

# **OUTDOOR DINING COMPLIANCE**

**Legal Issues Surrounding Outdoor Dining in the  
COVID-19 World**

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***Presented by:***

**Lukas Clary with Weintraub Tobin**

# Step 1: The Blueprint

- On August 28, 2020, CA released its Blueprint for a Safer Economy
- 4-Tier System determines what restaurants in given county are allowed to do
  - Purple: widespread – outdoor dining only
  - Red: substantial – indoor at fewer of 25% capacity or 100 people
  - Orange: moderate – indoor at fewer of 50% capacity or 200 people
  - Yellow: minimal – indoor at 50% of capacity
- Capacity all based on Certificate of Occupancy

# The Blueprint Cont.

- Bars, breweries, and distilleries that do not serve food:
  - Closed through Purple and Red tiers
  - Can only open at the Orange (outdoor only) and Yellow (indoor at 50%) tiers
- Wineries:
  - Closed through Purple and Red tiers
  - Open at fewer of 25% capacity or 100 patrons indoors in Orange Tier
  - Open at fewer of 50% capacity or 200 patrons indoors in Yellow tier
- **All tiers can be modified to more restrictive levels for all businesses at the local level**

## **Step 2: Determining What Constitutes Outdoor Service**

- Look to local (city and county) orders and guidelines**
- Must allow for the free flow of air through the entire space**
- Common requirement: one wall okay if at least 3 sides open**
- Walls on open sides no more than four feet tall**

# Tents, Awnings, Canopies

- Permits may be required for temporary structures
- Umbrellas, canopies, awnings, and other shade structures are allowed only if they do not have sides
- Tents must not have closed walls in place while open to the public, and all sides should be open for air flow
  - Best bet for blocking out rain and wind
- No smoking under tents and shade structures
- Umbrellas and other decorative material shall be fire-retardant, pressure-treated or manufactured of fire-resistant material
- Example: no portion of an umbrella shall be less than six (6) feet, eight (8) inches (eighty (80) inches) above the sidewalk

# Tent Structure Compliance

## Example from Oceanside

- The following requirements shall apply to use of tents or shade structures within
- public spaces:
  - No staking of tents is permitted in public rights-of-way.
  - All tent legs must be weighted with at least 40lbs.
  - Weights must be securely attached to canopy framing and/or canopy leg separately
  - Ropes and straps should be high quality
  - Bungee or rubber straps are prohibited
  - Weights must be on the ground and not dangling

# Tent Structure Compliance (cont.)

- Items that make acceptable weights:
  - 5-gallon bucket full of water, sand, or concrete
  - 4" PVC pipe at least 36" long filled with concrete
  - Large commercially available tent weights
  - Sandbags or salt bags 40lbs or heavier
- Weights and lines must not pose a hazard and be clearly visible
- For maximum safety, tents should be secured as soon as they are put up,
- and brought down as soon as weight is removed.
- Do not leave unsecured tents at any time.

# Responding to Weather Conditions

- Fans and misters are generally okay outside and under umbrellas, tents, etc.
- Space heaters are permitted provided that they are:
  - an outdoor approved type;
  - are located in accordance with the manufacturer's recommendations; and
  - are located at least two (2) feet from the edge of any umbrella canvas, any foliage, or any other flammable object or material
- Heaters of any kind shall not be used directly underneath tents and umbrellas



# **GUIDELINES ON STAFF PROTECTION MEASURES DURING OUTDOOR DINING**

# Social Distancing Measures

- Again, look to local rules for guidance
- Common example: 1 staff member per 250 feet of indoor space (includes areas not open to public)
- Masks at all times
  - Exceptions: unsafe for their job, if a face covering is medically inadvisable, or if necessary for communication by or with a person who is hearing impaired
- Limit employee-customer interaction:
  - Seat parties one at a time
  - Consider limiting one staff member to go to a table for all purposes
    - **BUT: be mindful of meal and rest break laws**

# Staying Warm and Comfortable During Winter Season

- Consider modifying dress code policy to allow warmer clothing or extra layers
- Provide space heaters in areas where staff frequent
- Consider extra umbrellas and awnings away from customers

# OSHA Compliance

- All outdoor places of employment in California are subject to additional requirements imposed by OSHA
- Partial or temporary structures such as tents, lean-tos, and structures with one or more open sides can be either indoor or outdoor workplaces depending on the circumstances
- Considered an outdoor workplace if it does not significantly reduce the net effect of the environmental risk factors that exist immediately outside of the structure

