ADA Accessibility Compliance
for Real Estate Owners and Developers
Determining Compliance Standards, Conducting Due Diligence and Other Risk Mitigation Strategies

TUESDAY, NOVEMBER 25, 2014

1pm Eastern    |    12pm Central   |   11am Mountain    |    10am Pacific

Today’s faculty features:

Marty Orlick, Partner, Chair of Jeffer Mangels Butler & Mitchell's ADA Compliance and Defense Practice Group, San Francisco, California

Kristina Launey, Partner, Seyfarth Shaw, Sacramento, Calif.

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ADA Accessibility Compliance and Litigation Defense: Legal Standards and Effective Strategies for Owners and Developers of Real Estate

Determining Whether Projects and Renovations Must Comply and Avoiding ADA Claims

Live Strafford Webinar
November 25, 2014

Panelists:

Martin H. Orlick, Esq.
Jeffer Mangels Butler & Mitchell LLP

Kristina M. Launey
Seyfarth Shaw LLP
"What, Me Worry?"

Alfred E. Neuman, Mad Magazine
I. Overview of the Americans with Disabilities Act Accessibility Standards [Not So New Anymore]

II. Who must comply

III. Exemptions and safe harbor protection

IV. Enterprise-wide ADA compliance

V. ADA due diligence for real estate lawyers

VI. Best practices for ADA compliance

VII. Effective Litigation and Dispute Resolution Strategies
Five titles under the Americans with Disabilities Act of 1990
- Our focus is Title III – Public Accommodations
- The Americans with Disabilities Act of 1990 was the most comprehensive civil rights legislation designed to provide full and equal access to public accommodations for persons with disabilities
- Five Titles. We will focus on Title III – Public Accommodations
- Over 22,000 ADA lawsuits in the US, over 9,000 alone in California since 2004
  - 3,050 ADA lawsuits reported to the California Commission on Disabled Access in 2013
  - Many against developers, retailers, banks, wineries, public buildings, hospitality industry owners and operators
- There are now over 22,000 compliant hotels, stores, arenas, libraries, courthouses
- ADA compliance is good for business – it is the law!
- Interplay of federal and state accessibility laws
New Federal Regulations

• 2010 ADA Title III Regulations ("2010 Regulations")

2. Sets new standards for what is an accessible facility ("2010 Standards").
3. Clarifies or expands key operational accessibility requirements (e.g., service animals, effective communication).
4. Addresses new accessibility issues (e.g., reservations, power mobility devices).
5. Addresses Title III coverage of timeshares and condo-hotels.
ADA Title III prohibits discrimination against individuals with disabilities by places of public accommodation.

ADA Title III requires that public accommodations:

- Not discriminate on the basis of disability;
- have accessible facilities;
- make reasonable modifications to their policies, practices, and procedures; and
- provide auxiliary aids and services at no additional charge, including those necessary to ensure effective communication with individuals with disabilities.
• Who is covered by the ADA?
• ADA imposes "joint and several" liability on owners, lessors, lessees and operators of public accommodations
  • What is a "public accommodation?"
  • Owners typically are responsible for the architectural and as-built conditions of the property
  • Operators typically set policies, practices and procedures and have liability
  • Landlords
  • Tenants
  • Foreclosing lenders
Who Is Regulated?

*Public accommodations:* Businesses that provide goods and services directly to the general public.

*But also …*

*Commercial facilities:* Privately-owned, non-residential facilities whose operations *affect commerce* but that do not serve customers or clients, such as factories, warehouses, or corporate office buildings.

• Would a TV filming studio with a live audience be a public accommodation?

• What if the studio is a warehouse that brings in carpenters, designers, make up artists, key grips, actors and food services but no live audience?
The compliance date for the 2010 Standards for new construction and alterations is determined by:

- the date the last application for a building permit or permit extension is certified to be complete by a state, county, or local government;
- the date the last application for a building permit or permit extension is received by a state, county, or local government, where the government does not certify the completion applications; or
- the start of physical construction or alteration, if no permit is required.
As of March 15, 2012, commercial facilities, like public accommodations, must comply with the new construction and alterations regulations of the 2010 Standards.

- 2010 Standards for new construction must be met unless site conditions make compliance structurally impracticable — a rare exception.

- The commercial facility must also meet 2010 Standards accessibility requirements for (1) any elements or spaces that it is altering, and (2) that are part of the path of travel to a primary function area that it will be altering.

