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LABOR AND EMPLOYMENT

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This year has brought significant changes and developments to the public accommodation provisions of the Americans with Disabilities Act ("ADA"). In light of new standards that have been promulgated, and the accompanying increased penalties from the U.S. Department of Justice ("DOJ")—i.e., $55,000 for the first violation, and $110,000 for each subsequent violation—the tidal wave of recent professional plaintiff lawsuits and government enforcement efforts will continue to rise. Understanding the following five issues will help ensure that your clients' properties and facilities do not face costly ADA compliance fines.

1. What Are Some of the New Minimum Requirements Under the ADA's 2010 Standards?

Although the ADA has prohibited places of public accommodations from discriminating against individuals with disabilities when providing goods and services to the general public since 1991, the DOJ promulgated, in 2010, revised standards and regulations implementing the ADA ("2010 Standards"). Effective March 15, 2012, the 2010 Standards set new minimum requirements for newly designed and constructed places of public accommodations to be readily accessible to and usable by individuals with disabilities.

Below are a few "highlights" of applicable rules and regulations to which places of public accommodation must adhere to ensure compliance with the 2010 Standards:

- *Policies to Allow Use of Service Animals* – Service animals (defined as dogs and miniature horses) must be permitted when the task performed is related to a disability. Thus, companies should modify their policies to permit the access and use of service animals by persons with disabilities, even if they typically maintain a "no pets" policy.

- *Use of Mobility Devices* – Places of public accommodation must permit the use of manually powered devices intended for use by individuals with disabilities, such as wheelchairs and similar devices. Additionally, reasonable modifications in policies,

practices, and procedures should be made to allow for the use of "other power driven mobility devices," unless a business can demonstrate that the mobility device in question cannot be operated in accordance with legitimate safety requirements. For example, a court recently ruled that Segways at Disneyland should be permitted unless determined to be unsafe.

- *Effective Communication to Individuals with Disabilities* – The ADA's revised regulations require places of public accommodation to take steps necessary to communicate effectively with individuals with vision, hearing, and speech disabilities. Examples of other common auxiliary aids and services include sign language interpreters, note takers, computer aided transcription services, exchange of written notes, telephone handset amplifiers, assistive listening devices and systems, telephones compatible with hearing aids, closed caption decoders, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones or equally effective telecommunications devices.

- *Pools, Hot Tubs, Saunas, and Fitness Rooms* – These types of facilities are not covered by the ADA's "safe harbor" exception. Thus, it is imperative that businesses understand their new obligations to ensure compliance for these areas immediately.

2. What Should Pool and Spa Operators Do About Pool Lifts?

The 2010 Standards have significantly changed the requirements for swimming pools and spas by mandating that they be equipped with independently usable pool lifts. The DOJ has issued an interpretation ("Interpretation") requiring that the pool lifts be "fixed" and installed and available at every pool and spa at a facility at all times when open to the public.

The original date for compliance with this directive was March 15, 2012. However, the DOJ received substantial comments from hotel, resort, and pool owners, urging it to both extend the mandatory compliance date for pool lifts and/or revise the Interpretation as it relates to providing accessible entries and exits to pools and spas. As a result, on March 15, 2012, the DOJ temporarily postponed compliance with the 2010 ADA Standards in regards to the fixed nature of pool lifts. The compliance date has now been pushed back to January 31, 2013. This extension does not change the substance of the DOJ's requirement that pool lifts be "fixed." The DOJ failed to address concerns raised by the lodging industry and associations through the public comment period that fixed lifts could increase liability to operators from children or misuse around unattended pools and that lifts should be able to be shared between multiple pools and spas, or the concerns over extensive electrical and construction work that would be associated with installing a fixed lift.

What this means for pool and spa operators is that, while they now have additional time to bring their property into compliance, the requirement that a single fixed lift be installed for every pool and spa on the facility remains firm, and noncompliance could subject owners and operators to liability under the ADA from a DOJ investigation or private lawsuit.

3. Internet Business Activities – Is an Actual Physical Place of Business Required?

In several recent cases involving Netflix, the issue has arisen as to whether an online video-streaming service qualifies as a place of public accommodation under the ADA or whether a "bricks and mortar" presence is required to invoke ADA protections. This summer, in *National Association of the Deaf v. Netflix*, Judge Ponsor of the U.S. District Court for the District of Massachusetts denied Netflix's motion for judgment on the pleadings that challenged the application of the ADA to its video streaming website. In denying Netflix's motion, the court ruled that the ADA is not limited to actual physical structures, but rather applies to Internet-based businesses. In so ruling, Judge Ponsor

stated the following:

> In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.

Shortly thereafter, in *Cullen v. Netflix*, a U.S. District Court in California reached the opposite conclusion, finding that an "actual physical place" was a requirement to be considered a place of public accommodation pursuant to the ADA. Accordingly, the *Cullen* court held that a video streaming website was not subject to the ADA because it was not an actual physical place.