# OSHA Compliance (con't)

- Injury and Illness Prevention Plan
- More requirements during summer months and in weather triggering possible heat exposure
- Provide for drinking water, shade or other cooling mechanism, first aid, and emergency response

# Practical Guidance on Heat Illness Prevention

- Water must be potable (i.e., fit to drink), fresh, pure, suitably cool, and provided to employees free of charge
- Employees should be encouraged to drink water throughout shifts
- When temperatures exceed 80 F, shade structures must be erected if no other shade is readily available
- Recognize the signs and symptoms of heat illness and take immediate measures to address it
- Provide basic first aid, such as cooling towels and shade
- Be prepared to contact emergency services

**Any Questions?**  
***Anyone?? Anyone???***



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# Welcome To

## “Accessibility During a Pandemic And Gradual Reopening”

Presented by



# Tracey Delisle

Chief Business Development Officer



*I do not represent the DSA or any  
government agency.*

*I am not an attorney.*

*Information provided is not intended to  
be legal advice.*

I started a small sign business back in 1987 and I'm currently a Silent Partner in that company which is now run by my youngest son Kyle. Our niche in that business has always been ADA signs, but what I did not know is the path that was ahead of me 30 years later because of it.

A wonderful client of ours with a small family restaurant was sued with an ADA Lawsuit. They poured everything they had into that business, and to my surprise what put them out of business was an ADA lawsuit by a serial litigant. They had to pay the litigant a \$10,000.00 settlement and the cost of the repairs needed for compliance were just too expensive. All it took was one lawsuit and their dream was gone.

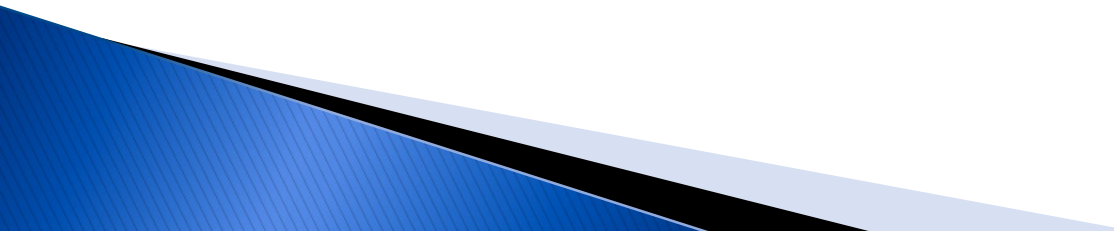
In an effort to help local businesses like this one my eldest son Cory started to do some research and found:

- A need for accessibility consulting
- CASp programs only for Architects and City Plan Checkers.
- A passion to educate and help businesses promote accessibility and avoid an ADA Lawsuit!

**Certified Access Services was born!**



# Definitions

- ▶ **CASp** Certified Access Specialist Program
  - ▶ **SERIAL LITIGANTS** A plaintiff who files many accessible related lawsuits for PERSONAL Financial gain.
  - ▶ **ADA** Federal Accessibility Law
  - ▶ **Title 24** California Building Code
  - ▶ **DSA** Division of State Architects
  - ▶ **BARRIERS** A violation of State or Federal Accessibility Standards
  - ▶ **P.O.T.** Path of Travel
  - ▶ **EEC** Early Evaluation Conference
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# The State of California need to do something! Businesses were being hurt by Serial Litigants



## Their Plan

1. Create incentives for getting a CASp inspection in the form of legal benefits.
- ▶ After 25 Years there were still a lot of misconceptions about the ADA.

# CASp QUALIFICATIONS

- ▶ They have several years of experience working in the field of ADA.
- ▶ They are qualified to read building plans and recommend modifications to them prior to the construction.
- ▶ They are expert witnesses in ADA Lawsuits.
- ▶ All inspectors **MUST** be certified by the State of California to provide CASp Inspections.
- ▶ Codes the inspectors must know: ADA Federal codes, Title 24 codes/CBC.
- ▶ Sometimes city codes if they are more restrictive.



# Misconceptions about ADA

Statement I hear the most!

