

The DOJ's New ADA Regulations and Accessibility Guidelines

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Guidelines Affect Places of Public Accommodation, and State and Local Governmental Entities

On Sept. 15, 2010, the U.S. Department of Justice (DOJ) published new final regulations in the Federal Register under Title II and Title III of the Americans with Disabilities Act (ADA), on accessibility for state and local governmental entities and places of public accommodation.

The changes adopted by these new regulations will become effective on March 15, 2011, six months after they were published in the Federal Register. Eighteen months after publication, on March 15, 2012, both new construction and alterations will be required to be in compliance with the regulations' standards. Those entities that were required to comply with the 1991 Standards for Accessible Design (1991 Standards) during any new construction or alteration of facilities or elements, but that have not done so by 18 months after the publication date of the final rule, must comply with the 2010 Standards for Accessible Design.

Given the complexity of the regulatory changes, state and local governmental entities and public accommodations need to consider the impact of the new regulations and the ADA/ABA Accessibility Guidelines when making modifications to existing facilities or engaging in new construction.

Changes Under Title II and Title III and ADA/ABA

The new regulations make a number of similar changes under both Title II (related to state and local governmental entities) and Title III (related to public accommodations), and also adopt the revised Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines (ADA/ABA Accessibility Guidelines). The ADA defines places of public accommodation as facilities operated by private entities whose operations "affect commerce," including hotels, restaurants, museums, parks, retail stores, theaters, sports venues, public or private schools, banks, hospitals or offices of healthcare providers, daycare and senior centers, pharmacies, and offices of accountants and lawyers, and service establishments, among others.

The new regulations provide guidance on service animals; wheelchairs and other power-driven mobility devices (e.g., Segway® PT); video remote interpreting services; accessible seating, ticketing and ticket pricing; and various housing issues. The following are some key modifications:

Service Animals

The new regulations define "service animal" as a dog that has been trained to do work or perform tasks for the benefit of an individual with a disability. Dogs that are not individually trained to perform tasks that mitigate the effects of a disability, including those used purely for emotional support, are not service animals. The new regulations also state that other animals do not qualify as service animals, except that public entities and public accommodations are required to make reasonable modifications to permit the use of miniature horses if these have been trained to perform tasks for disabled individuals.

Mobility Devices

Wheelchairs and other manually powered devices designed primarily for use by people with mobility impairments must be permitted in all areas open to pedestrian use. Other power-driven mobility devices also must be allowed to be used, unless the covered entity can demonstrate that such use would fundamentally alter its programs, services or activities; create a direct threat or create a safety hazard.

Effective Communication

The new regulations define auxiliary aid to include video remote interpreting services used to provide effective communications. Video remote interpreting uses video conferencing technology to provide sign-language interpreting services. The DOJ included performance standards for video remote interpreting in the new regulations, which require training for users and other involved individuals to promote efficiency and effectiveness.

Ticketing

The new regulations provide guidance to venue operators on selling tickets for accessible seating for individuals with disabilities, including when venue operators can sell accessible seating to individuals who do not need it. The new regulations also cover ticket pricing and the prevention of the fraudulent purchase of accessible seating. A public entity or public accommodation may not require proof of disability before selling tickets for accessible seating.

Standards for Accessible Design

The DOJ has adopted revised ADA design standards. To minimize compliance burdens on entities subject to more than one legal standard, the DOJ has attempted to harmonize these design standards with the 2010 federal standards implementing the Architectural Barriers Act and with the private-sector model codes that are adopted by most states. Note that while the final rules take effect on March 15, 2011, compliance with the 2010 Standards for Accessible design is permitted as of Sept. 15, 2010.

The new regulations include a general "safe harbor" providing that those elements in covered facilities built or altered in compliance with the 1991 Standards are not required to be brought into compliance with the 2010 Standards until those elements are scheduled for alteration. However, the "safe harbor" does not apply to those elements in existing facilities that were not governed by the 1991 Standards, but are now governed by the new regulations and 2010 Standards.

The new regulations provide that full compliance with the requirements for new construction and alterations is not required where the public entity or public accommodation "can demonstrate that it is structurally impracticable to meet the requirements" such as in those "rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." However, the public entity or public accommodation is required to comply in other aspects or features to the maximum extent practicable.

Changes to 2010 Standards for Accessible Design

Some of the relevant key changes to the 2010 Standards for Accessible Design — when compared with the 1991 ADA Accessibility Guidelines (ADAAG) are noted below.

Employee Work Areas

Employee work areas must be served by Common Use Circulation Paths (with Exceptions for certain types of work areas), have wiring in place for the future installation of visible appliances and, in new construction, must be served by accessible means of egress.

Amusement Rides

Many newly designed or newly constructed amusement rides must be accessible and located on an accessible route to the ride. However, amusement rides designed primarily for children, amusement rides that are controlled or operated by the rider (e.g., bumper cars), and amusement rides without seats, qualify for certain exceptions for accessibility compliance.

Recreational Boating Facilities

Accessible boat slips (when boat slips are provided at a facility) must be dispersed throughout the various types of boat slips and the number of accessible slips required is based on the total number of boat slips provided.

