Hospitality Update

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Changes In ADA Accessibility Standards Are On The Way

By Tom Rebel (Atlanta)

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act (ADA). The ADA provided broad anti-discrimination prohibitions against disabled individuals in several areas, including employment, state and local government services and facilities, public accommodations, and telecommunications.

Title III of the ADA contained proscriptions in the public accommodations area, which refer to establishments that cater to the public, such as hotels, motels and restaurants. To implement them, the Department of Justice (DOJ) issued regulations and adopted architectural standards issued by the Federal Access Board. These guidelines, called the ADA Accessibility Guidelines or ADAAG, took effect in 1991, imposing stricter standards for alterations begun after January 26, 1992 and new construction concluded in 1993 and later.

During the succeeding 20 years, Title III's provisions have been enforced both by the DOJ and by private suits where a prevailing plaintiff not only gets an order making facilities accessible, but also attorneys' fees and costs. The attorneys' fees can be significant and this has created an incentive for several plaintiff's firms to be active in filing suits, often for those who we call "serial plaintiffs."

What's New

On the 20th anniversary of the ADA, Attorney General Eric Holder issued a notice that the DOJ was adopting a new Rule, and replacing the 1991 ADAAG with a newer version (2010 Standards). The Rule and the standards are phased into effect in two stages. The DOJ Rule becomes effective six months after its publication in the Federal Register, while the 2010 Standards become effective 18 months after publication of the Rule in the Federal Register. The Rule was published in the Federal Register on September 15, 2010, so the effective dates are March 15, 2011 for the new Rule and March 15, 2012 for the 2010 Standards.

Any new construction in which the last building permit is issued or certified (depending upon the jurisdiction) on or after March 15, 2012, or any alterations commenced on or after March 15, 2012 must comply with the 2010 Standards. New construction or alterations commenced on or after the effective date of the Rule, but before the effective date of the 2010 Standards, can either be done in conformance with the old or the 2010 Standards. Importantly, elements that were in compliance with the 1991 ADAAG as of March 15, 2012 do not have to be brought up to compliance with the 2010 Standards unless they are subsequently altered.

Set out below is a summary of some of the changes to the architectural standards which are likely to impact the hospitality industry.

Reach Ranges

No changes were made for forward reaches, but the side-reach ranges are lowered from a maximum of 54 inches (to the highest operable part) to 48 inches and raised from a minimum of 9 inches (to the lowest operable part) to 15 inches. This will affect a number of elements, including:

- light switches, thermostats and clothes rods in accessible rooms;
- hair dryers and towel racks in bathrooms in accessible rooms; and
- hand dryers and soap- and paper-towel dispensers in accessible restrooms.

All of these items must be placed so that the highest operable part is no higher than 48 inches above the finished floor and no deeper from the face than 10 inches. If the object is more than 10 inches from the counter front for example, the reach range is less – 44 inches for objects within 10 to 24 inches of the front.

Accessible Public Area Restrooms

The 2010 Standards provide some regulatory relief to employers. For example, men's restrooms with only one urinal will no longer be required to provide an accessible urinal. Also, the 2010 Standards allow greater flexibility for the placement of the centerline of the wheelchair accessible toilet (between 17 and 19 inches from the wall to the centerline, as opposed to the old 18 inches to the centerline).

But the ability to install a lavatory immediately adjacent to the water closet has been eliminated from the 2010 Standards. To allow for side

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transfers, the 2010 Standards prohibit lavatories from overlapping the clear floor space at water closets. It is possible to design an accessible restroom that is no larger but without the lavatory adjacent to the water closet, partly because the 2010 Standards allow items like grab bars, dispensers, coat hooks and shelves to overlap the clear floor space necessary to approach the various elements.

Sales-And-Service Counters

For the first time, the 2010 Standards establish different accessible lengths for counters based on the type of approach provided. If it is a forward approach, the accessible portion of the counter must be at least 30 inches long and no higher than 36 inches with knee and toe space. If it is a parallel approach, the Standard remains at 36 inches wide and no higher than 36 inches.

Accessible Rooms

The new Standards provide that at least one guestroom with mobility features must also provide accessible communication features. The old ADAAG required all such rooms to have communication features. Also, not more than 10% of the guestrooms required to provide communication features may be satisfied by putting those features in guestrooms with mobility accessibility. In addition, the new scoping provisions provide that both guestrooms with communication features and those with mobility features must be dispersed among the types of rooms.

Importantly, the new Standard no longer allows a portable visual alarm option. Rooms with communication features must be equipped with a fire alarm system which is permanently installed with audible and visual alarms. They must also have visible notification devices that alert room occupants of incoming telephone calls and a door knock or bell.

For new and altered guestrooms that are not designated as accessible guestrooms, the doors must have adequate clear width to allow wheelchair passage. This includes bathroom doors. There are some other changes to accessible rooms.

