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Public Accommodations Face Wide-Ranging Changes – Long-Awaited ADA Revisions Issued By DOJ

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Introduction

On July 26, 2010, the 20th anniversary of the signing of the Americans with Disabilities Act ("ADA"), the Department of Justice (“DOJ”) announced the issuance of the Revised ADA Regulations governing Titles II and III (the “2010 Regulations”) which include a revised ADA Accessibility Guidelines for Buildings and Facilities (the “2010 Standards”) (collectively the “2010 Revisions”). [1] Once effective, these revised regulations will impact all industries – including, sports and entertainment venues; places of lodging; restaurants and bars; retail establishments; and academic institutions – in a variety of ways encompassing policies, practices and procedures, and design/construction. Existing places of public accommodation, those undergoing or contemplating alterations, and those being designed or built, must closely consider the impact that the 2010 Revisions may have on their business operations and facilities.

The Application of the 2010 Revisions

Since its inception in 1990, the purpose of the ADA has been based on a civil rights premise to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities through clear, strong, consistent and enforceable standards.

The 2010 Revisions will apply to existing facilities, alterations, and new construction. The dates of several major events are triggered by the date when the 2010 Revisions are published in the *Federal Register* (the “Publication Date”). The Publication Date is of yet undetermined.

Effective Date

The 2010 Revisions become effective six months after the Publication Date(the “Effective Date”). Eighteen months after the Publication Date, compliance with the 2010 Revisions will be required for new construction, alterations to existing facilities, and existing structures to the extent they must comply with their ongoing obligation for readily achievable barrier removal (the removal of inaccessible elements without much difficulty or expense).

Impact on Existing Facilities

An existing facility for purposes of the 2010 Revisions is one that was already in existence on the Publication Date (“Existing Facilities”). Existing Facilities can avail themselves of an element-by-element safe harbor that is included in the 2010 Revisions (the “Safe Harbor”). The Safe Harbor sets forth that specific elements in covered facilities that were built or altered in compliance with the now current Standards (any time up to 18 months after the Publication Date) are not required to comply with the 2010 Revisions until those elements are next altered. If an element does not comply with the existing Standards, the safe harbor is not available.

During the twelve-month time period between the Effective Date of the 2010 Revisions and the expiration of the 18-months following the Publication Date, Existing Facilities may choose to comply with either the existing rules and regulations or the 2010 Revisions. Existing Facilities that are still non-compliant at the end of the 18-month period following the Publication Date have no choice but to achieve compliance as set forth in the 2010 Revisions.

One other important note for Existing Facilities, to the extent any of the 2010 Revisions reduce the technical requirements or the number of required accessible elements below the number required in the current Standards, the technical requirements or the number of accessible elements in a facility may be reduced in accordance with the requirements of the 2010 Standards.

Impact on Alterations/New Construction

The obligations that must be met by facilities that are undergoing alterations or are being newly constructed depend upon the timing of specific triggering events set forth in the 2010 Revisions.

- The existing Standards will still apply if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government – or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government – is before the Publication Date; or if no permit is required, the start of the physical construction or alterations (not including ceremonial groundbreaking or razing of structures prior to site preparation) occurs before the Publication Date; and
- The facility has the ability to choose whether to comply with either the existing Standards or the 2010 Revisions if one of the aforementioned triggering events occurs after the Publication Date but prior to 18 months after that date; and
- The 2010 Revisions must be followed if the triggering event occurs after 18 months following the Publication Date.

The Substance of the 2010 Revisions

The 2010 Revisions contain a vast array of new and revised rules. This Alert will first focus on several of the significant changes that will impact public accommodations across industries. The Alert will then highlight some of the most important changes that are more industry-specific.[2]

Significant Aspects of the 2010 Revisions Affecting Multiple Industries

Employee-Only Work Areas & Circulation Paths: The current rules require an accessible path to approach, enter, and exit employee-only work areas. Pursuant to the 2010 Revisions, public accommodations must not only ensure that employee-only work areas provide for an accessible path to approach, enter, and exit, but they must also provide a 36-inch wide accessible common use circulation path within employee work areas. (This requirement will not apply to Existing Facilities pursuant to the readily achievable barrier removal requirement.)

