduce the risk of exposure to denial of equal access claims, how to request a stay and early evaluation conference in state court litigation involving a denial of access claim, or a list of Certified Access Specialist, contact Elizabeth Koumas at (619) 398-8301.

PENDING CALIFORNIA LEGISLATION

Assembly Bill 793: In February's newsletter, we advised employer's of pending federal legislation which would give rise to the Fair Pay Act, also known as the Ledbetter Act. That law passed under our new President's regime. The *federal* law makes it unlawful each time an employer writes a paycheck that gives some workers less than others, because of **race, sex, disability, religion or national origin**, and applies retroactively to bias claims that are filed on or after May 28, 2007. Currently, under California law, the Equal Pay Act, codified in the Labor Code only protects against gender biases with respect to pay. Assembly Bill 793 is California's version of the Fair Pay Act, and would provide much broader discrimination protection, including but not limited to discriminatory pay based on disability.

Assembly Bill 943: Many employers routinely conduct background checks of *all* new hires, which typically include credit checks. After 2001, stringent guidelines were imposed on employers who still opted to conduct such consumer report investigations, which usually include credit checks. Now, credit report investigations by employer may be prohibited *unless* they are *"substantially job-related."* "Substantially job-related" means where the position of the person for whom the credit report is sought has access to money, or other assets or confidential information, or is a manager. The pending legislation contains exceptions where a credit check is mandated by statute or governmental regulations/requirements.

REMINDER: FEDERAL MINIMUM WAGE INCREASE THIS MONTH



This month, the federal minimum hourly wage that must be paid to California employees will increase from the $ 6.55 per hour rate, which became effective July 24, 2008, to $ 7.25 per hour starting July 24, 2009. Since the current California minimum hourly wage is greater ($8.00/hr.), California employers need not worry. But be

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mindful if you have operations in *other* states that which have a lower state minimum wage, which may be impacted by the impending increase. [CORRECTION– June's newsletter included an article with an erroneous title stating the federal wage was increasing *last* month, although the correct effective date of the increase was set forth in that article.]

EMPLOYMENT LAW COMPLIANCE AND RISK REDUCTION SERVICES

Annual Audit of Employee Handbook

"When was the last time an audit was conducted of your written policies, to ensure compliance with current labor laws?"

It is critical to the success of any business operations to learn how to protect your company's interests while conveying your employees' rights and obligations in a handbook. Periodic review of your policies and practices will help ensure compliance with the ever changing labor laws. By way of example only, if you are a covered employer, do your leaves of absence policies contain the new protections for leave relating to active duty reservists (enacted in October 2008), or to care for injured military personnel (effective January 2009)? To prevent your written policies from being used against you, including but not limited to, your discipline policy creating an implied contract to discharge employees only for good cause, and granting leave of absence rights where you are not otherwise obligated to provide them, schedule an audit of your employee handbook immediately.

Sexual Harassment Training Workshops for Employees and/or Supervisors to Protect Business from Legal Claims

" When was the last time you provided training to your employees and supervisors to prevent sexual harassment in the workplace?"

Whether you are an organization that employs 50 or more employees, (or one who regularly receives services from 50 or more persons), *required* by California Assembly Bill 1825 to conduct California supervisor training every other year since January, 2005, or a smaller business equally interested in preventing workplace harassment, in order to demonstrate that you exercise reasonable diligence to establish a work environment that is harassment free, schedule your 2007 Sexual Harassment Prevention Training workshop. This can be an important factor if a court needs to decide whether or not there is employer liability for the conduct of one of its employees.

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Supervisor Workshops are intended to ensure that your managers not only understand the law and the possibility of personal exposure for their own actions, but also their role and duties in preventing harassment; as well as understanding the proper procedures to follow should a complaint be received from an employee. Since January 2005, Assembly Bill 1825 requires all supervisors to be provided with at least two (2) hours of training relating to sexual harassment. All new supervisors (hired or promoted) must receive training within 6 months of obtaining the position. The training must be repeated every 2 years. The *minimum* training must:

- Provide guidance on federal and state statutory provisions re: harassment, discrimination, retaliation,
- Provide information on the correction of sexual harassment and the remedies available to victims,

- Provide practical examples for instructing supervisors on prevention,
- Be conducted by trainer or educator with knowledge and expertise in preventing such conduct, and
- Provide classroom or other effective interactive method (videos or non-interactive web based product are not enough.)

Staff Workshops are intended to inform employees what harassment is (and is not), your company's specific policy, and the reporting procedures in place to protect the employee's rights.

Have you conducted your workshop yet?

PRACTICE TIP:

Please contact Elizabeth J. Koumas at (619) 398-8301 for more information about how to obtain for a **flat rate fee agreement** for either of these services. For more information about Ms. Koumas, please visit our website at: www.koumaslaw.com.

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