



Revised ADA Access Standards Among Rules on Hold

2/13/2009

By Allen Smith

Every day since the U.S. Department of Justice (DOJ) announced it was withdrawing draft final amendments to the Americans with Disabilities Act (ADA) Standards for Accessible Design from the Office of Management and Budget (OMB) review process, Marsha Mazz, technical assistance coordinator with the Access Board, gets e-mails from people worried about what the withdrawal means.

The DOJ withdrew the draft final rules on Jan. 21, 2009, in response to a Jan. 20 memo from Rahm Emanuel, President Barack Obama's chief of staff, directing federal agencies to defer publication of any regulations until the rules are reviewed by officials in the new administration. The DOJ noted that withdrawal does not affect the existing ADA Standards for Accessible Design.

"I'm noticing a huge consternation on the part of people in the public over the withdrawal of the rule from OMB," Mazz said in a Feb. 12 interview. Mazz said that many do not understand that the withdrawal of rules under consideration is not unusual and remarked that the withdrawal "signals nothing in terms of the Obama administration's opinion."

Carolyn Gray, an attorney with Proskauer Rose in Washington, D.C., who chairs the firm's Accessibility and Accommodations Practice Group, has had serious concerns of her own for some time about the changes the revised standards would bring about to employee work areas. Yet Gray told *SHRM Online* that it would be "difficult for the Obama administration to do less" for disability rights advocates than the Bush administration recommended.

Revisions in the Pipeline for Years

Revisions of the ADA Standards for Accessible Design, which apply to the new and altered facilities of private entities open to the public and state and local governments under Titles II and III of the ADA, respectively, have been in the works for years. The revisions seek to harmonize ADA building standards with model building codes.

Prior to 2000, there were three national model building codes—the Building Officials and Code Administrators Code, Uniform Building Code and Standard Building Code, Mazz noted. These three codes then were merged into the International Building Code in 2000.

The Access Board issued proposed revisions to its ADA Accessibility Guidelines in November 1999 and in final draft form in April 2002. The Access Board then revised the ADA Accessibility Guidelines on July 23, 2004.

On Sept. 30, 2004, the DOJ issued an advance notice of proposed rulemaking announcing its intention to adopt revised ADA design standards that are consistent with the revised ADA Accessibility Guidelines. The revised ADA Accessibility Guidelines are only guidance for the DOJ and the public, not enforceable ADA standards.

Former Attorney General Michael Mukasey signed proposed regulations to revise the DOJ's ADA Standards for Accessible Design on May 30, 2008, and the voluminous proposed regulations to revise the ADA Standards for Accessible Design for Titles II and III were published in the *Federal Register*

on June 17, 2008.

Business Concerns

At a July 15, 2008, hearing, Scott Vinson, vice president of the National Council of Chain Restaurants division of the National Retail Federation, said that an issue "of great importance is one involving where the line is to be drawn between the requirements of Title III and Title I" of the ADA. Title I applies to employers, prohibiting employment discrimination by employers with 15 or more employees and requiring them to reasonably accommodate qualified individuals with disabilities.

"We are greatly concerned over the proposal to extend the reach of Title III into employee work areas," Vinson remarked. "Under current law, employee work areas must be designed and constructed so that individuals with disabilities can approach, enter and exit the employee work area. Accessibility within employee work areas has to date been left to the reasonable accommodation employment provisions contained in Title I; however, under the newly proposed guidelines this long-standing separation between Titles I and III is being abandoned in favor of allowing Title III to encroach into employee work areas. The newly proposed guidelines will require [that] the accessible common use circulation paths be incorporated into the design and construction of the employee work areas."

Gray also testified on behalf of the National Retail Federation at the hearing and shares Vinson's concerns. Gray said she represents many hotels and has seen from computer designs of hotels how much more costly hotels would be under the draft final rules. Even under the current ADA standards, hotels often choose not to make alterations because they cannot afford all of the costly changes they would have to make under the current ADA Standards for Accessible Design, she noted. As a result, in these difficult economic times, many hotels might paint but are choosing not to remodel, she said. And the costs would be even greater under the revised standards, she cautioned, observing that unlike those of Title I, the Title III building standards apply to new and altered commercial facilities open to the public, regardless of the number of employees.

However, Mazz emphasized that the revised guidelines have an exemption for any work area smaller than 1,000 square feet and would not provide much more than already is required under fire and safety codes. She said that the International Building Code originally had provided more stringent requirements for work areas than the Access Board recommended and has since been harmonized with the Access Board's guidance.

Mazz cautioned that the revised ADA Accessibility Guidelines in some instances are less stringent than the current ADA Accessibility Guidelines and observed that for now covered entities must comply with the current ADA Standards for Accessible Design, which the DOJ continues to enforce.

DOJ Complaints Filed in New York

On Jan. 13, 2009, Lev Dassin, the acting U.S. attorney for the Southern District of New York, announced that DOJ, which enforces Titles II and III of the ADA, had sued the owners and operators of five hotels in New York's Theater District. The design of the Moderne, the Ameritania, the Amsterdam Court, the Hotel Carter and the Radio City Suites allegedly violates the ADA Standards for Accessible Design. According to the complaints, the main entrance, registration counter and public restrooms at the Moderne and Amsterdam Court are inaccessible for people with disabilities. Not one of the Radio City Suites' 113 rooms, Ameritania's 219 rooms and Hotel Carter's 614 rooms is accessible, the DOJ claimed.

The lawsuits were brought after a compliance review of approximately 50 Theater District hotels in 2005, which resulted in voluntary compliance agreements with 15 hotels and 29 other agreements that the DOJ is in the process of finalizing.

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