This requirement is subject to several exceptions; specifically, when employee work areas exist that are:

> (i) (or have portions that are) less than 300 square feet and are elevated seven inches or more above the ground or finished floor, where elevation is essential to the functioning of the space;

(ii) less than 1,000 square feet and are defined by permanently installed partitions, counters, casework, or furnishings (*e.g.*, many kitchens in quick-service restaurants, the employee-side of service counters);

(iii) an integral component of equipment (*e.g.*, some power plants); and

(iv) exterior and fully exposed to weather.

Machinery and equipment are permitted to reduce the clear width of common use circulation paths where the reduction is essential to the function of the work performed (*e.g.*, machinery and equipment which must be placed in a certain way to work properly, for ergonomics, or for safety).

The 2010 Revisions further explain that individual employee work stations (*e.g.*, a grocery checkout counter) are designed for use by one person and do not contain common-use circulation paths and, therefore, are not required to provide an accessible common-use circulation path.

Service Animals: The existing definition of service animal has been significantly narrowed by the 2010 Revisions to only include a dog that has been individually trained to do work or perform tasks for the benefit of an individual with a disability. Other animals, whether wild or domestic, are no longer considered service animals under the 2010 Revisions. Trained miniature horses may be an exception to this rule in certain situations. An emotional support animal (any animal that provides emotional support, well-being, comfort, or companionship) is not to be considered a service animal. However, psychiatric service dogs are recognized; for example, a dog can be trained to “ground” a person with a psychiatric disorder.

Places of public accommodation may ask individuals seeking to be accompanied by an animal: (i) if the animal is required because of a disability; and (ii) what task or work the animal has been trained to do. Places of public accommodation are prohibited from requiring proof of service animal certification or licensing. Places of public accommodation may remove a service animal if it is “out of control and the animal’s handler does not take effective action to control it” or the animal is not housebroken.

Mobility Devices: The 2010 Revisions adopt a new two-tiered approach to mobility devices, drawing a distinction between wheelchairs (and other devices designed for use by individuals with mobility disabilities, *e.g.*, canes, crutches, walkers) and “other power-driven mobility devices” (those not primarily designed for use by individuals with mobility disabilities, *e.g.*, Segways). Wheelchairs (and other devices designed for use by people with mobility impairments) must be permitted in all areas open to pedestrian use. “Other power-driven mobility devices” must be permitted to be used unless the covered entity can demonstrate that such use would: (i) fundamentally alter its programs, services, or activities; (ii) create a direct threat to others; or (iii) conflict with legitimate safety requirements.

Places of public accommodation can request – and must accept – the presentation of a valid, state-issued disability placard or card, or state-issued proof of disability, as verification that an individual uses the other power-driven mobility device for his or her mobility disability. In the alternative, the place of public accommodation must accept a verbal representation, not contradicted by observable fact, as a credible assurance that the other power-driven mobility device is being used because of a mobility disability.

Industry-Specific Issues

The following section highlights aspects of the 2010 Revisions that are of particular relevance to specific industries.[3]

Sports and Entertainment Facilities and Other Places of Public Assembly

Scoping Requirements for Accessible Seating: The 2010 Revisions significantly reduce the scoping requirements for accessible seating in large facilities, setting forth that: (i) facilities with 500-5000 seats must have six accessible seating locations (wheelchair location and companion seat) plus one additional accessible seating location for every additional 150 fixed seats above 500 in the general seating area; and (ii) facilities with 5001 or more fixed seats in the general seating area must have 36 accessible seating locations (wheelchair location and companion seat) plus one additional accessible seating location for every 200 fixed seats above 5000 in the general seating area. For larger facilities, this change amounts to almost a 50 percent reduction from the existing "one percent plus one" requirement.