Exercise Machines and Equipment

At least one of each type of exercise equipment must be on an accessible route and must have a clear floor space (30 inches minimum x 48 inches minimum) positioned to enable an individual with a disability to use the equipment.

Fishing Piers and Platforms

Newly designed, newly constructed, or altered fishing piers must provide accessible routes (with exceptions). At least 25% of guardrails or handrails must be no higher than 34 inches and must be dispersed. Clear floor or ground space must be provided at each accessible railing, and turning space must be provided on the pier.

Golf Facilities

Newly constructed and altered golf facilities must have either an accessible route or golf cart passages with a minimum width of 48 inches connecting accessible elements and spaces within the boundary of the golf course. The golf-cart rental area, bag drop-off area, and weather shelters shall be located on an accessible route. Certain percentages of practice teeing grounds, practice teeing stations at driving ranges, and putting greens must be accessible.

Miniature Golf

At least 50% of all holes on a miniature golf course must be accessible. These accessible holes must be consecutive, and they must be on an accessible route. The last accessible hole must be on an accessible route that connects to the course entrance or exit without going back through other holes.

Play Areas

Play areas designed, constructed, and altered for children ages two and over in a variety of settings, including parks, schools, childcare facilities, and shopping centers, are covered. Accessible ground and elevated play components, accessible routes, ramps and transfer systems (typically a platform or transfer steps), and accessible ground surfaces must be provided.

Reach Ranges

The unobstructed side reach range has been lowered to 48 inches above finish floor from 54 inches in ADAAG. Additionally, the unobstructed low reach has been raised to 15 inches from nine inches in ADAAG. This change will affect a variety of building elements such as light switches, electrical outlets, thermostats, fire alarm pull stations, card readers, and keypads.

Areas of Sport Activity

An accessible route must connect the boundary of each area of sport activity (e.g., courts and playing fields, whether indoor or outdoor). In court sports, the accessible route must directly connect both sides of the court.

Public Entrances

At least 60% of public entrances must be accessible as compared with 50% of public entrances required to comply under the 1991 Standards.

Water Closet Clearances in Single-User Toilet Rooms

In single-user toilet rooms, the water closet now must provide clearance for both a forward and a parallel approach and, in most situations, the lavatory cannot overlap the water closet clearance. The in-swinging doors of single-user toilet or bathing rooms may swing into the clearance around any fixture if clear floor space is provided within the toilet room beyond the door's arc.

Assembly Areas

The incremental scoping for wheelchair spaces and companion seats required in assembly areas with fixed seating has been reduced. Under the 1991 Standards, incremental scoping for assembly facilities with more than 500 seats was one additional wheelchair space and companion seat for each increase of 100 seats. 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 one additional space for each 200 seats over 5001. More specific guidance about the appropriate vertical and horizontal dispersion of accessible seating, sightlines over standing spectators, and the provision of companion seating has been provided.

Access to Stages

In situations where a circulation path directly connects a seating area and a stage (either a permanent or temporary stage), both Title II and Title III entities must now provide an accessible route that directly connects the accessible seating and the stage.

Direct Access Entrances from Parking Structures

Where levels in a parking garage have direct connections for pedestrians to another facility, all of these direct entrances must now be accessible.

Transient Lodging Guest Rooms

Overall scoping for guest rooms with accessibility features is unchanged, but the rules now limit the number of rooms where both communication access and mobility access features are provided. No more than 10% of the guest rooms (but not less than one room) required to provide mobility features may also be equipped with communication features. Accessible guest rooms must be dispersed throughout various classes/types of rooms offered.

What This Means for Public Accommodations, Public Entities, and Those Who Design Modifications or New Construction on Their Behalf

Prior to making modifications to existing public facilities and public accommodations, entities should evaluate whether it would be more favorable to comply with the 2010 Standards or the 1991 Standards. Because new construction and alterations will not be required to comply with the 2010 Standards until March 15, 2012, entities will have a window where they can apply the 1991 Standards or the 2010 Standards when making modifications to existing facilities or engaging in new construction.

The adoption of the revised ADA/ABA Accessibility Guidelines may be helpful for architects and designers, because the new standards have been harmonized with the model building code (International Building Code and ICC/ANSI A117.1) referenced by many U.S. states, including Pennsylvania and New York. Therefore, if a designer complies with the state building code's accessibility requirements, they will likely — for the most part and with some exceptions — achieve compliance with federal accessibility requirements under the ADA. This is in contrast to the 1991 Standards, where some of the accessibility requirements were in conflict with those required by the model building code. The adoption of the revised ADA/ABA Accessibility Guidelines by the DOJ may make designing accessible facilities in compliance with both state and federal requirements less challenging.

Conclusion

State and local governmental entities and public accommodations seeking to assess and reduce their potential exposure to lawsuits under Title II and Title III of the ADA should consider working with legal counsel and

accessibility professionals to modify existing policies to comply with the new regulations. They also should consider the impact of the new regulations and the ADA/ABA Accessibility Guidelines when assessing the plans for and the timing and costs of potential modifications to existing facilities or new construction.

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