CLAIM:

“I don’t need to  
comply with the  
ADA because I’m  
grandfathered”



# Misconceptions about ADA

CLAIM:

“I am following the State and Health guidelines so I don’t need to worry about accessibility during the pandemic”



# What is Readily Achievable?

- ▶ A barrier is required to be removed if it is easily accomplishable and able to be carried out without much difficulty or expense.

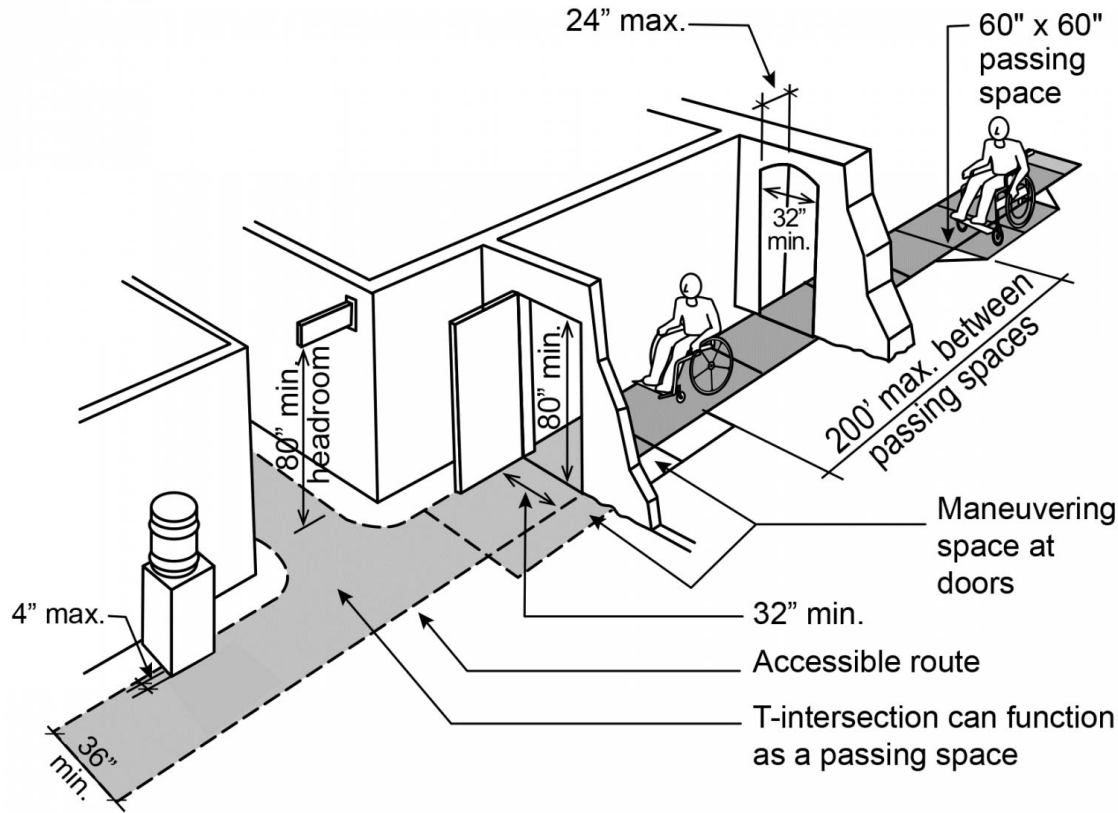
*Some factors to be considered include:*

- The nature and cost of barrier removal
- The overall financial resources of the site involved
- The overall financial resources of any parent corporation or entity