Accessible seating for luxury boxes, club boxes, and suites in arenas, stadium and grandstands are to be determined separately from the general seating areas. In other assembly areas (*e.g.*, a performing arts facility with tiered boxes) such luxury seating areas will be accounted for as part of the scoping requirements for the general seating areas.

Dispersal of Accessible Seating Locations: Accessible seating locations must be dispersed horizontally (all around the field of play or performance area), vertically (at varying distances from the screen, performance area, playing field), throughout each balcony or mezzanine, and at all levels of the facility served by an accessible route (even if it is not the same route used by other guests to access the seating area). Moreover, the 2010 Revisions explain that facilities are required to provide accessible seating locations in each "specialty seating area" that make available to patrons "distinct services or amenities" that generally are not available to other patrons. Where multiple clubs or restaurants are available that are identical in the services and amenities provided, not all such clubs are required to be made accessible.

Companion Seats: The 2010 Revisions expressly allow for the use of movable companion seats which must be located at the same floor elevation as the wheelchair location.

Scoping Requirements for Designated Aisle Seats: The 2010 Revisions require designated aisle seats be provided for five percent of the total number of aisle seats, instead of for one percent of all seats as required in the existing Standards. This should result in a notable reduction of the number of designated aisle seats required in most sports and entertainment facilities.

Release of accessible seating: The 2010 Revisions allow venues to release unsold accessible seating for sale to individuals without a disability for their own use for a single event or series of events: (i) when all non-accessible tickets (excluding luxury boxes, club boxes, or suites) have been sold; (ii) when all non-accessible seats in a designated seating area have been sold and the tickets for the accessible seating area are being released in the same designated area; or (iii) when all non-accessible tickets in a designated price category have been sold and the tickets for the accessible seating are being released in the same price category.

Ticketing: Pursuant to the 2010 Revisions, tickets for accessible seating locations must be available via the same methods as non-accessible seating (*e.g.*, same hours, same stages of ticket sales offerings (*e.g.*, lotteries, pre-sales, general sales, wait lists), same methods of distribution (*e.g.*, box office, telephone, Internet), and same types and numbers). Venues must not only provide sufficient information to explain the locations, features, and amenities of accessible seating in sufficient detail for individuals with a disability to independently determine if an accessible seating location meets their needs, but must do so in the same manner that general seating information is provided to the public (*e.g.*, telephones numbers, charts, maps, websites).

The 2010 Revisions also require that tickets for accessible seating be made available "at all price levels for every event or series of events." Further, if accessible seating is unavailable at a specific price point within a seating section, comparable or better available accessible seating must be offered at the same (or at a lesser) price as the originally requested tickets that were not available.

Prevention of Fraud: The 2010 Revisions augment the ability of venues, in certain situations, to guard against the fraudulent purchase of tickets for accessible seating locations. For single-event tickets, the venue may inquire whether the individual purchasing the tickets for accessible seating has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating (or whether someone else in the purchaser's group has such a disability). For tickets to a series-of-events (*e.g.*, season tickets) the venue may ask the individual purchasing the tickets for accessible seating to attest in writing that the accessible seating is for a person who has a mobility disability or a disability that requires the use of the accessible features that are provided in accessible seating.

Additionally, the 2010 Revisions expressly recognize the legality of voluntary accessible ticketing clubs – whereby individuals with disabilities self-identify to obtain priority access to accessible seating. If a venue adopts such a program, a reasonable number of tickets to accessible seating must remain available for purchase at all prices and dispersed at all locations for individuals who are not members.

Accessible Routes to Tiered-Dining Areas in Sports Facilities: While the 2010 Revisions ordinarily require that an accessible route be provided to all dining areas in new construction (including raised or sunken areas), there is an exception for tiered dining areas in sports facilities. Accessible routes must be provided to at least 25 percent of the tiered dining areas in sports facilities, provided that each tier provides the same services and an accessible route serves the accessible seating.

