

## BY-LINED ARTICLE

### New ADA Regulations Affect Govt. Entities, Public Accommodations

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On Sept. 15, the U.S. Department of Justice published new final regulations in the *Federal Register* under Title II and Title III of the Americans with Disabilities Act 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. For example, the regulations provide specific requirements for reservations made by places of lodging and additional coverage for timeshares and condominiums that operate like hotels as well as a host of other facilities including certain residential facilities, swimming pools and play areas, among others.

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 health care providers, daycare and senior centers, pharmacies and offices of accountants and lawyers, among others.

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

- Standards for accessible design. The DOJ has adopted revised ADA design standards that include the relevant chapters of the Architectural and Transportation Barriers Compliance Board's 2004 ADA/ABA Accessibility Guidelines as modified by specific provisions of the new regulations. To minimize compliance burdens on entities subject to more than one legal standard, the DOJ has synchronized 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.
- "Safe harbor." The new regulations include a general "safe harbor" under which 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. It is important to note that 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.
- Ticketing. The new regulations provide guidance to venue operators on selling tickets for accessible seating for individuals with disabilities and the hold and release of accessible seating, including when venue operators can sell accessible seating to individuals who do not need it. The new regulations also cover ticket pricing, prevention of the fraudulent purchase of accessible seating, the ability to purchase multiple tickets including for accessible seating, and how the purchase of tickets through the secondary market affects the venue operator's duties. A public entity or public accommodation may not require proof of disability before selling tickets for accessible seating.
- 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 the miniature horses have been trained to perform tasks for the benefit of 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 a 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.
- Exception for structural impracticability. 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.

## Effect on Public Entities, Architects and Designers

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, he or she 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.

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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