# Readily Achievable – Cost of Barrier Removal



Basic Features of an Accessible Route

## Relocation of water cooler

Cost:  
**\$0.00**

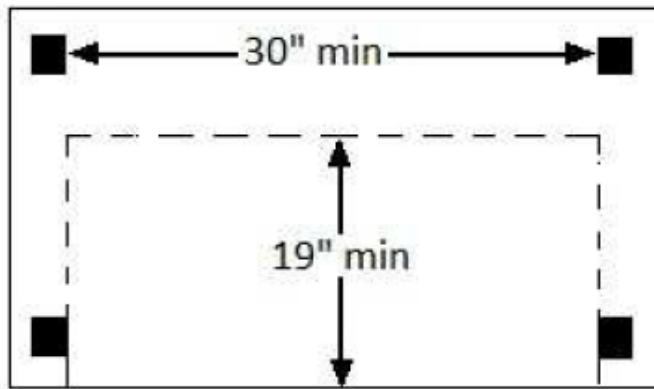
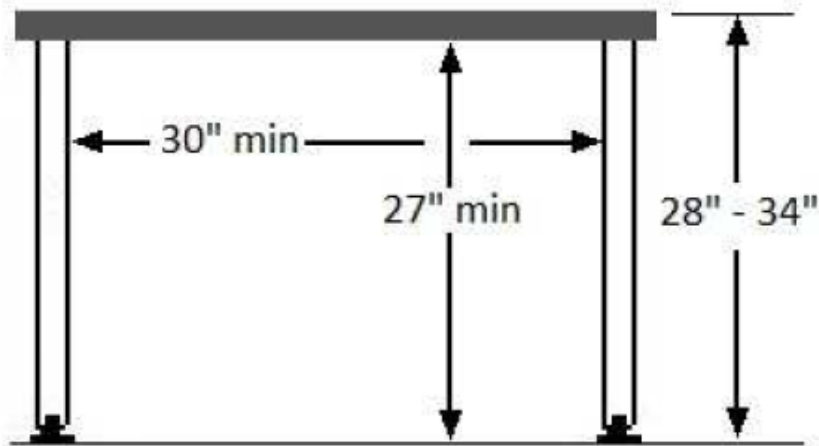
Effort:  
**Minimal**

