

ADA Legal Webinar Series

Food Service Providers and Compliance with the Americans with Disabilities' Act

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Agenda

- Introduction and Why Talk About Food Service Providers;
- ADA General Requirements;
- ADA Priorities to Focus on;
- ADA Customer Service Policies, Practices, and Procedures;
- Police Involvement in Disability-Related Customer Service Matters;
- Accessible Web Sites, Mobile Apps, and Drive Thrus?;
- Architectural Accessibility – New Construction, Altered Facilities, and Readily Achievable Barrier Removal Recommended Business Practices and Disability Etiquette;

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Why Talk About Food Service Providers

- We take it for granted that people with disabilities can always go where we all go to eat out;
- CDC & Census estimate 61 million Americans have a substantially limiting disability;
- 8 million people had vision impairments and 7 million had difficulty hearing;
- 19 million had trouble grasping or lifting everyday items;
- What do they all have in common?

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Looking for Accessibility



- Accessibility refers to the characteristic that products, services, and facilities can be independently used by people with a variety of disabilities;
- Accessibility must be part of a business marketing scheme;
- A large segment of the population is kept from visiting a food and beverage business by a small step along the walkway to a front door, a round door knob that must be gripped and turned, an obstructed hallway to the restroom, or a web site inaccessible to blind users or people unable to use a mouse;
- Businesses that integrate accessibility as an operational component are more likely to be innovative and inclusive enterprises that reach more people with positive brand messaging.

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Alarming Growth in ADA Litigation

- [10,000 ADA Title III lawsuits](#) filed against businesses of all kinds in 2019 – related to architectural and web site accessibility ;
- 11 thousand website related lawsuits expected in 2020;
- “Drive-by” lawsuits alleged to force businesses to go bankrupt and creating a “cottage” industry of so-called “unnecessary” lawsuits;
- Most Food Service owners fail to understand ADA obligations.

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Key ADA Requirements I

- Public Accommodation: a private entity that owns, operates, or leases places of public accommodation – stores and shops, restaurants and bars, service establishments, theaters, hotels, recreation facilities. 28 C.F.R. § 36.104;
- A business may not discriminate against individuals on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations offered. 28 C.F.R. § 36.201;
- Discrimination includes failure to design and construct, or alter or renovate, a restaurant, bar, or commercial facility built for first occupancy after January 26, 1993 to be accessible and usable by individuals with disabilities consistent with the 2010 ADA Standards. 28 C.F.R. §§ 36.401, 36.406(a).
- Businesses must remove architectural barriers in existing facilities” where readily achievable on an on-going basis; i.e., renovations or alterations to make older facilities accessible that do not impose significant difficulty or expense in view of the size of the business and available resources. 42 U.S.C. Section 12182(b)(2)(iv)&(v);
- Inside and outside public use areas are covered – entrance, waiting area, bar area, dining room, toilet rooms, corridors, parking, child play area, patio, etc. this is not applicable to non-public areas; e.g., food preparation and storage locations, employee locker rooms, and other service-related areas.

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Key ADA Requirements II

- Businesses must provide goods and services in an integrated setting unless separate or different measures are necessary to ensure equal opportunity -- allow individual to enter via alternate accessible entrance;
- Businesses must make reasonable modifications to policies, practices, and procedures that deny equal access -- preparing food without peanuts upon request. 28 C.F.R. § 36.302;
- A business must consider alternative measures to maximum extent feasible when removal of barriers is not readily achievable -- relocating group gatherings in inaccessible location to a wheelchair accessible location;
- Discrimination includes failure to maintain accessible features in operable working condition -- elevator in disrepair or unauthorized use of accessible parking. Temporary interruptions in service or access for maintenance or repairs are permissible;
- A business is required to make available auxiliary aids and services to ensure Effective Communication if necessary. The required auxiliary aid will depend on the type of communication needed -- taking orders via relay service from hearing impaired customer, providing a braille or large print menu, writing notes with speech-impaired person, taking online orders via an accessible web site or mobile app. 42 U.S.C. § 12182(b)(2)(A).

