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United States: The ADA Again? Why Now?: Effective Dates And New Requirements

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Article by Christopher B. "Chris" Hanback 

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Increased media coverage, complaints and lawsuits will predictably accompany the effective date of new Americans with Disabilities Act (ADA) Standards in March 2012. Accordingly, the coming months would be a prudent time for owners and operators of hotels, resorts, retail stores and office buildings to turn their attention to accessibility issues at existing facilities and those properties scheduled for renovation and new construction in the next year. Many lawsuits will include demands that exceed legal requirements, and time spent now in reviewing accessibility compliance will help in avoiding entirely or limiting lawsuits that may include overreaching by plaintiffs and advocacy groups.

In 2010, the Department of Justice issued new final regulations (the "2010 Standards") that update the 1991 ADA Regulations and Americans with Disabilities Act Accessibilities Guidelines ("ADAAG"). These Standards apply under Title III of the ADA to "public accommodations," including hotels, commercial office buildings, resorts, retail space in office and apartment buildings, shopping centers, museums, sports facilities and a host of other buildings and facilities that are open to the public.

As discussed below, the accessible design and construction requirements continue to vary depending on whether the building pre-dates the effective dates of the key ADA Standards in 1991 or is new construction or an alteration of an existing facility that goes beyond cosmetic renovations. In addition, new provisions govern recreational facilities including boating facilities, exercise equipment, fishing piers, golf facilities, play areas and swimming pools, spas, saunas and steam rooms. A number of technical spacing and location requirements affect commercial, retail and hotel space.

Considerable publicity recently accompanied the issuance by the U.S. Equal Employment Opportunity Commission (EEOC) of regulations and guidance that expanded and clarified the definition of disability and what is "regarded as" a disability under the separate provisions of Title I of the ADA. However, the new definitions will have limited impact on compliance with accessible design and construction requirements for public accommodations under Title III of the ADA. This is because, in employment matters, defendants and their counsel have regularly challenged whether a plaintiff was disabled in defending employment complaints under Title I. Under Title III for physical accessible design complaints, whether the plaintiff was disabled has seldom been an issue or even challenged in such cases, except in limited circumstances relating to requests for accommodations for certain emotional problems and conditions resulting in fatigue or hypersensitivity.

Our focus here is on the different effective dates, changes in the special services, features and accommodations required for persons with disabilities, as well as the heightened importance of "barrier removal" requirements for existing hotels, resorts, retail stores and office buildings.

Three Phases of Accessible Design and Construction

The 2010 Standards continue to impose varying design requirements on places of public accommodation and facilities depending on the date of construction or renovation. There are three basic levels of compliance: barrier removal, new construction and alterations.

New Standards for Barrier Removal

The first level applies to all public accommodations and requires removal of all architectural barriers in existing

facilities, including (regardless of when constructed) communication barriers that are structural in nature, where such removal is readily achievable, *i.e.*, easily accomplishable and able to be carried out without much difficulty or expense. This includes provision of "auxiliary aids and services." Barrier removal broadly refers not only to the removal of protuberances in a building but also to the requirement to place controls in easily accessible locations for mobility-impaired individuals.

These requirements originally became applicable to all public accommodations under the 1991 Standards as of January 26, 1993. The chart below sets forth when the 2010 Standards (and certain safe harbors) take effect.

Examples of barrier removal and auxiliary aids include: installing ramps, making curb cuts at sidewalks and entrances, widening doorways and installing grab bars in toilet stalls. Also, adding raised letters or Braille to elevator control buttons, assistive listening devices, fire warning signals, and telecommunications devices for deaf persons (TDDs). First priority is to be given to measures that enable the disabled to "get in the front door."

Compliance Dates and Applicable Standards for Barrier Removal and Safe Harbor

Date	Requirement	Applicable Standards
Before March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards must be modified to the extent readily achievable.	1991 Standards or 2010 Standards
On or after March 15, 2012	Elements that do not comply with the requirements for those elements in the 1991 Standards or that do not comply with the supplemental requirements (<i>i.e.</i> , elements for which there are neither technical nor scoping specifications in the 1991 Standards) must be modified to the extent readily achievable.	2010 Standards
Elements not altered after March 15, 2012	Elements that comply with the requirements for those elements in the 1991 Standards do not need to be modified.	Safe Harbor

New Standards for New Construction and Alterations

The second level of compliance relates to new construction for first occupancy, originally after January 26, 1993, under the 1991 Standards, and now between September 15, 2010 and March 15, 2012, under the 2010 Standards. Such new construction is subject to the most extensive requirements as outlined in the Americans with Disabilities Act Design Guidelines ("ADAAG").

The third level of compliance is for alterations (significant renovations) to a place of public accommodation after January 26, 1992, under the 1991 Standards, and now between September 15, 2010 and March 15, 2012, under the 2010 Standards. This requires an intermediate level of compliance designed to bring a property up to new construction levels of compliance – presuming that continuing renovations are undertaken over a period of years.

For the purposes of this section, "start of physical construction or alterations" does not mean ceremonial groundbreaking or razing of structures prior to site preparation.

Compliance Dates for New Construction and Alterations

Compliance Dates for New Construction and Alterations

Compliance Dates for New Construction and Alterations	Applicable Standards
On or after January 26, 1993, and before September 15, 2010 (building permit application/certification must be before September 15, 2010)	1991 Standards
On or after September 15, 2010, and before March 15, 2012 (building permit application/certification is on or after September 15, 2010)	1991 Standards or 2010 Standards
On or after March 15, 2012 (building permit application/certification is on or after March 15, 2010)	2010 Standards

New or Expanded Requirements Under the 2010 Standards

The following are new or revised requirements to provide accessible services or accommodations, as well as accessible design and construction features, under the 2010 Standards.

