

ADA Compliance for Real Estate Owners and Operators: Avoiding and Responding to Drive-By Claims and Enforcement Actions

Understanding the ADA Regulatory Framework and Potential for Abusive Litigation

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ADA Compliance for Real Estate Owners and Operators:

Avoiding and Responding to Drive-By
Claims and Enforcement Actions
February 14, 2017

Agenda

- 1 Growth of ADA Title III Litigation
- 2 Legal Framework and Proposed Legislation
- 3 Architectural Standards for Compliance
- 4 Effective Communication and Website Accessibility
- 5 Service Animals and OPMDs
- 6 Prevention and Risk Management

Presenters



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Growth of ADA Title III Litigation

Common Types of ADA Title III Lawsuits For Real Estate Owners and Operators

- Inaccessible facilities (includes all “drive-by” lawsuits)
- Service animal exclusion
- Power mobility device exclusion
- Failure to provide auxiliary aids and services for effective communication
- Inaccessible Website (the virtual “drive-by” lawsuits)

ADA Accessibility Litigation

- Increase in ADA Title III lawsuits in recent years



Most Active Jurisdictions

Top 10 States for ADA Title III Federal Lawsuits in 2016



Noncompliance Risks

- Remedies can be severe:
 - Injunctive relief
 - Attorneys' fees and litigation costs
 - Civil penalty and compensatory damages (in DOJ actions)
 - Reputation risk



Noncompliance Risks

- Federal Lawsuits by Private Plaintiffs
 - Plaintiffs can proceed directly to federal court.
 - Scope: Cases can involve one or more facilities.
 - Class actions are becoming more frequent.
 - Types of relief:
 - injunctive relief; and
 - attorneys' fees.
 - No monetary damages.
 - State law claims may be added that do provide for monetary damages.

Noncompliance 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:
 - injunctive relief;
 - damages for aggrieved persons; and
 - civil penalty of up to \$75,000 for the first violation and \$150,000 for each subsequent violation.

What is Title III of the ADA?

ADA Basics

- The Americans with Disabilities Act (“ADA”) is a federal civil rights law that prohibits discrimination against individuals with disabilities.
- Signed into law by President George H.W. Bush on 7/26/90.
- Covers five key areas:
 - Employment (Title I)
 - State and Local Government Activities (Title II)
 - Public Transportation (Title II)
 - Places of Public Accommodation (e.g., shopping malls, hotels, retailers, theaters) (Title III)
 - Telecommunications (Title IV)

*** Today's focus = Title III

ADA Basics

- 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



ADA Basics

- ADA Title III requires places of public accommodation to:
 - have **accessible facilities**;
 - make **reasonable modifications** to its policies, practices, and procedures; and
 - provide auxiliary aids and services at no additional charge, to ensure **effective communication** with individuals with disabilities.
 - **Maintain the accessible features** of its facilities.

ADA Basics

- Accessible commercial and public accommodations
- Operational requirements for public accommodations:
 - Service animals
 - Nontraditional power mobility devices – e.g. Segways
 - Hotel reservations
 - Ticketing sales
 - Effective communication
 - Websites and other technology
 - Reasonable modifications to policies/practices
 - Provision of auxiliary aids and services

ADA Basics

- **Physical Access Standards:**

- Facilities altered after January 26, 1992: Alterations must comply with applicable ADA Standards to the “maximum extent feasible” and compliance with path of travel requirements is required;
- Facilities constructed after January 26, 1993: Comply with all applicable ADA Standards unless structurally impracticable, or technically infeasible;
- Pre-1993 facilities: “Readily achievable” barrier removal standard applies.

Proposed Legislation to Address “Drive-By” Lawsuits

- Requiring Notice and Opportunity to Cure as Prerequisite to Filing ADA Title III Lawsuit
- Senate Bill S. 3446/ House Bill H.R. 3765
- **Key Components**
 - Disability Rights Section of DOJ Civil Rights Division to educate state and local governments and property owners on effective and efficient strategies

Proposed Legislation to Address “Drive-By” Lawsuits

- **Key Components** (cont.)
 - Cannot commence lawsuit unless:
 - Provide written notice specific enough to allow owner or operator to identify barrier;
 - Owner/operator failed to respond within 60 days of receipt with written description outlining improvements to remove barrier; and
 - Owner/operator fails to remove barrier or make substantial progress within 120 days of providing written description
 - House Bill also includes limitations on pre-suit demand letters

What are the Architectural Standards for ADA Compliance?

ADA Design Standards

- Found in Justice Department Regulations Part 36:
- 1991 ADA Standards for Accessible Design (“1991 Standards”)
- 2010 ADA Standards for Accessible Design (“2010 Standards”)

ADA Design Standards

- 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
- If that date is on or after March 15, 2012, then new construction and alterations must comply with the 2010 Standards.
- **Safe Harbor**: If that date is on or after September 15, 2010, and before March 15, 2012, then new construction and alterations must comply with either the 1991 or the 2010 Standards.

