



LABOR & EMPLOYMENT DEPARTMENT

ALERT

DOJ ISSUES FINAL REGULATIONS ON ADA ACCESSIBLE DESIGN REQUIREMENTS

By Andrez Carberry and Richard Cohen

On the heels of the 20th anniversary of the enactment of the Americans with Disabilities Act (ADA), the U.S. Department of Justice (DOJ) recently published final regulations in the *Federal Register* detailing new accessible design requirements for entities covered by the ADA (2010 Standards).

The 2010 Standards will have a significant impact on entities open to the public, such as entertainment venues, museums, recreational facilities, restaurants, places of lodging, medical facilities and schools (public and private). These regulations will impact Corporate America with respect to not only physical design, but web sites and other technological equipment designed for customer service.

The 2010 Standards are effective March 15, 2011, six months after their publication in the *Federal Register*. However, covered entities are not required to comply with the 2010 Standards until 18 months after the publication date: March 15, 2012. From September 15, 2010, to March 14, 2012, covered entities may choose to follow (in their entirety) either the 1991 or the 2010 Standards. But, as of March 15, 2012, all renovations, alterations and new construction must conform to the 2010 Standards. The applicable standard will be triggered by the date a covered entity submits an application for a

building permit or, if no permit is required, by the start of physical construction or alteration.

Selected Highlights of the 2010 Standards

• Clarification of Covered Facilities

A hallmark of the 2010 Standards is they provide clarification, and in some instances, incorporate more facilities than previous standards. For example, the 2010 Standards clarify their application to, and requirement for, among others:

1. **Amusement rides:** must be accessible and located on an accessible route.
2. **Recreational boating facilities:** boat slips and boarding piers must be accessible.
3. **Exercise machines and equipments:** at least one type of every exercise equipment must be accessible and positioned to enable use by a person with a disability.
4. **Fishing piers and platforms:** must be accessible, subject to the same exceptions for gangways.
5. **Golf facilities:** accessible routes or golf car passages to the course, rental areas, bag drop areas and one or two teeing grounds.
6. **Miniature golf courses:** at least 50 percent of all holes must be accessible and consecutive.

7. **Play areas:** now covered, and must have accessible ground and elevated play components, routes, ramps, transfer systems and accessible ground surfaces.

8. **Swimming pools, wading pools and spas:** must have accessible means of entry/exit.

9. **Saunas and steam rooms:** must be accessible with appropriate turning space and an accessible bench.

• **Safe Harbor Provision**

Under the Element by Element Safe Harbor Provision in the 2010 Standards, if a covered entity has built or altered its facility in order to comply with the 1991 Standards, then it does not have to comply with the 2010 Standards until such time that the element again becomes a part of a planned alteration/renovation.

Note: Existing facilities not in compliance with the 1991 Standards, or were not subject to the 1991 Standards, do **not** benefit from the Safe Harbor Provision.

• **Reach-Range Requirements**

The side reach-range requirements have been altered. The maximum reach range can now be no higher than 48 inches and no lower than 15 inches. This requirement applies to operable parts on accessible elements, elements on accessible routes, rooms and spaces.

• **Employee Work Areas**

Under the 2010 Standards, subject to certain exceptions, employers must ensure that new or altered work areas permit an employee using a wheelchair to not only approach, enter and exit the work area, but also provide accessibility to common use circulation paths within the employee work areas.

• **Service Animals**

Under the 2010 Standards, only a dog can qualify as a service animal (limited exception permits use of miniature horses). Specifically, a service animal is defined as “[a]ny dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability” provided the “[w]ork or tasks performed by the service animal is directly related to the handler’s disability.” A dog that serves purely emotional support is not a service animal. However, individuals with mental disabilities who use dogs trained to perform a specific task are covered. For example, an attack dog or

a fennec fox would not qualify as a service animal, but a dog trained to assist its handler with a psychiatric disability, such as post-traumatic stress disorder, anxiety or paranoia, would be considered a service animal.

In addition, places of public accommodation cannot require individuals accompanied by a service animal to pay a surcharge for the service animal, even if individuals without disabilities are required to pay for their animal’s admission.

• **Reservations for Places of Lodging**

Places of lodging must permit individuals with disabilities to make reservations for accessible guest rooms during the same hours and in the same manner as other guests, and identify and describe accessible features in the hotels and guest rooms offered by their reservations services. Accessible rooms must also be held for individuals with disabilities until all other non-accessible guest rooms of that type have been rented. Accessible guest rooms must also be removed from all reservation systems to avoid inadvertent release to someone other than the person who reserved the room.

• **Timeshares, Condominium Hotels and Other Places of Lodging**

Timeshares and condominium properties that operate like hotels are subject to the 2010 Standards with respect to the common areas of the facility. However, these facilities are not subject to the reservation “hold back” requirement discussed above, nor the barrier removal and alteration requirements, if the physical features of the respective room’s interiors are controlled by individual owners rather than by a third-party operator.

• **Assembly Areas**

The scope of seating in large facilities has been altered such that under the 2010 Standards, facilities with 501 to 5000 seats must provide one additional wheelchair space for each additional 150 seats (or fraction thereof), and facilities with more than 5001 seats must provide one additional wheelchair space for each 200 seats over 5001.

• **Mobility Devices**

A covered entity shall permit individuals using a manually powered aid (motorized and non-motorized wheelchair, walkers, crutches, canes, etc.) in any areas open to the public. The covered entity must also make **reasonable modifications** to permit access to individuals using other power-driven mobility devices (i.e.,

Segway®PT), unless the entity can demonstrate the device cannot be safely operated in accordance with the regulation.

Note: A covered entity shall not ask an individual using a power-driven mobility device questions about the nature and extent of his/her disability. However, the entity may request proof the motorized device is required, such as a valid state-issued disability placard, card or proof of disability or “a verbal representation, not contradicted by observable fact.”

• **Water Closet Clearance in Single User Restrooms**

The water closet must permit clearance for both a forward and a parallel approach, with further restrictions on the overlap of the lavatory and the water closet clearance.

Going forward, covered entities must audit their spaces and polices to ensure they are in compliance with the 2010 Standards and/or maximizing the Safe Harbor Provisions. Nonetheless, although some entities will be able to operate under the 1991 Standards, be mindful that any future renovations, alterations or construction will require compliance with 2010 Standards. Finally, covered entities should retain documentation of all renovations and alterations conducted in an effort to conform with the 1991 and 2010 Standards.

For more information about this Alert, please contact Richard B. Cohen at 212.878.7906 or rcohen@foxrothschild.com, Andrez S. Carberry at 212.878.7964 or acarberry@foxrothschild.com or any member of our Labor & Employment Department.



Fox Rothschild LLP
ATTORNEYS AT LAW

Attorney Advertisement

© 2010 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.