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An important Real Estate law update from the law firm of Jackson Walker.

**March 11, 2011**

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## ADA Changes Effective March 15, 2011: What it Means for Your Business

By **Randy A. Racine**

The U.S. Department of Justice's amended Final Rule, which substantially revises and expands the regulations implementing the Americans with Disabilities Act (ADA), becomes effective on March 15, 2011. The revisions set forth in the amended Final Rule potentially have far-reaching implications for owners and operators of businesses, developers, lenders, commercial landlords and tenants. Full compliance with the new regulations is mandatory by March 15, 2012.

In addition to important changes to Title II of the ADA, which requires nondiscrimination on the basis of disability in governmental services, the amended Final Rule also changes Title III of the ADA, which covers private enterprises and facilities. Common examples of facilities covered by Title III include financial institutions, hospitals, doctors' offices, restaurants, shopping centers, retail stores, hotels, movie theaters, private schools, convention centers, day care centers, fitness clubs, sports stadiums and other recreation facilities.

Among other substantive changes to the existing regulatory framework, the new regulations replace the 1991 ADA Standards for Accessible Design (1991 Standards) with the 2010 ADA Standards for Accessible Design (2010 Standards). The 2010 Standards provide new specifications for a wide range of architectural access features, including public stairwells, elevators, restrooms, parking spaces, signage and assembly areas. Bathroom design demonstrates just one example of the nuanced differences between the 1991 Standards and the 2010 Standards. Under the 1991 Standards, restrooms were required to be configured with a "front" method of allowing a disabled person to transfer from a wheelchair to a toilet. Under the 2010 Regulations, a bathroom stall must provide clearance for an individual to access the toilet both from the front and the side.

A brief description of other changes to the non-discriminatory requirements set forth in the new regulations follows:

- **Mobility Devices:** The new regulations clarify businesses' obligations to accommodate wheelchairs and other power-driven mobility devices. Under the new regulations, wheelchairs must be permitted in all areas open to pedestrian use. Business owners also must permit the use of other power devices (e.g., Segways), unless the owner can demonstrate that the use of such devices would fundamentally alter the business's programs, services and activities, or would create a safety hazard.
- **Service Animals:** Under the new regulations a business cannot assess a surcharge for using a "service animal," even if a fee is required from other persons with pets. The new regulations limit the kind of animal which may be a "service animal" to dogs, but expand the types of tasks which might

bring a dog into the category of a “service animal.” A dog may be a “service animal” if it is trained to deal with psychiatric issues, such as reminding its handler to take medicine, providing safety checks or room searches (for individuals with post-traumatic stress disorder), and/or stopping its handler from harming himself. Other animals and dogs which provide mere emotional support, are not “service animals.” The new regulations do permit the use of trained miniature horses as alternatives to dogs, subject to certain limitations, but to allow flexibility in situations where using a horse would not be appropriate, miniature horses are not included in the definition of “service animal.”

- **Reservations for Places of Lodging:** Under the new regulations, places of lodging must: (1) allow individuals with disabilities to make reservations for accessible guest rooms during the same hours and in the same manner as other guests; and (2) identify and describe accessible features in the hotels and guest rooms in enough detail to permit individuals with disabilities to assess whether such lodging meets their needs. Furthermore, places of lodging must ensure that reserved accessible guest rooms are actually available for those disabled guests upon their arrival.
- **Communication:** The new regulations include guidance on compliance with the provisions relating to effective communication with disabled guests. Specifically, the new regulations allow for the use of video remote interpreting services as an auxiliary aid, but only to the extent the business operator complies with specified performance standards.
- **Ticketing:** The new regulations provide guidance on the sale of tickets for accessible seating, the sale of season tickets, the hold and release of accessible seating to non-disabled individuals, ticket pricing, prevention of the fraudulent purchase of accessible seating and the ability to purchase multiple contiguous tickets when buying accessible seating.

The new regulations include a “safe harbor” provision protecting facilities built or altered prior to March 15, 2011, in compliance with the 1991 Standards. Thus, portions of existing facilities which fall under the purview of – and are in compliance with – the 1991 Standards need not come into compliance with the barrier removal requirements of the 2010 Standards until future alterations or renovations. Notably, however, the safe harbor provision does not apply to portions of existing facilities that were not regulated by the 1991 Standards. To comply with the new regulations with respect to areas of a facility not covered by the 1991 Standards, existing facilities must be modified to the extent readily achievable to meet the new requirements.

Owners and operators of facilities covered by the ADA should inspect their premises to verify compliance with the appropriate standards, and to make alterations as necessary to meet them. Likewise, developers should obtain assurances from design and construction contractors that plans for new projects account for the amended regulations. Financial institutions making loans for such projects should make similar design requirements, as well as appropriate operational requirements, of their borrowers.

Both commercial landlords and tenants should also take note of the new regulations. Despite the faulty assumption held by many landlords and tenants, federal law dictates that regardless of contrary terms in a lease, both the landlord and the tenant are liable for noncompliance with Title III of the ADA. Thus, even if a commercial lease states that the tenant is responsible for ADA compliance, a disabled individual may sue both the landlord and the tenant for noncompliance with the ADA.

The Department of Justice enforces ADA compliance through audits, voluntary compliance programs and, in some cases, through lawsuits. In Texas, as in other states, accessibility advocates and plaintiff’s lawyers have brought ADA lawsuits against thousands of

Texas businesses. Business owners can expect that the compliance issues surrounding implementation of the new regulations will lead to a new wave of enforcement actions. Our goal is to ensure this does not happen to you.

Jackson Walker's Real Estate group is experienced in advising and protecting its real estate clients in today's challenging market. Please call us to help interpret the Department of Justice's new regulations and to understand how both they and the 2010 Standards will affect both the physical and operational aspects of your business.

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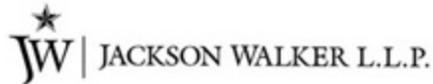
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