Hotels and Other Places of Lodging

Accessible Room Scoping: The 2010 Revisions do not change the number of guest rooms that must be accessible to individuals with mobility disabilities or the number that must be accessible to persons who are deaf or hard of hearing.[4] At least one guest room with mobility features must now also provide communication features. Pursuant to the 2010 Revisions, not more than 10 percent of the guest rooms required to provide mobility features and also equipped with communication features can be used to satisfy the minimum number of guest rooms required to provide communication features.

Dispersal of Accessible Rooms: Applicable to new construction and altered facilities, the 2010 Revisions require that guest rooms with mobility features and guest rooms with communication features, “shall be dispersed among the various classes of guest rooms, and shall provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests. When the minimum number of guest rooms required is not sufficient to allow for complete dispersion, guest rooms shall be dispersed in the following priority: guest room type, number of beds, and amenities.”

Reservations of Accessible Rooms: The 2010 Revisions require that guests be able to reserve accessible rooms using the same methods (*e.g.*, telephone and Internet) and during the same hours as guests reserving non-accessible rooms. Identification of accessible features in hotels and guest rooms must be offered through the hotel reservations services with sufficient detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets their accessibility needs.

Hold and Release of Accessible Hotel Rooms: In order to provide guests with disabilities equal opportunity to benefit from the services offered by the public accommodations the 2010 Revisions require covered entities to hold accessible rooms for use by individuals with disabilities until all other guest rooms of that type have been reserved and the accessible room requested is the only remaining room of that type.

Upon request, covered entities are also required to reserve specific accessible guest rooms or specific types of accessible guest rooms and ensure that the accessible guest rooms requested are blocked and removed from all reservation systems (to eliminate double-bookings). When a public accommodation does guarantee hotel or other room reservations, it must provide the same guarantee for accessible guest rooms as it makes for other rooms, except that it must apply that guarantee to the specific room reserved and blocked, even if in other situations, its guarantee policy only ensures that a room of a specific type will be available at the specific price.

Retail Establishments

Self-Service Shelving and Display Cases: The 2010 Revisions provide that self-service shelving (which shall be read broadly to apply to all types of shelves, racks, hooks, and similar self-service merchandising fittings, including self-service display units) are required to be on an accessible route but are not required to be located within accessible reach ranges. Such fixtures are permitted to be installed above or below the reach ranges possible for many individuals with disabilities so that space available for merchandising is used as efficiently as possible.

Dressing, Fitting, and Locker Rooms: Where dressing, fitting, and locker rooms are provided in clusters, the 2010 Revisions require that five percent of such rooms (but at least one room in each cluster) must be accessible.

The 2010 Revisions also alter, and potentially increase, the footprint for dressing, fitting, and locker rooms that are new construction or undergoing alterations. Specifically, the 2010 Revisions require the provision of clear floor space at the end (short-axis) of a bench instead of in front of a bench (as set forth in the current Standards).

Sales and Service Counters: Pursuant to the 2010 Revisions, facilities have the option of choosing whether their sales and service counters should be accessible via a forward approach or a parallel approach, with the exact technical requirements for accessibility depending upon which option is selected. In either configuration, the accessible portion of the counter must extend the same depth as the sales or service counter top.

An exception to these requirements is provided for alterations to sales and service counters in existing facilities where providing a longer accessible counter would result in a reduction of the number of existing counters at work stations.

Queues and Waiting Lines: Queues and waiting lines serving counters or check-out aisles must be accessible to individuals with disabilities.

Restaurants and Bars

Scoping Requirements for Accessible Seating: Pursuant to the 2010 Revisions, restaurants and bars must now provide accessible seating (with accessible knee and toe clearances), located along an accessible route, equal to five percent of the total number of general seating spaces and standing spaces at dining surfaces. This standard will often require a greater number of accessible tables than under the existing Standard (which based scoping on the number of dining tables at an establishment).