Compliance Obligations for New Construction

- Comply with the 2010 Standards unless **structurally impracticable**.
- Structural impracticability relates to site conditions.
- Difficult to meet this exception

What ADA obligations does a facilities renovation trigger?

- **Path of Travel obligation:** If a primary function area is renovated, an additional amount up to 20% of the renovation budget has to be spent on making the path of travel to the primary function area and the restrooms, water fountains, and telephones serving that area, into compliance with the ADA Standards to the maximum extent feasible.
- **Altered spaces and elements:** Comply with the 2010 Standards to the maximum extent feasible.

No “Grandfathering” Rule for Pre-ADA

- There is no “grandfathering” of pre-ADA facilities
- Pre-ADA public accommodations facilities have continuing obligation to remove architectural barriers
- Obligation exists if removal is **readily achievable**.
- **Readily achievable** means “easily accomplishable without much difficulty or expense.”

“Readily Achievable” Barrier Removal

- The application of the “readily achievable” 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; and
 - Legitimate safety requirements.

Examples of Barrier Removal

- Non-exclusive list of barrier removal actions:
 - Installing ramps;
 - Creating designated accessible parking spaces;
 - Repositioning telephones;
 - Adding raised markings on elevator control buttons;
 - Installing flashing alarm lights;
 - Widening doors;
 - Rearranging toilet partitions to increase maneuvering space;
 - Insulating lavatory pipes under sinks to prevent burns;
 - Removing high pile, low density carpeting;
 - Rearranging or removing tables, chairs, and other furniture from an accessible guest room to create more wheelchair maneuvering space; and
 - Removing a bed frame to lower a bed so that a guest in a wheelchair can transfer onto the bed.

Relationship between ADA Standards and Building Codes

- 1991 Standards and local building codes are not always the same and in many cases differ.
- 2010 Standards are much more consistent with local codes but there is still no guarantee.
- Compliance with building code is no defense to ADA liability.
- Building code inspectors are not inspecting for ADA compliance.
- Some states have different or more stringent accessibility requirements than the ADA, including: CA, FL, NY, MA, IL.

Common ADA Violations Cited in Drive-By Lawsuits

- Accessible parking not provided or not compliant (e.g., excessive slopes, no signage or improperly mounted signage, space too small, no access aisle)
- Sidewalks, curb ramps, ramps have excessive slopes, no handrails (for ramps)
- No accessible lowered sales counter
- Blocked aisles
- No accessible seating in dining establishments
- Restroom elements not accessible
 - Mirror too high
 - Toilet and grab bars in the wrong position
 - Sink pipes not insulated
 - Lack of clearance under sink
- Signage designating permanent rooms and spaces does not have Braille, raised lettering, and mounted in wrong location

Can you sue your architect/consultant for designing a non-compliant facility?

- **Federal Preemption of Indemnification of Claims for ADA/FHA Violations:**
 - Rolf Jenson Assocs. v. Eighth District Judicial Court, 282 P.3d 743 (2012) (Supreme Court of Nevada)
 - Equal Rights Center v. Niles Bolton Assocs., 602 F.3d 597 (4th Cir. 2010).



“Effective Communication” Requirement

ADA Requirement to Provide Effective Communication

- The ADA requires “reasonable modification” and access to auxiliary aids and services to ensure effective communication with customers. 42 U.S.C. Section 12181(b)(2)(A)(ii-iv).
- The ADA departs from other antidiscrimination statutes by requiring affirmative steps to accommodate persons with disabilities.

EFFECTIVE COMMUNICATION

- Blind/low vision customers:
 - Read written information/contract to customer
- Speech impaired customers:
 - Ask customer to write down what (s)he wants to say if you don't understand
 - Texting
- Deaf customers:
 - Exchange written notes
 - Gesture
 - Texting
 - Accept calls made via relay services and treat them like other calls

EFFECTIVE COMMUNICATION (cont.)

- How do deaf people make calls using a relay service?
 - Person uses a TTY machine to call a TTY relay operator who calls ABC and acts as an intermediary;
 - Person uses computer to type messages to an IP relay operator who calls ABC and acts as an intermediary;
 - Person signs on a videophone, iPad, or computer with camera to relay operator who signs. Operator calls Enterprise and acts as an intermediary.

Web Accessibility as “Effective Communication”



Website Accessibility Litigation – The Virtual Drive-by Lawsuit

- More than 300 federal cases filed in 2015 and 2016
- Five states with most cases – Florida, Pennsylvania, California, New York, Massachusetts, and Washington
- Demand letters sent to hundreds, possibly thousands of businesses from fewer than 10 law firms
- Businesses caught unaware

Does the ADA Require Accessible Websites?