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Policy Priorities to Foster Inclusion and Accessibility I

- Facilitate Disability Etiquette training for staff in accommodating people with disabilities -- welcoming service animals, assisting with food retrieval from a self-service buffet, understand verbal or other instructions from speech or hearing impaired customers, reading a menu, rearranging tables, or assistance to locate a toilet room (28 C.F.R. § 36.302(a));
- Customers with disabilities must be able to make reservations by the same means and terms as others -- communicating with hearing impaired individuals calling through relay service or blind individual visiting a web site with an adapted PC or smart phone (28 C.F.R. § 36.302); 28 C.F.R. § 36.303);
- Have specific information about the accessibility features for any particular business location for assisting customers -- able to offer alternative arrangements if needed (28 C.F.R. § 36.302);
- Maintain or repair inside and outside accessible elements and features -- remove unauthorized drivers from accessible parking, unobstructed path to public toilet rooms, elevators should be operational, trim Overgrown bushes, trees, or flower arrangements to remove low hanging protrusions or clear path of travel for visually or mobility impaired individuals (28 C.F.R. § 36.302);

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Policy Priorities to Foster Inclusion and Accessibility II

- Offer menus and printed materials in accessible formats for blind, low vision, or for people with other print disabilities -- Braille or large print, read menus upon request (28 C.F.R. § 36.303(b));
- Make reasonable modification to policies, practices, and procedures upon request -- retrieve food from a self-service buffet or make available alternative means of service if customer is unable to use a late night drive-thru (28 C.F.R. § 36.302);
- Make available dietary information for customers with diabetes or food allergies (28 C.F.R. § 36.302);
- Offer alternative food upon request for dietary needs if obtainable from restaurant supplier -- MSG, peanuts, ginger, Gluten-free foods (28 C.F.R. § 36.307(b)).

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Policy Priorities to Foster Inclusion and Accessibility III

- Arrange tables and seating to improve mobility and maneuvering space for customers using wheelchairs, scooters, walkers, and canes;
- Customers accompanied by a service animal may enter all public areas without surcharge (28 C.F.R. § 36.302(c));
- Two permissible questions to identify a service animal when its function is not obvious; 1) is the service animal required because of a disability; and 2) what work or task has the animal been trained to perform? Staff may neither ask for medical documentation nor for certification that the animal was formally trained;
- Web sites and Mobile Apps should be accessible pursuant to [W3C Web Accessibility Standards](#) -- people should be able to navigate without a mouse, blind users should be able to navigate via PC or smart phone with a screen reader, images should be tagged and video should be closed captioned (28 C.F.R. § 36.303 - US DOJ enforced via Settlement Agreements).

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The Drive-Thru Problem



- Taco Bell sued in class action alleging the chain violates ADA when restaurants close lobbies and only allow late-night orders via the drive-thru window;
- Plaintiffs allege that drive-thru lanes lack a meaningful accommodation for visually impaired customers unable to drive, and since Taco Bell policy does not allow anyone to walk through the drive-through lane, they're unable to place a late-night drive-thru order without assistance from a sighted driver;
- Should Taco Bell modify policies to accommodate visually impaired customers unable to drive in its drive-thru lanes when the restaurant is closed to walk-in customers?

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Right to Participate in the Regular Program

- DOJ: even if a separate or special program for individuals with disabilities is offered, a public accommodation cannot deny an individual with a disability participation in its regular program;
- Some other limitation on the obligation to provide services must apply; e.g., person poses a Direct Threat or does not meet eligibility criteria.

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Illustrative Analysis

- A blind individual may be excluded from using a drive-thru if the restaurant demonstrates that the exclusion is necessary for safe operation of the drive-thru;
- Blind person does not meet eligibility criteria to use drive-thru;
- US DOJ: Individuals with disabilities are entitled to participate in regular programs, even if the public accommodation could reasonably believe that they cannot benefit from the regular program. ADA TAM III-3.4200;
- Diego: Staff should reasonably accommodate individuals unable to use a drive-thru by taking orders and bringing food out in the same fashion they bring food out to drivers who were told to park and wait for their order that could not be delivered at the drive-thru (28 C.F.R. Sec 36.302)

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Defenses: Undue Burden

- A business need not provide an accommodation or make a modification when doing so imposes “undue burden” on business operation; i.e., significant difficulty or expense given the size of the business and available resources to comply with ADA. 28 C.F.R. § 36.104.