Readily Achievable?  
**YES**

# Non Accessible Tables



# 5% Accessible Tables Needed!





# Built Up Ramps in Access Aisles

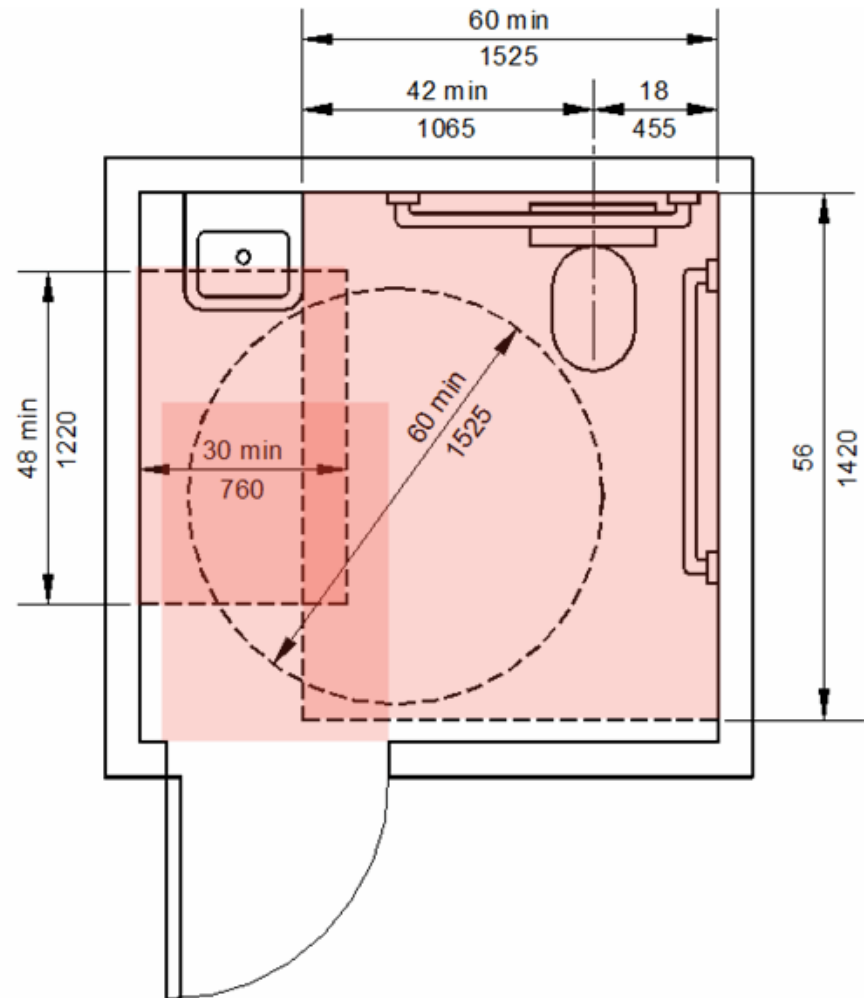




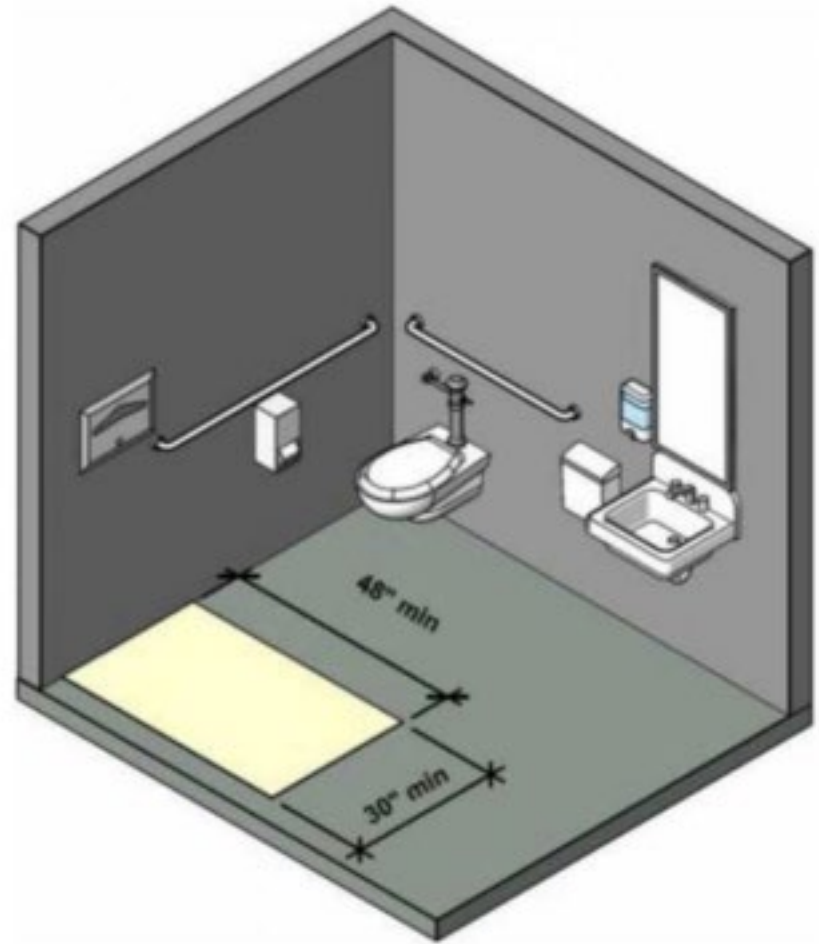
# Non Accessible Bars



# Restrooms

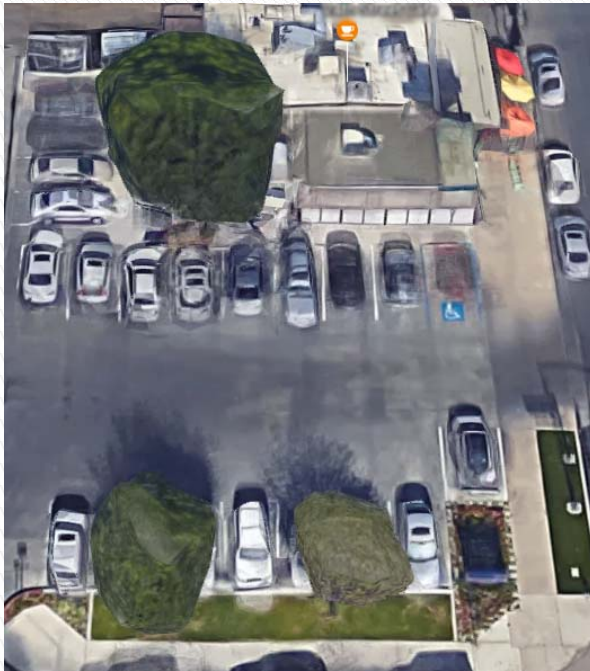


# Seat Cover Dispenser





# Sidewalk seating and Umbrella/Tent



## ▶ **SIDEWALKS**

- ▶ If your jurisdiction has allowed.
- ▶ You can use the full sidewalk as long as **48"** clear path can be accomplished to meet ADA Guidelines.

## ▶ **UNBRELLAS**

- ▶ Minimum 80" overhead clearance. Local jurisdiction may be higher still will need to meet ADA.
- ▶ Table requirements still apply! 5% of shaded tables need to be ADA.