- No specific requirement in law or regulations, but Justice Department cites obligation to provide equal access and ensure “effective communication”
- Aggressive enforcement agenda by Justice Department against many businesses such as H&R Block, Peapod, Carnival Cruise Lines, edX, and others
- Courts have allowed ADA Title III lawsuits about websites to move forward
- One CA court has held that having a non-accessible website violates CA non-discrimination law
- Advocacy groups and serial plaintiff lawyers filing lawsuits

Web Accessibility

- **Web Accessibility Proposed Regulations Coming?**
 - Obama administration said 2018
 - Trump Executive Order makes proposed regulations very unlikely.



Web Accessibility Basics

- **World Wide Web Consortium (W3C)**
 - The main international standards organization for the World Wide Web (abbreviated WWW or W3).
- W3C generated the **Web Content Accessibility Guidelines 2.0 (WCAG 2.0)**
 - The leading set of web accessibility guidelines referred to by government agencies and authoritative entities.



Service Animals

Service Animals

- A “service animal” under ADA Title III is any dog that is individually trained to work or perform tasks for individuals with physical, sensory, psychiatric, intellectual, or other mental disabilities.
 - Other species of animals are not “service animals” (but see following slide on **miniature horses**).
 - Pets are not “service animals.”
 - Animals whose sole function is to provide emotional support, comfort, therapy, companionship, or crime deterrence are not “service animals.”

Service and Emotional Support Animals

- **Service animals vs. “Comfort” or “emotional support animals”**
 - Public accommodations **MUST** allow use of a service animal.
 - Emotional support animals are not covered under the ADA.
 - However, emotional support animals may be allowed to accompany individuals in housing as “reasonable accommodations” or “reasonable modifications” for the individual’s disability under the FHA and comparable state laws or on airplanes under the Air Carrier Access Act.

Service Animal Rules

- The ADA requires public accommodations to:
 - allow individuals with disabilities to bring their service animals into all areas of a facility where customers are normally allowed to go.
 - make reasonable modifications in policies, practices, or procedures to permit an individual with a disability to be accompanied by a miniature horse if it has been individually trained to do work or perform tasks for the benefit of the individual with a disability.



Service Animal Rules

- You may **not** ask for proof that the animal has been certified, trained, or licensed as a service animal.
- However, you **may** ask the following two questions:
 - Do you need the animal because of a disability?
 - What work or tasks has the animal been trained to perform?

Service Animal Rules

- You may **not** ask an individual to explain or verify what kind of disability he/she has.
- You may **not** charge a special entrance or usage fee to a guest with a service animal.
 - However, if you normally charge guests for damage that they cause to the property, you can similarly charge a guest with a service animal for any damage caused by the service animal.

Service Animal Rules - State Laws

- Some state laws/regulations define “service animal” more broadly than the ADA. For example:
 - Illinois: a “service animal” includes **any animal** “trained in obedience and task skills to meet the needs of a disabled person” (510 ILCS 70/2.01c).
 - Iowa: a “service animal” includes **any animal** “professionally trained and certified by a recognized certification entity to assist a person with a disability in meeting specific personal care needs or engaging in daily activities” (IA ST § 216C.11(2)).
 - Montana: a “service animal” includes “a dog **or other animal** individually trained to provide assistance to an individual with a disability” (MT ST 49-4203(2) (emphasis added)).
 - Nevada: a “service animal” includes **any animal** “that has been trained to assist or accommodate a person with a disability” (NRS 426.097).

Service Animal Rules - State Laws

- Many states also provide protections for [service animals in training and their trainers](#).
- The ADA does not disturb any state or local law/regulation that provides protection for individuals with disabilities at a level greater or equal to that provided by the ADA.

Service Animal Rules

- You may exclude the animal from the property **IF** the animal is out of control and the guest is not taking corrective action, **OR** the animal is not housebroken.
 - In that case, you should give the guest the option of remaining at the property without the service animal.
- Allergies and general fear of animals are **NOT** valid reasons for denying access or refusing service to individuals with service animals.



Power-Driven Mobility Devices

Mobility Device Basics Under 2010 Regulations

- Public accommodations 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” (OPDMD) by individuals with mobility disabilities, unless it can be shown that the OPMD cannot be operated in accordance with established safety rules.

Segways

- **Segways** are considered **other power-driven mobility devices**.
 - Segway max. speed: 12.5 mph
 - Avg. running speed: 6-10 mph
- Rules for safe Segway use highly recommended



Prevention and Risk Management

ADA Risk Management

- “An ounce of prevention is worth a pound of cure.”
 - *Benjamin Franklin*
- **Best Practices**
 - Hire ADA Consultant for New Construction/Alterations
 - Survey
 - Indemnification and Contribution in Purchase and Sale Agreements and Leases
 - Have ADA policies in place and train employees
 - Review websites for accessibility
 - Technical consultants

ADA Risk Management

- 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

Response Strategies for Drive-By Lawsuits

- **Settle quickly:** Low-cost, some barrier removal
- **Litigate:** Challenge plaintiff's standing, fix issues to moot case, show there is no violation

Questions?



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Thank You