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Factors to Justify Undue Burden

- The nature and cost of the required action;
- The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact of the action upon the operation of the site;
- The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and,
- If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity. *Id.*

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Defenses: Fundamental Alteration

- When a public accommodation can demonstrate that a reasonable accommodation, modification, or auxiliary aid would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations offered, it is not required to make the modification;
- An impermissible fundamental alteration is a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered. 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 36.302.

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US DOJ Policy Regarding Defenses

- Where a business claims ADA defenses to justify declining a requested accommodation, not remove an architectural barrier, or not making a modification to a business practice, a food service provider, such as a restaurant, will be expected to make a significant effort to provide alternative reasonable accommodations or modifications before it can claim “undue burden” and/or “fundamental alteration” to justify not having to comply with an ADA requirement. See, U.S. Department of Justice Technical Assistance Manual section II-4.3600 Limitations and alternatives.
- Should we also keep in mind the “maximum extent feasible” requirement?

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Questions?

- Questions?



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Police Involvement in ADA-related Customer Service Matters

- A restaurant and a customer with a disability should exercise caution before relying on police authorities to resolve a disability-related disagreement; e.g., a blocked accessible parking space or denial of entry to a person with a service animal;
- 911 services may be contacted for emergencies; e.g., customer having a seizure, choking, or having a heart attack;
- 911 services might dispatch police to look into other matters; e.g., when a business policy is violated or a crime has been committed;
- The police has no legal obligation to enforce Federal civil rights laws on behalf of a business or customer; i.e., involving police in a customer civil rights dispute does not guarantee a resolution favorable to either party.



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Illustration 1



A restaurant calls police to report that a customer is causing a disturbance. When the responding officer arrives at the scene, she discovers an adult male swaying on his feet and grimacing. He has pulled the table cloth from the table. The manager believes that the man has had too much to drink and is behaving aggressively. The officer, however, determines that the customer is having a seizure.

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Illustration 2



A customer comes to dine with her dog and explains it is an ADA-protected service animal. The host inquires whether the dog is needed due to a disability and asks what work or task the animal is trained to perform. The customer says she has no obligation to answer the questions and demands to be seated. The manager comes out and explains that the dog must perform a work or task related to a disability, and that until they understand why the dog is needed, they cannot permit the dog to remain because the restaurant has a “no pets” policy.

An argument ensues and the manager informs the customer that while the dog must be removed, she is welcome to return and dine at the restaurant. The customer becomes agitated and refuses to remove the dog and demands to be allowed to stay as required by the ADA. After repeating why the dog may not stay, management calls police to come and ask the person to leave the premises if she does not remove the dog. Police arrive, assess the situation, and instruct the customer to either remove the dog and return, or to leave because the presence of the dog violates the No Pets policy.

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Recommended Policy and Awareness of Potential Liability

- Make the two permissible inquiries about the dog;
- The customer should willingly cooperate and answer the questions;
- If a reasonable determination is not possible due to customer non-cooperation or misunderstanding there is no obligation to allow the animal to remain;
- At that point, the presence of the dog may violate the discretionary No Pets policy;
- A claim of “retaliation” and “interference” with the disability rights of an individual can potentially be brought by a customer who, rightly or wrongly, believes that her rights were violated;
- A business should document accommodation denials and use of police in case of a lawsuit.

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Questions?

- Questions?



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Web Sites and Mobile Applications

- Web Sites and Mobile Applications



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The Domino's Effect I

- In [Robles v Domino's Pizza LLC](#), the U.S. Court of Appeals for the Ninth Circuit reversed a federal trial court decision dismissing a Title III lawsuit alleging that Domino's website and mobile app were not fully accessible while using a PC or smart phone adapted with screen reader assistive technology. Robles is visually impaired and on several occasions was unable to order food because he could not navigate the online platforms used by all customers to order food for pickup or delivery. A screen reader and proper web coding would allow a blind customer to navigate a site and mobile apps to read a menu and fill out the order form;
- Domino's Pizza challenged the suit by reasoning that the ADA non-discrimination requirement does not apply to online services because the ADA became law before businesses used the internet for commerce;
- Domino's further argued that the absence of a Federal web accessibility standard to make digital platforms accessible put online accessibility in wide dispute.



