Donna DiMaggio Berger
Community Association Leadership Lobby (CALL)

dberger@bplegal.com
www.callbp.com

Tallahassee Office
204 South Monroe Street
Suite 203 Tallahassee,
Florida 32301-1800
Tel: 850.412.1115
Fax: 850.412.1120

CALL Administrative Office
1 E. Broward Blvd.
Suite 1800
Ft. Lauderdale, FL 33301
954.364.6012
call@bplegal.com

Follow me!

Twitter
LinkedIn
FaceBook

ADA Tester Lawsuits and Sprinkler Opt Out Votes

October 29, 2014

We have recently been receiving information about some resort-type private communities who are being sued by an ADA Tester who visits these private communities and claims that he has been denied full and equal access and full and equal enjoyment of the facilities, services, goods and amenities within the community.

Since some private communities provide services to the general public, these kinds of ADA testers treat them as a place of public accommodation for the purposes of ADA compliance.

In one recent lawsuit I reviewed, the plaintiff identifies himself as a "tester for the purpose of discovering, encountering, and engaging discrimination against the disabled in public accommodations. When acting as a 'tester', Plaintiff employs a routine practice. Plaintiff personally visits the public accommodation; engages all of the barriers to access, or at least of (sic) those that Plaintiff is able to access; tests all of those barriers to access to determine whether and the extent to which they are illegal barriers to access; proceeds with legal action to enjoin such discrimination; and subsequently returns to Premises to verify its compliance or non-compliance with the ADA and to otherwise use the public accommodation as members of the able-bodied community are able to do."

These kinds of plaintiffs typically sue for declaratory and injunctive relief, attorney's fees, expenses and costs pursuant to 42 U.S.C. Section 12182, et. seq. and the 2010 Americans with Disabilities Act (ADA). In the case I reviewed, the ADA Tester claimed that he needed:

- A properly labeled handicap and van-disabled parking space
- The use of a parking access aisle
- The use of a lift for pool and Jacuzzi accessibility
- The use of a gate latch to the pool area that is of the appropriate height

Insurance expert, Joel Meskin, advises that most D&O policies will defend the ADA matter, but will not pay for the accommodation costs, if any. Unfortunately, this kind of lawsuit is not new in Florida, Hawaii or Texas. CALL's goal is to educate our members that this kind of testing is unfortunately being done in not-for-profit community associations instead of being confined to truly public accommodations like hotels and office buildings. Associations who are contacted by an ADA tester should immediately contact their association attorney. In addition to the costs to modify the amenities and

Download the New Becker & Poliakoff Mobile App! Now Available for Android and Apple.

Upcoming Classes & Events

all the other costs associated with litigation, these suits do have an impact on your insurance.

On a separate note, many of you became active in CALL as a result of our battle to secure opt out votes for older high-rises in Florida back in 2003. Since that battle has been successfully won, many of our impacted members have taken the vote. For those of you who have not, please be aware that the deadline to do so is looming. Pursuant to Section 718.112(2)(l), a majority of your total voting interests must vote to forego sprinklers by December 21, 2016. If you fail to obtain that vote by that deadline, you will have to proceed with the installation of sprinklers by applying for a permit to install same and demonstrating to the local authority having jurisdiction that you will be compliant by December 31, 2019.

If you haven't yet taken the vote and you are an impacted high-rise, please do take advantage of the opt out rights that CALL fought so hard to secure for you. Contact your association attorney to ensure that the voting on this important issue is handled correctly.

Very truly yours,

Donna DiMaggio Berger
Shareholder
Member, College of Community Association Lawyers Fort Lauderdale Ext. 15331 (954.364.6031)

www.bplegal.com

Visit Our Websites

CALL | Condominium & HOA Law Blog | The Corporate & Capital Law Blog
The Customs and International Trade Law Blog | The Florida Construction Law Authority
The Community Association Law Blog | Koz on Gaming

Offices

Florida • New Jersey • New York • Virginia • Washington DC