Accommodations

- **Power-driven devices.** Segways and similar devices must be permitted in addition to wheelchairs unless they interfere with an owner or service provider's program or pose a threat or safety hazard.
- **Reservations at places of lodging.** Hotels, resorts and other entities that provide guest rooms under similar conditions and with similar amenities must modify their policies and procedures to ensure that disabled individuals are able to make reservations. This includes ensuring that disabled persons can make reservations during the same hours as non-disabled persons, that sufficient information and detail is provided by the lodging in order that they may determine whether particular rooms meet their needs and to assure that accessible rooms are in fact held for use by the disabled until all other rooms have been rented and are not inadvertently released.
- **Service animals.** Limited to dogs (and miniature horses) *trained* to perform specific tasks for both physical and mental disabilities, but not to merely provide "emotional support." Be aware that other laws, such as the Fair Housing Act (FHA), may require permitting a broader definition of service animals, such as emotional support animals, in multifamily residences.

Features

- **Unit dispersion.** Accessible guest rooms in lodgings must be dispersed in the following order: guest room type, number of beds and amenities.
- **Communications and accessible features in unit.** The number of rooms that must have both special communications features and mobility access features (roll-in shower) – in addition to the number of ADA basic accessible features – is limited to 10 percent.
- **Attached parking garages.** When parking garages are connected to other facilities for pedestrian access, all of the entries to the facility from the garage must be accessible (*i.e.*, each connected level).
- **Pool entry.** An accessible means of entry is required for swimming pools, wading pools and spas, which may include lifts, transfer walls and sloped entry.
- **Reach ranges.** Reach ranges for a side reach are adjusted from between 54" and 9" to between 48" and 15".
- **Short-term rental of residences.** Short-term rental units ("transient lodging," including time shares and fractional interests) of generally 30 days or less in properties primarily for longer-term residence – such as apartment and condominium buildings, as well as mixed-use and corporate hotel facilities – are subject to the 2010 ADA requirements (hence, may be subject to both FHA and ADA requirements). However, the obligations for units owned by individual owners and not controlled by third party operators will generally not be subject to the 2010 ADA requirements.
- **Recreational boating and fishing piers.** Specified numbers of boat slips and boarding piers and boat launches must be accessible. Newly designed and constructed or altered fishing piers must provide accessible

routes and certain percentages of guardrails and handrails must be no higher than 34".

- **Golf facilities.** Newly constructed or altered golf facilities must have accessible passages of a minimum of 48" within the boundary of the golf course. An accessible route must be provided to golf rental and bag drop-off areas, and one or two teeing grounds per hole must be accessible. Certain percentages of practice teeing grounds, practice teeing at driving ranges and putting greens must be accessible.
- **Employee work areas.** Wheelchair accessibility for employees is expanded by requiring accessible common-use circulation paths in new and altered work areas.
- **Accessible routes.** All accessible routes that connect site arrival points and accessible building entrances must be in the same area as general circulation paths.

Impact on "Barrier Removal" of "Alteration (Renovation) Requirements"

The 2010 Standards increase the barrier removal requirements subject to certain exceptions and safe harbors. Elements that have not been altered in existing facilities on or after March 15, 2012, and that comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards are not required to be modified in order to comply with the requirements set forth in the 2010 Standards.

1. Before March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with either the 1991 Standards or the 2010 Standards.
2. On or after March 15, 2012, elements in existing facilities that do not comply with the corresponding technical and scoping specifications for those elements in the 1991 Standards must be modified to the extent readily achievable to comply with the requirements set forth in the 2010 Standards.
3. The foregoing safe harbors do not apply to those elements in existing facilities that are subject to supplemental requirements (i.e., elements for which there are neither technical nor scoping specifications in the 1991 Standards), and therefore those elements must be modified to the extent readily achievable to comply with the 2010 Standards. Under Title III of the ADA a public accommodation is urged to take measures to comply with the barrier removal requirements of this section in accordance with the following order of priorities.
 - First, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking or public transportation. These measures include, for example, installing an entrance ramp, widening entrances and providing accessible parking spaces.
 - Second, a public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These measures include, for example, adjusting the layout of display racks, rearranging tables, providing Brailled and raised character signage, widening doors, providing visual alarms and installing ramps.
 - Third, a public accommodation should take measures to provide access to restroom facilities. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls and installation of grab bars.
 - Fourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation.

The 1991 and 2010 Standards both provide that: "... measures taken to comply with the barrier removal requirements ... shall comply with the applicable requirements for alterations" However, the Standards also have specific language on what constitutes a "barrier" and examples of acceptable steps to "remove" a barrier. While it appears that the reference to the use of the technical specifications applicable for alterations only applies to how a barrier removal should be accomplished, advocates frequently asserting that the alteration requirements must govern *when* and *what* needs to be done to "remove" a barrier.

Summary

When Title III of the ADA was enacted by Congress in the early 1990s, its impact on buildings and facilities built in past years and decades was limited to modest barrier removal requirements. The focus clearly was upon substantially

increasing accessibility for persons with disabilities in newly constructed and substantially renovated buildings. It was presumed that over the passage of time many building would be renovated and thus achieve greater accessibility in design.

Now, after two decades have passed – and the fact that a number of existing public accommodations have not been subject to alterations and the accompanying accessible design upgrades – many advocates feel that the barrier removal requirements are inadequate for any building open to the public. Indeed, as those who have faced lawsuits in recent years know, regardless of the actual legal requirements for existing buildings under the ADA, advocates have nevertheless tried to impose the most demanding new construction or alteration specifications as the legal standard for barrier removal on older buildings. This trend is likely to continue, and suggests that it is critical that owners and operators assess whether they have met the applicable specifications for barrier removal at their existing properties.

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