Sales and Service Counters: *See* the Retail Establishments section above.

Queues and Waiting Lines: The 2010 Revisions' requirement that queues and waiting lines serving counters or check-out aisles must be accessible to individuals with disabilities includes those utilized for food service.

Academic Institutions

Definition of "Housing at a Place of Education": The 2010 Revisions define "housing at a place of education" as "housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence."

Standards Applied to “Housing At a Place of Education”: The 2010 Revisions continue to require housing at a place of education to comply with transient lodging standards for accessibility but, at the same time, add several additional accessibility requirements drawn from the residential facilities standards relating to accessible turning spaces, work surfaces in kitchens, and the accessible route throughout the unit.

Examinations and Courses Relating to Applications, Licensing, Certification, or Credentialing for Secondary or Postsecondary Education, Professional, or Trade Purposes: The 2010 Revisions require that testing entities offer such examinations and courses in a place and a manner accessible to persons with disabilities or offer alternative accessible arrangements.

Language was also added to reflect DOJ’s position that, when testing entities receive documentation provided by a qualified professional who has made an individualized assessment of an applicant that supports the need for a requested modification, accommodation, or aid, the testing entity should generally accept such documentation and provide the accommodation in a timely fashion.

Conclusion

There can be little doubt that the issuance of the 2010 Revisions will have a significant impact on most, if not all, public accommodations. It is, therefore, important that places of public accommodation use the six month period leading up to the Effective Date to assess and fully comprehend how these rules will impact the structural elements and policies, practices, and procedures of their facilities.

While the element-by-element Safe Harbor contained in the 2010 Revisions provides compliant facilities with some level of comfort, the adoption of an element-by-element standard also makes the downside of non-compliance considerably worse. Not only will non-compliant elements ultimately need to be corrected under the 2010 Revisions, but if the non-compliance is brought to light as part of a government investigation or private litigation, the standard may open the door for large-scale inspections of the entirety of the facility in question.

Places of public accommodation must always remember that – at its core – the ADA remains a civil rights law.

Now, perhaps more so than ever before, disability rights are a "front burner" issue. In this climate, it is crucial that places of public accommodation take great care to properly navigate their accessibility obligations.

Full copies of the Revised ADA Regulations can be found at: www.ada.gov/regs2010/ADAregs2010.htm. Stay tuned for news regarding our upcoming seminars/webinars elaborating on the 2010 Rules and related issues.

As always we are available to discuss any specific issues you might have.

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[1] DOJ, who has broad responsibility for both Title II (state and local government) and Title III (public accommodations) has introduced this regulatory issuance noting that it updates or amends "certain provisions of the Title III regulation so that they comport with the Department's legal and practical experiences in enforcing the ADA since 1991."

[2] This Alert does not attempt to cover every new or revised item set forth in the 2010 Revisions. Therefore, owners, operators, landlords and tenants of places of public accommodation should carefully study the entirety of the 2010 Revisions and consult with knowledgeable counsel before undertaking any major design, renovation, or construction projects or making any changes to policies, practices, and procedures regarding accessibility.

[3] We reiterate that these are but some of the many modifications to the existing Standards that may impact these industries and also note that there are other industry-specific items (*e.g.*, regarding healthcare facilities) included in the 2010 Revisions. We encourage public accommodations to familiarize themselves with all of the issues affecting their industry and consult with informed counsel to obtain a full understanding of their obligations going forward.

[4] The 2010 Revisions expand the definition of “places of lodging” to expressly include guest rooms and other rental units in timeshares, vacation communities, and condo-hotels where some or all of the units are owned and controlled by individual owners and rented out some portion of the time to the public. Scoping requirements for timeshares or condominium hotels are based on the number of units in the project that are designed and constructed with the intention that their owners may participate in a transient rental program.