
# COLORADO ADA LAWSUITS ON THE RISE

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Claims and lawsuits under Title III of the Americans With Disabilities Act ("ADA") against Colorado restaurateurs are rapidly becoming commonplace. On a single Friday in February 2016, seven such suits were filed in Denver Courts. All were filed against Colorado bars and restaurants, and all were filed by the same disabled individual. Unfortunately, much like our ski traffic, the frequency of such lawsuits is likely to get worse with time.

Title III of the ADA applies to places of public accommodation and commercial facilities and provides that:"No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation." 42 U.S.C. § 12182(a).

Title III ADA claims can take on two forms – they can be prosecuted by the Department of Justice, or can be filed by private individuals. Claims brought by the Department of Justice may simply result in an agreement for remediation of the violation, or in the event a pattern or practice of discrimination is established, could result in monetary and civil penalties up to $55,000 for the first violation, and $110,000 for subsequent violations.

Claims by private individuals under Title III are more common and relatively straightforward. To succeed, the claimant is required to show: (1) that he or she is disabled; (2) that the defendant is a private entity that owns, leases or operates a place of public accommodation; and (3) that the claimant was denied public accommodations by the defendant due to the claimant's disability. If proven, Title III violations practically amount to a strict liability offense, and Courts are permitted to award costs and attorney fees to the prevailing party.

The potential for an award of attorney fees has become the driving force and primary motivation for bringing these actions, and filing attorneys are not likely to forego their right to recover fees and costs, even if the alleged violation is cured quickly. For that reason, cases filed by private individuals often result in early settlement in exchange for a negotiated amount of the attorney fees, together with a request that the Court place the case in abatement to allow the defendant time to cure the accessibility issue(s). However, issues surrounding the claimant's standing to bring the lawsuit, or the scope and technical requirements of the alleged violation can sometimes be challenged, and some ADA claims can be successfully defended. As such, an early and expedient evaluation of the claim by an attorney, which considers the potential success and cost of defense, together with the cost of remediation and continuing fees and expenses of the claimant's attorney and expert(s), should be considered.

## PROACTIVE PREVENTION

While ADA standards and technical requirements are complex (and beyond the scope of this short article), owners and operators should be knowledgeable of ADA standards and common pitfalls. For example, there is no doubt that restaurants, bars and hotels fall squarely within the definition of places of public accommodation, and there are no exceptions to ADA compliance for restaurants. "Grandfathering" is also a common misperception.


*continued on page 9*

Although the applicable standards can vary, existing facilities are not "grandfathered," and still must comply with Title III of the ADA.

The best measure in avoiding potential ADA claims is to ensure that your establishment is ADA compliant. Education and prompt action can help to minimize, if not eliminate, financial exposure for ADA violations. Challenges to ADA compliance are broad and can include attacks on the establishment's written policies and procedures, construction and design elements, or even online reservation systems. Whether you are an existing business or a brand new restaurant or bar, completing a comprehensive ADA compliance assessment with a qualified accessibility expert or architect is the best way to identify issues of non-compliance, allows you to provide equal enjoyment to patrons, and protects against future liabilities. At the end of the day, if you are open to the public, you are bound to comply with the ADA.

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# WHAT TO DO IF THREATENED BY AN ADA LAWSUIT

Remember, you are not alone! Getting a threatening letter demanding thousands of dollars is disturbing! If you get a letter threatening litigation, the NRA suggests you consider the following steps:

### 1. RESEARCH THE PLAINTIFF.

A simple internet search would probably show whether a law firm has been filing a number of these cases.

### 2. CHECK WHETHER OTHER BUSINESSES IN THE AREA ARE BEING CONTACTED BY THE SAME INDIVIDUAL OR ENTITY.

In these ADA "drive-by lawsuits," plaintiffs commonly sue other businesses in the area as well. Depending on the particular facts of each case, coordinating defense efforts or strategies may yield cost efficiencies and other advantages.

### 3. ASSESS THE VIOLATIONS ALLEGED.

Carefully assess with legal counsel or other consultants the merits of the violations being alleged and potential strategies for resolving them.

### 4. NOTIFY YOUR INSURANCE COMPANY.

Insurance coverage for the potential lawsuit you are being threatened with may or may not be available depending on the particular provisions of the policy and the nature of the allegations. Promptly notifying the insurance company of the claim will ensure that your rights under the policy are preserved.

### 5. KNOW YOUR RIGHTS.

In the event an individual or entity threatens a restaurant with, or actually files, a lawsuit, you have the right to be represented by counsel and to ask that the individual or entity communicate with the restaurant only via that counsel. The individual or entity making the threat may also attempt to persuade the restaurant to hire them to advise on accessibility issues. We recommend against it.

**Here are some resources for ADA compliance:**

NRA ADA Toolkit
ADA Checklist for Existing Facilities
ADA Guide for Small Businesses
ADA Update: A Primer for Small Business
Other ADA documents