The 2010 Standards do not require commercial facilities to engage in the removal of existing barriers or comply with any rules relating to the facility’s operations.
• Existing recreational elements must be made to comply with the 2010 Standards to the extent “readily achievable.”
• “Readily achievable” means “easily accomplishable without much difficulty or expense.” The application of this standard is highly case specific and depends on a number of factors that include:
  • the nature and cost of the action
  • the facility’s financial resources and the financial resources of any parent corporation/entity (if applicable)
  • the administrative and fiscal relationship between the facility and any parent corporation/entity (if applicable)
  • the effect of the action on the facility’s operations
  • the number of employees at the facility
  • legitimate safety requirements
Existing Recreational Elements That Must Comply With The 2010 Standards by March 15, 2012

- Swimming pools, wading pools, and spas
- Saunas and steam rooms
- Exercise machines and equipment
- Play areas
- Fishing piers and platforms
- Recreational boating facilities

- Golf courses
- Amusement rides
- Mini golf facilities
- Shooting facilities
- Team or player seating
- Accessible route to bowling lanes
- Accessible route to court sports facilities
How to Avoid Becoming an ADA Target

Be proactive, cover all the bases – "You can pay us now or you can pay us more later!"

- **Enterprise-wide ADA Compliance Programs**
  - Written policies, practices and procedures
  - DOJ – Document Requests
  - Confidential Attorney-Client System-wide ADA surveys
- **Effective Communication**
  - Auxiliary aids and services
  - Website Accessibility
    - Case law & settlements (Target case, H&R Block Settlement, etc.)
    - The Almost-Pending Regulations
- **Service Animal & “Other Powered Mobility Devices”**
ADA Due Diligence for Real Estate Professionals

- Typical Due Diligence Checklists include:
  - Title
  - Environmental
  - Structural
  - Financial

- **Add ADA Due Diligence to Your Checklist:**
  - Your client's secrets are only safe with a lawyer
  - Attorney Work Product Protection
    - "Factoids" are not absolutely shielded
  - Pre-acquisition
  - Pre-leasing
  - Pitfalls to Avoid and Exposure
  - California Civil Code Section 1938
  - San Francisco Administrative Code Section 38 Disclosures
• **ADA Due Diligence in Purchasing Debt**
  • Purchasing Debt for Investment
  • Purchasing Debt with the Intent to Foreclose

• **ADA Due Diligence for Lenders**
  • DOJ’s position on foreclosure successor liability
  • *DOJ Technical Assistance Manual, III - Public Accommodations*
    “Is a bank that acquires ownership of a place of public accommodation through foreclosure subject to Title III? **Answer:** Yes. Any owner of a place of public accommodation is covered as a public accommodation regardless of the intended or actual duration of its ownership.
  • Louisville, KY – DOJ Consent Decree
  • Rockland, ILL – DOJ Investigation

• **Addressing ADA risk allocation in Purchase and Sale Agreements, leases, and management agreements**
  • Avoid costly consequences and unpleasant disputes between landlords and tenants, owners and operators
  • The importance of ADA compliance for the owner, tenant or operator

• **How do you select the right due diligence team?**
  • It's all about experience and understanding real estate transactions
California Civil Code Section 1938:
"Any owner or lessor shall state on every lease form or rental agreement executed on or after July 1, 2013, whether the property being leased or rented has undergone inspection by a Certified Access Specialist (CASp), and, if so, whether the property has or has not been determined to meet all applicable construction-related accessibility standards pursuant to Section 55.53."
San Francisco Administrative Code Chapter 38:
To protect small businesses by requiring:
(1) All leases and amendments to existing leases of premises of 7,000 SF or less to disclose whether existing public restrooms, ground floor entrances and ground floor exits are accessible by removing all architectural barriers to the extent “readily achievable”; OR
(2) Landlords must notify tenants in writing that the property may not currently meet all applicable construction-related accessibility standards for public restrooms, ground floor entrances and exits.
San Francisco "Small Business"
ADA Lease Disclosure Requirements cont'd.

San Francisco Administrative Code Chapter 38:
To protect small businesses by requiring:
- Disability Access Obligations Notice
- No penalty or consequences for non-compliance
- What are the implications?
New Features in Auxiliary Aids and Services

- Telecommunications Relay Services (TRS)
- TTY Internet Protocol Communications Devices
- Accessible Websites

WHY?
- Effective communication
• **Insurance Products:**
  - Comprehensive General Liability Insurance
    - No occurrence, no injury, no coverage
    - ADA claims are typically expressly excluded
  - Employment Practices Liability Insurance covers discrimination and may cover ADA claims
  - Indemnification and Contribution in Purchase and Sale Agreements and Leases
• My building was constructed before the ADA, so I'm grandfathered, right?

• I hired a licensed architect and general contractor to build my building, so I can rely on them to get it right?

• The building department approved my plans and said the property was code compliant when it issued the Certificate of Occupancy, so it is compliant, right?
• I’m just the tenant, so why am I responsible for ADA building violations?

• I’m the property owner, the building is separately managed or leased, so why am I responsible for ADA violations?