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The Domino's Effect II

- On appeal the Ninth Circuit found that Title III of the ADA applies to Domino's website because it is a service Domino's offers to facilitate ordering food from a physical location;
- The court found that Title III extends to auxiliary aids and services of a public accommodation in general, rather than limiting Title III non-discrimination obligations to require auxiliary aids and services only at the physical location of a public accommodation;
- The court also held that Domino's Pizza had ample notice that its website and online platforms were required to be accessible to customers with disabilities. *Id.*
- On October 7, 2019 the Supreme Court denied a petition from Domino's to hear whether its website is required to be accessible to customers with disabilities and allowed the Ninth Circuit court ruling to stand.
- – sending the case back to the Federal District court for further proceedings.



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Domino's Pizza Creates an Unavoidable Web Accessibility Obligation

- Without action from Congress or a new regulation from the Department of Justice, more piecemeal litigation seems likely;
- Without a federal web accessibility standard for businesses to follow and conflicting judicial opinions throughout the country, the frustrating reality is that the potential for ADA liability remains for food service providers; and,
- The constantly evolving nature of web sites may likely fuel allegations of ADA violations, because 100 percent constant compliance may not be realistically achievable in an e-commerce economy where continually revised online services and sales are paramount in just about any business scheme – especially for online food ordering and delivery services.

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Web Accessibility Remediation is Key to Defend Potential Lawsuits

- Web sites and mobile apps must include special coding for assistive technologies to function properly;
- Courts and DOJ require businesses to improve web accessibility by following the [Web Content Accessibility Guidelines](#) (WCAG) 2.0 -- currently in version 2.1 -- developed to make web content more accessible to people with various accessibility challenges -- visual, auditory, physical, speech, cognitive, language, learning, and neurological; see Justice Department Enters into Settlement Agreement with Peapod to Ensure its grocery Delivery Website is Accessible;
- WCAG is broken down into 12 guidelines and organized under four overarching design principles: Perceivable, operable, understandable, and robust. For each guideline WCAG gives users [testable criteria](#) to determine which of three levels of conformity has been attained: Level A (Lowest), Level AA or Level AAA.

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Recommended Web Remediation Practices

- Ensure web sites and mobile apps conform to [Web Content Accessibility Guidelines 2.0 Level AA](#) Success Criteria (WCAG 2.0 AA updated to 2.1);
- Designate a web accessibility coordinator -- may be handled by web design company;
- Retain an independent accessibility consultant to annually evaluate web and mobile apps;
- adopt a formal web accessibility policy with an easily reachable contact to provide alternate means to access otherwise inaccessible web content;
- Solicit feedback from visitors to web site on how accessibility can be improved;
- Undertake automated accessibility testing and manual testing by individuals with varying disabilities of web and mobile apps -- a service provided by web design companies;
- Mandatory annual accessibility training for in-house web content staff.

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Questions?

- Questions?



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Architectural Barrier Removal

- Food establishments around the country continue to be sued for failure to remove architectural barriers – mostly relating to existing facilities built before the ADA became law;
- There is widespread confusion regarding what ADA barrier removal standards apply;
- Many so-called “drive-by” lawsuits against businesses are legitimately based on a failure to remove barriers in older facilities despite having had three decades to comply;
- Other claims may be erroneous or based on the application of the wrong barrier removal standard; i.e., applying New Construction standards to older existing facilities not undergoing renovation built before the ADA took effect;
- Business owners must clearly understand what barrier removal standards apply to their particular facility to comply with actual requirements and better defend in a lawsuit; see e.g., Consent Decree: [United States v. Craft LLC and 30 Hop LLC Consent Decree](#).

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New Construction Standard

- A facility built after January 26, 1993 must be in full compliance with the DOJ ADA standards for accessible design;
- Only Exception: rare instances of “structural impracticability” caused by extreme terrain or architectural issues that could not be reasonably resolved;
- Buildings must be designed 100 percent accessible from the blueprint stage and the 2010 ADA Standards apply to an entire facility unless any exceptions are SPECIFICALLY delineated. 42 U.S.C. § 12183(a)(1).