## ▶ **TENTS**

- ▶ Same height requirements as Umbrella.
- ▶ 3 Side walls of tents to be open to meet health guidelines.
- ▶ New winter guidelines are being written.

## ▶ **SPACE HEATERS**

- ▶ **36"** Isle between tables

If you can see it

they can see it!



# SERVICE ANIMALS

- ▶ Two types of Service Animals (Dog and Mini Horse)
- ▶ Not a: Cat, Peacock, Mini Pig, Snake, Bird or Rat
- ▶ No Online Certificate
- ▶ Emotional Support Animal is NOT a Service Animal
- ▶ Two Questions that can be asked
  - ▶ 1. Is this a Service Animal
  - ▶ 2. What Task has the animal been trained to do.
- ▶ TRAIN YOUR STAFF WHAT YOU WANT THEM TO SAY!

*Why are we talking  
about this?*

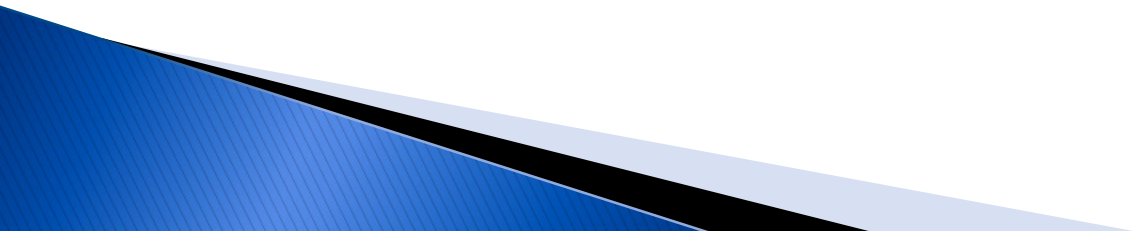
*“My friend said that I  
needed to provide a ramp,  
so that’s what I did”*



# Restaurants have the highest number of ADA Lawsuits filed against them!

- ▶ **This is how they find you? They (“Serial Litigants”) do NOT need to visit to file a lawsuit”**
- ▶ Drive by your property
- ▶ Google Earth
- ▶ Websites
- ▶ Yelp/ Social Media
- ▶ Drones
- ▶ Phone Calls
  
- ▶ **Who is filing the Lawsuits?**
- ▶ Serial Litigants
- ▶ Law Firms – Recruiting
  
- ▶ **Why are they filing these Lawsuits?**
- ▶ They claim ADA laws have been in place since the 1990’s and businesses need to bring their property into compliance. In their opinion you have had plenty of time so filing a lawsuit is the best way to make you bring your property into compliance.

## **THE CITY SIGNED OFF AND SAID I HAD DONE EVERYTHING RIGHT!**

- ▶ They are inspecting on a project basis.
  - ▶ They are inspecting on CBC/ Title 24.
  - ▶ They do not look at how you run your business.
  - ▶ 2020 Some cities will be asking for a CASp report prior to final inspection.
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# What can I do to avoid an ADA Lawsuit?

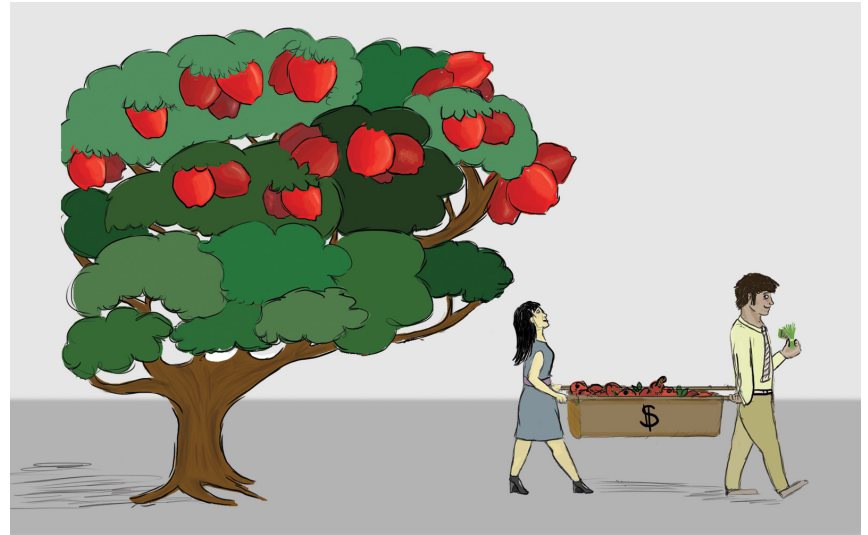
## Don't be low hanging fruit!