Room Reservation Policies

Effective March 15, 2012, hotels and motels must modify their procedures to ensure that individuals with disabilities can make reservations for accessible guestrooms during the same hours and in the same manner as other individuals. The reservations service must be able to identify and describe accessible features in the hotels in enough detail to reasonably permit individuals to assess whether a given hotel or guestroom meets their accessibility needs. They must ensure that accessible guestrooms are held for use by individuals with disabilities until all other guestrooms of that type have been reserved, reserve upon request accessible guestrooms or specific types of guestrooms and guarantee that the specific guestroom reserved will be held.

First Time Standards For Recreational Areas

The 2010 Standards for the first time set accessibility standards for a number of areas, including pools, spas, saunas, steam rooms, gym equipment and golf courses. Because there were no existing standards, the safe-harbor provision discussed above does not apply to these elements. The new standards require at least two accessible means of entry for larger pools, and at least one accessible entry for smaller pools, as well as accessible entry for spas, saunas and steam rooms. Because many resort facilities do not have an accessible means of entry for existing pools, they will have to consider buying appropriate lifts or otherwise making these elements accessible.

The 2010 Standards require that there be an accessible route in golf courses to connect all accessible elements, as well as the golf cart rental areas, bag-drop areas, tee grounds, putting greens and weather shelters. An exception allows the accessible route requirements to be met within the boundaries of the golf course by providing a golf cart passage, as long as the specified width and curb cuts are met. Most golf courses probably already have most of the accessible paths necessary.

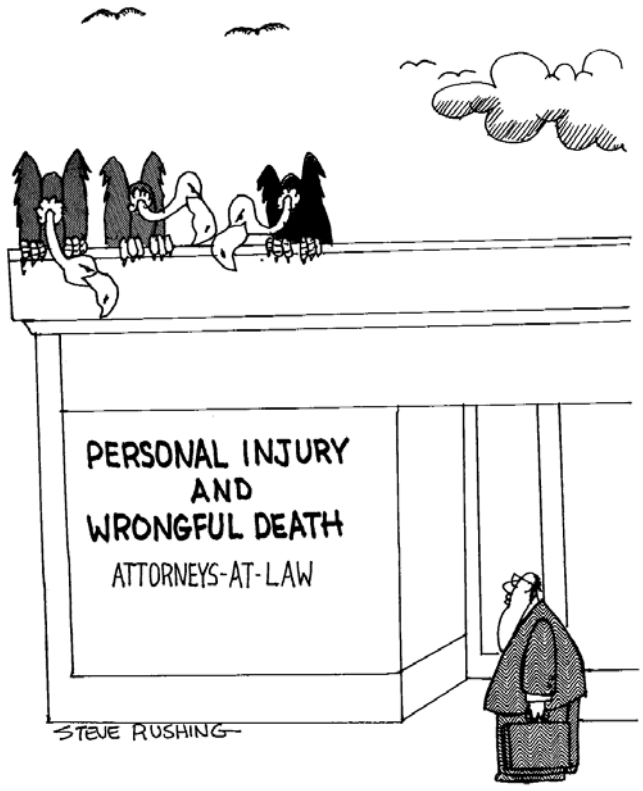
The new Standards require that there be an accessible route to exercise machines and equipment and provide that at least one of each type of exercise machine must meet the clear floor space requirements. Significantly, the Standards do not require changes to exercise machines or equipment in order to make them more accessible to persons with disabilities. Unfortunately, most strength training equipment and machines are considered different types and there are many types of cardiovascular exercise machines. Two machines may share a clear floor space, but providing access and sufficient clear floor space will require much thought and may result in eliminating some machines, particularly in fitness rooms with limited space.

The Bottom Line

All in all, there are hundreds of changes from the 1991 ADAAG to the 2010 Standards. And the Department of Justice is more aggressively enforcing the Act's provisions. Moreover, there is already a heightened awareness among advocacy groups and the disabled community at large, and many plaintiff's lawyers are learning that Title III lawsuits can generate significant fees.

The time to act is now. Hospitality employers should begin to put together a plan for ensuring that current facilities comply with the 1991 ADAAG, or are brought into compliance before the effective date of the 2010 Standards and that newly constructed or altered facilities are compliant with the 2010 Standards on or after the effective date.

For more information contact the author at trebel@laborlawyers.com or 404.231.1400.



Gone To The Dogs

Rules on Service Animals to Become Much Stricter

By James J. McDonald, Jr. (Irvine)

Regulations issued in 1991 following the enactment of the Americans with Disabilities Act (ADA) required that public accommodations (which include restaurants, hotels, retail establishments, theaters and concert halls) modify their policies, practices, or procedures to permit the use of a service animal by an individual with a disability. Essentially this means that service animals accompanying persons with disabilities have to be admitted to establishments with policies otherwise excluding pets or other animals.

When the ADA was enacted, most service animals were "seeing-eye" dogs that assisted blind or sight-impaired persons. In most cases, these dogs were highly-trained and, because of their extensive training, were not likely to create a nuisance or a sanitary problem.