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Alteration and/or Renovation Standard

- Altered (renovated) portions of facilities must comply with New Construction ADA design standards to the maximum extent feasible;
- The path of travel and other amenities serving the altered portion must be made accessible to the extent that doing so costs no more than 20 percent of the alteration project total cost. 42 U.S.C. § 12183(a)(2);
- Alteration: a change to a building or facility that affects or could affect the usability of the building or facility -- or affect a portion of a facility;
- This includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing of circulation paths or vehicular ways, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions;
- Normal maintenance, reroofing, painting or wallpapering, or changes to mechanical and electrical systems are not alterations -- unless they affect the usability of the building or facility. 28 C.F.R. §§ 36.402.

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Readily Achievable Barrier Removal in Existing Facilities

- Readily Achievable Barrier Removal in Existing facilities: barrier removal that is easily accomplishable and able to be carried out without much difficulty or expense depending on the size and resources of the business. 42 U.S.C. § 12182(b)(2)(A); 28 C.F.R. § 36.304;
- Existing Facility: a building that was built before July 26, 1990. Facilities *built after that date* must comply with New Construction standards. 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.104;
- Determining what is “readily achievable” necessarily involves a case-by-case review of specific facilities and business economic circumstances on an on-going basis.

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Courts may look at the following factors to determine whether barrier removal is “readily achievable”



- The nature and cost of the action;
- The overall financial resources of the site or sites involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the site;
- The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and,
- If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity. *Id.*

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Barrier Removal in Practice

- A business has the burden of proving that removal of an architectural barrier is not readily achievable;
- Readily Achievable Barrier Removal is a flexible compliance standard and something not presently achievable might be possible to accomplish at a later date;
- ADA Barrier removal must be reviewed on an on-going basis while planning future modifications when a “significant difficulty or expense” prevents a business from undertaking immediate action;
- If barrier removal options are not readily achievable alternative methods to provide service must be considered -- curbside service or home delivery at no additional charge.

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There is No ADA Grandfather Clause



- Existing facilities are not exempted by a “Grandfather Clause” based on the age of a property often incorrectly cited by building code officials or business owners;
- The Readily Achievable Barrier Removal Standard is on-going and does not exempt compliance unless a business can prove that barrier removal would impose undue burden on business operation;
- Ownership or operation of a business, leasing facilities to a business, or leasing a business to another business that serves the public carries on-going ADA barrier removal obligations – regardless of the age of a facility.

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The ADA Checklist for Existing Facilities

- The ADA Networks and the Institute for Human Centered Design make available a free, downloadable Readily Achievable Barrier Removal Checklist for a business reviewing an existing property.
- The [ADA Checklist](#) incorporates architectural scoping from the 2010 ADA Standards for Accessible Design and provides fillable forms to help review the accessibility of prioritized elements -- parking, toilet rooms, counter heights, placement of goods in isles, seating, etc.



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Document!

- Documentation of a completed checklist may help a food service provider address complaints by showing a good faith effort to remove barriers consistent with available resources or financial capability.



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The Problem with Industry efforts to Stem Litigation

- The National Restaurant Association supports “commonsense” legislation -- the ADA Education and Reform Act. This would provide businesses with a “notice and cure” opportunity to identify and correct alleged ADA violations before plaintiffs could engage in “unnecessary” litigation and pursue costly legal settlements;
- Problem: Businesses have had 30 years to comply with ADA obligations;
- Problem: Civil Rights laws have never required complainants to notify and wait for a cure prior to suing a business;
- Problem: States are actively legislating State-law notice requirements on plaintiffs while ironically imposing fines and other penalties on the business and allow lawsuits to proceed if the ADA problem is not cured.

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Questions?

- Questions?



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Resources

- [ADA Checklist for Existing Facilities Downloadable form](#)
- [ADA Hospitality & Disability Website](#)
- [Food Service: Accommodating Diners with Disabilities](#)
- [Expanding Your Market: Gathering Input from Customers with Disabilities](#)

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Contact Your Regional ADA Center

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