• My “Triple Net” lease prevents me from being sued for ADA violations, doesn’t it?
• Does the business have effective written ADA compliance policies, practices and procedures?
• Do you follow them?
• Has your client performed an enterprise-wide ADA assessment?
Policies, Practices and Procedures
The New Service Animal
Service Animals

- Dogs and miniature horses only
- Comfort animals are not service animals
- What you can and what you cannot ask guests about their service animals
  - You may ask whether the guest needs the animal because of a disability
  - You cannot request proof of training or license for the service animal;
  - You cannot ask a guest to explain or verify his/her disability
  - You may ask what tasks has this animal been trained to perform
- You cannot charge a pet fee or cleaning charge
  - You may charge for actual damage
The “work” or “tasks” performed by a service animal must be directly related to the individual’s disability.

Examples:

1. Guiding people who are sight-challenged or blind
2. Pulling a wheelchair
3. Retrieving dropped items
4. Alerting individuals who are deaf or hard of hearing to the presence of people, sounds, hazards, etc.
5. Alerting and protecting a person who is having a seizure; and
6. Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors or reminding the individual to take medication
Service Animals: Practice Pointer

• We often see “no animals other than service dogs” built into leases or on signs to buildings. This does not comply with the ADA, and does not comply with many states’ laws, which allow other species of service animals besides only dogs (remember the miniature horses?)

• Be careful about state, city and FHA regulations regarding service animal policies
Mobility Device Basics Under 2010 Regulations

• Places Open to the Public must:
  • Permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids (walkers, crutches, canes, braces, etc.) in any areas open to pedestrian use.
  • Make reasonable modifications in policies, practices, or procedures to permit the use of “other power-driven mobility devices” (OPMD) by individuals with mobility disabilities, unless it can be shown that the OPMD cannot be operated in accordance with established safely rules.
• Segways are now considered power-driven mobility devices

  • Segway max. speed: 12.5 mph
  • Avg. running speed: 6-10 mph

• Requires modifications of “policies, practices and procedures” to allow Segways
Implications for the Hospitality and Service Industries

1. Physical accessibility barriers, design and construction
2. Policies, practices, and procedures
3. Service animals, mobility devices
4. Auxiliary aids and services, effective communications
“Barrier Removal”
(Bringing non-compliant building elements into compliance)

- Summary of Barriers and Solutions / Priorities
  - Entrance and check-in;
  - Accessible Paths of Travel - Ramps / Curbs
  - Parking areas
  - Valet parking
  - Public Facilities – Registration, Concierge Services, Business Centers, Fitness Centers, Conference Facilities
  - Restaurants
  - Bars
  - Rooms and spaces
  - Spas
  - Recreational areas
  - Pools and Jacuzzis
Typical ADA Barriers
Lobby Escalator Presents
A Dangerous Protruding Object

Solution to Stair
Overhead Obstruction
Elegant Solution to Overhead Obstruction

Elegant Solution to Overhead Obstruction
Elegant Solutions

Elegant Wheelchair Lift

Elegant Wheelchair Lift
Elegant Accessible Restroom Solution
Inconsiderate Placement of Tree Blocks Parking Access Aisle

Disregard of Accessible Parking Space
Inaccessible Registration or Transaction Counters
Typical Non-compliance in Resorts

- No accessible path of travel from parking spaces to entrance
- No accessible path of travel to chair lift or other amenities
- Signage must be clearly visible
Typical Non-compliance in Resorts

No pool lift

No spa lift
What do you do when your client is served with a Summons and Complaint – or worse, an investigation letter or subpoena from the DOJ?

• Take a deep breath
• Take stock of your client's ADA compliance initiatives
• Contact experienced counsel
• Perform a site-specific and enterprise-wide ADA assessment

• DOJ/Hilton Worldwide Consent Decree - Post-1993 construction
  • 2,800 locations, 13 investigated – system-wide Consent Decree
Drive-by and Individual Plaintiff Litigation

- DOJ Enforcement Actions – No Target is Too Large or Too Small
  - Hilton / DOJ ADA Settlement
  - Franchisor liability for ADA compliance
  - DOJ industry sweeps and system-wide investigations
  - Zagat top 50 restaurants
  - Peroutka & Peroutka - 2 complaints led to a DOJ investigation
  - Fines and other costs – DOJ has recently stepped up enforcement and penalties
- State civil rights agencies
- Private advocacy groups
- Private right of action through individual and class action litigation
- EEOC complaint against FedEx – auxiliary aids and services for employees and job applicants
- Website accessibility actions growing
Non-Compliance Risks

• Department of Justice (DOJ) Enforcement
  • Federal lawsuit following investigation.
  • Scope of action: single facility or an entity’s entire portfolio or system.
  • Types of relief:
    1. injunctive relief;
    2. damages for aggrieved persons; and
    3. civil penalty of up to $75,000 for the first violation and $150,000 for each subsequent violation.

• Federal Lawsuits by Private Plaintiffs
  • Plaintiffs can proceed directly to federal (or state) court.
  • Scope: Cases can involve one or more facilities.
  • Class actions are an option under the right circumstances.
• Types of relief:
  1. injunctive relief; and
  2. attorneys’ fees.
• No monetary damages.
• State law claims may be added that do provide for monetary damages.
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