This is an area of law that is rapidly evolving, as evidenced by the above conflicting decisions. There is more support than ever before, however, in favor of the application of the ADA to web-based businesses without physical structures. As such, online businesses may wish to (i) consider whether and to what extent their websites are sufficiently accessible to those with visual and auditory disabilities, and (ii) take the necessary steps to ensure sufficient accessibility.

For greater detail on this subject, please see the Epstein Becker Green *Act Now* Advisory titled "Internet Business Activities—Are They Now the Bull's-Eye for ADA Public Accommodation Lawsuits?"

4. Is Your ATM ADA Compliant?

The 2010 Standards create new compliance obligations and contain technical specifications impacting what have become fixtures in all sectors: automatic teller machines ("ATMs"). As is customary when new standards take effect and become enforceable, places of public accommodation want to know whether and how their ATMs will be impacted by the 2010 Standards and whether they will be afforded any safe harbor protections for compliance with currently effective requirements. The answer, not surprisingly, is not a hard-and-fast rule, and any safe harbor protection will apply on an element-by-element basis.

It is helpful to view the 2010 Standards as separating the new requirements impacting ATMs into two categories: (i) structural elements that impact the physical accessibility of ATMs, and (ii) communication-related elements that relate to the customer's interactive or communicative experience at ATMs. The DOJ has stated, specifically relating to ATMs, that structural elements are distinct from communication-related elements, and thus safe harbor protection would likely apply to those structural elements. This means that new requirements addressing height and reach, or accessible path and floor space, would be entitled to the safe harbor protection, and thus compliance with the 1991 ADA Standards for Accessible Design ("1991 Standards") is sufficient. Business owners should be aware, however, that any alterations made to structural elements of existing ATMs from this point forward will mean that the safe harbor will no longer apply and therefore must comply with the 2010 Standards.

The DOJ takes a different approach with respect to communication-related elements of ATMs, which it defines as "auxiliary aids and services." While the DOJ has not provided a specific list of which new requirements would be considered "communication-related," it is safe to assume that they would include requirements regarding voice guidance, speech output (including audible tones for security purposes and devices capable of providing audible balance inquiry information), and Braille instructions for initiating speech mode and

features. The safe harbor will not apply to these communication-related elements; businesses can avoid making modifications only if they can meet the demanding threshold of showing that compliance with the new communication-related elements would impose an undue burden on them. Accordingly, existing ATMs that comport only with the 1991 Standards must be modified or retrofitted to comply with the communication-related requirements contained in 2010 Standards.

The absence of a list specifying which new requirements in the 2010 Standards are considered to be "communication-related" creates some confusion for businesses operating ATMs. While some elements are clearly communication-related, other components defy easy categorization and, in turn, may create confusion for hotels as to their obligations. Because the DOJ and disability rights groups will likely initiate efforts to monitor compliance with and enforce the 2010 Standards, and in light of potential civil liability and hefty fines and penalties, businesses should assess their existing ATMs and take steps to comply.

5. How Is California Limiting Statutory Damages?

Throughout the past decade, California businesses have been victimized more than businesses in virtually any other state by "drive by" plaintiffs. One way in which California businesses are particularly susceptible is that under the California state equivalent to the ADA, a plaintiff is entitled to statutory damages of $4,000 per violation. There is a new law, however, that will provide relief to such business owners.

Specifically, on September 1, 2012, Senate Bill 1186 passed both houses of the California Legislature and Governor Jerry Brown signed it into law on September 19, 2012, making the legislation effective immediately. This new law will reduce a defendant's minimum liability from $4,000 to $1,000 for each offense if the defendant has corrected all construction-related violations that are the basis of the claim within 60 days of being served with the complaint and complied with certain other obligations. Alternatively, the new law will reduce a defendant's minimum liability from $4,000 to $2,000 for each offense if the defendant is a small business and has corrected all construction-related violations that are the basis of the claim within 30 days of being served with the complaint.

Notably, when a plaintiff alleges multiple claims for the same alleged violation on different occasions, the new law requires a court to consider the reasonableness of the plaintiff's need to repeatedly visit the public accommodation in light of the plaintiff's obligation to mitigate damages. In particular, the new law states that this provision is intended to address the misuse of the California state equivalent to the ADA by attorneys and plaintiffs who allege the same barrier deterred the plaintiff on repeated occasions from visiting the public accommodation, for the purpose of stacking authority liability and intimidating defendants into settlements.

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In sum, with the abundance of ADA litigation, it would behoove businesses to conduct a walk-through inspection of their property with legal counsel to review compliance efforts and recommendations for improving compliance. As the old adage goes, an ounce of prevention is worth a pound of cure. Reviewing policies and procedures, training staff members, and conducting an inspection protected by the attorney-client privilege will go a long way toward ensuring that your properties and facilities do not face costly compliance fines.

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