- ▶ Average Lawsuit is \$10,000.00

What you should do

Do a self survey

- ▶ Get a CASp Inspection
- ▶ Create a Barrier removal plan
- ▶ Incrementally increase accessibility while reducing exposure to a lawsuit



# Certified Access Services

## CASp

- ▶ We will help you Identify the ADA Barriers.
- ▶ You will receive a Report that is easy to read and can easily be sent to contractors for an estimate.
- ▶ You can make a plan knowing you have consulted with an expert about the latest codes that apply to your building.
- ▶ We are not contractors or architects.
- ▶ We support you when you hire a contractor they can call anytime if they need clarification.
- ▶ We keep you up to date as the codes change and may affect your property.
- ▶ We help you deter and ADA Lawsuit or a Piggy Back Lawsuit.
- ▶ Or a P.O.T Trigger
- ▶ **PROTECT YOUR BUSINESS, PROMOTE ACCESSIBILITY, AND EDUCATE THE COMMUNITY**

# Benefits of a CASp Inspection

## ▶ **Without State benefits**

- ▶ Does not need to show harm only needs to identify a barrier.
- ▶ They do not need to visit your property.
- ▶ Have to respond within 21 days so you have no time to cure.
- ▶ Slim chance of winning in court
- ▶ 99% of the time you will have to settle with them.

## ▶ **With State Benefits**

- ▶ 90 Day Stay for State ADA cases filed against you.
- ▶ Statutory Damages Reduction
- ▶ EEC (Early Evaluation committee)
- ▶ State Certificate
- ▶ Readily Achievable
- ▶ Tax Credits and Deductions

It's not a matter of IF  
it's a matter of When?

Benefits start day of  
inspection!



# Tax Credits and Deductions

## **DISABLED ACCESS CREDIT**

*This tax credit help small businesses cover the cost of making their businesses accessible.*

- ▶ Tax **CREDIT** of up to **\$5000.00**

## **ARCHITECTURAL AND TRANSPORTATION TAX DEDUCTION up to \$15,000.00 each year.**

- ▶ Strategize your construction
- ▶ Talk to your accountant before you sign any contracts.
- ▶ Considering Hiring a Disabled person and your Federal Tax Liability may be reduced by **\$2400.00** per new hire

Don't leave \$\$\$ on the table!

Strategize your projects!





CASp Evaluations

Accessibility Surveys & Consultation

Pre-Lease/Pre-Purchase Due Diligence

Plan Review and Education

# Feel free to reach out to us!



**Certified**  
**Access**  
S e r v i c e s

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Phone: 619-736-8585  
[www.ADAcertified.com](http://www.ADAcertified.com)

# A CASp WILL TAKE THE GUESS WORK OUT SO YOU DON'T HAVE TO WORRY!

- ▶ There are several list on the internet.
- ▶ The list cannot guarantee that it is the most restrictive for your building.
- ▶ It may be a list for ADA or Title 24 but may not combine the 2.
- ▶ A CASp will identify the codes that apply to you.
- ▶ Age of building, Date of alteration.
- ▶ Work with your legal if a case if filed.
- ▶ Keep you updated as codes change.
- ▶ Don't spend \$\$ you don't need to.

## ▶ **CERTIFIED ACCESS SERVICES TAKES THE GUESS WORK OUT SO**

This does not happen to you  
when they scour the internet!



We Protect you!

We Educate you!



All or part of this facility located at

has been inspected by a Certified Access Specialist (CAsp).

*Sample*

# ACCESS INSPECTED

THIS CERTIFICATE DOES NOT IMPLY THAT THIS FACILITY MEETS DESIGN AND CONSTRUCTION REQUIREMENTS FOR ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES.

Inspection Date:

CAsp Signature:

CAsp Certificate #:

CAsp Name:

(Please Print)

Inspection Certificate #:



[www.dgs.ca.gov/dsa/Programs/progAccess.aspx](http://www.dgs.ca.gov/dsa/Programs/progAccess.aspx)