But over time, quite a variety of species came to be characterized by their owners as service animals including pigs, horses, monkeys, snakes, lizards, birds and rodents. Dogs and other animals that merely provide emotional comfort to their owners also have been characterized as service animals. The proliferation of creatures claimed to be service animals has posed obvious problems for many restaurants and hotels in terms of safety, sanitation and disturbance of other guests. Until now, however, proprietors were largely powerless to bar these types of animals from their establishments.

What Animals Now Qualify

The U.S. Justice Department has issued new regulations effective March 15, 2011, which will substantially limit the types of animals that will qualify as service animals under the ADA.

First, only dogs (and miniature horses in some cases) will qualify as service animals under the new regulations. "Other species of animals, whether wild or domestic, trained or untrained," will not qualify. The new regulations do not place limits on breed or size of dog, however.

Second, the dog must be "individually trained to *do work* or *perform tasks* for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability." The regulations go on to state that the work or tasks performed by the service animal must be directly related to the handler's disability. Examples of work or tasks set forth in the regulations include:

- assisting sight-impaired persons with navigation or other tasks;
- alerting hearing-impaired persons to the presence of people or sounds;
- providing non-violent protection or rescue work;
- pulling a wheelchair;
- assisting an individual during a seizure;
- alerting an individual to the presence of allergens;
- retrieving items such as medicine or the telephone;
- providing physical support and assistance with balance and stability to individuals with mobility impairments; and

- helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.

Under the new regulations, the mere "provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks" for purposes of the definition of service animal. Thus, animals that provide only comfort or emotional support for their owners will no longer qualify as service animals. For a dog to qualify as a service animal to an owner with a psychiatric disability under the new regulations, the dog must be trained to perform specific work or tasks.

Examples given in the guidance accompanying the new regulations of tasks performed by psychiatric service animals include reminding the handler to take medicine, providing safety checks or room searches for persons with Posttraumatic Stress Disorder, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

The guidance also states that a dog that is used to "ground" a person with a psychiatric disorder will qualify as a service animal if the dog has been trained 1) to recognize that a person is about to have a psychiatric episode, and 2) to respond by nudging, barking or removing the person to a safe location until the episode subsides.

The new regulations additionally clarify that "attack dogs" trained to provide aggressive protection of their owners will not qualify as service animals. The crime-deterrent effect of a dog's presence, by itself, does not qualify as "work" or "tasks" for purposes of the service animal definition.

How They Should Be Handled

The new regulations also formalize prior Justice Department technical assistance addressing the use and handling of service animals. The regulations provide that a public accommodation may ask an individual with a disability to remove a service animal from the premises if the animal is not housebroken or if the animal is out of control and the animal's handler does not take effective action to control it. (Ordinarily, according to the regulations, a service animal shall have a harness, leash or other tether, unless the person with a disability is unable to use a harness, leash or tether or the use of such a device would interfere with the animal's ability to perform its work or tasks.) If a service animal is removed for any of these reasons, the person with a disability must still be permitted to

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access the establishment's goods, services or accommodations without the animal being present.

The regulations also confirm that a public accommodation is not responsible for the care or supervision of a service animal.

The regulations provide that a public accommodation may not ask about the nature or extent of a person's disability, but that it generally may make two inquiries to determine whether an animal qualifies as a service animal: 1) it may ask if the animal is required because of a disability, and 2) what work or task the animal has been trained to perform. These inquiries may not be made, however, when it is readily apparent that the animal is a service animal, such as where a guide dog is guiding a blind person or a dog is pulling a wheelchair. Further, a public accommodation may not require documentation, such as proof that the animal has been certified, trained or licensed as a service animal. Nor may a public accommodation require a person with a disability to pay a surcharge for a service animal, even if it applies such a surcharge for pets.

How The Law Applies

These regulations will not apply to landlords or airlines, which are governed by the Fair Housing Act and the Air Carrier Access Act, respectively. It is also not yet clear that these regulations, and particularly the definition of a service animal, will be applied by courts to cases brought under Title I of the ADA which covers employment. A good argument may be made based on existing case law that a stricter standard would apply under Title I.

Unlike under Title III where a dog must be allowed onto the premises if it qualifies as a service animal and does not leave a mess or cause a serious disturbance, an employee under Title I of the ADA is entitled only to such accommodations as are necessary to enable him or her to perform the essential functions of the job. An employee therefore will likely need to show that the presence of a service animal is *needed* for the employee to be able to perform his or her essential job duties. An animal that provides only comfort or emotional support to an employee but that is not needed in order for the employee to be able to work will not likely qualify as a reasonable accommodation under Title I of the ADA.

These new regulations give long-needed clarity to hotels, restaurants, retailers and other public accommodations regarding which animals must be allowed as service animals, and under what circumstances. No longer will these establishments need to allow patrons to bring exotic, dangerous, disruptive or unsanitary animals with them as purported "service animals."

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