

The Americans with Disabilities Act: Managing Statutory and Regulatory Change and Complexity

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The Americans with Disabilities Act (ADA) is almost 20 years old. It is a milestone for individuals with disabilities to achieve higher levels of productivity and inclusiveness in modern society. An argument supporting the ADA was many improvements to the accessibility of facilities could be accomplished at little or no cost during construction, renovation, and in the course of use. Legal complexity, technological development, and increasing demand by those expecting equal access to public programs and private facilities create a dynamic regulatory landscape. ADA law is difficult to understand for the dedicated expert, let alone the facilities manager trying to comply with a plethora of codes in addition to budget, quality, and schedule constraints.

It is easy for building managers to reach a simplistic and inaccurate conclusion when deciding what the requirements are for ADA compliance: search the Internet, find the federal Access Board's ADA Accessibility Guidelines (ADAAG), and you have your answer. Although you could meet all legal requirements with that approach, your method would be flawed, your analysis erroneous and your conclusion as to what is required could be non-compliant. This can lead to costly construction that is non-compliant, creating inappropriate obstacles to the intended primary beneficiaries of the ADA.

There are several areas of federal law that are difficult to fully understand and the ADA is one of them. Some reasons for this are:

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- The U.S. Supreme Court has interpreted the statute narrowly in some of its decisions. Congress passed legislation that, among other things, overturned those interpretations.
- The Access Board publishes and updates guidelines (ADAAG) that are in turn adopted as enforceable standards by the Departments of Justice and Transportation (DOJ and DOT respectively). The DOJ's 2010 Standards for Accessible Design are regulations with the force of law, but the guidelines, by themselves, are not.
- Your state is free to enact statutes and rules compliant with federal law, but more strict or expansive in scope. A

complete analysis includes verification of compliance with state statutes and regulations.

- Your state may be one that had its regulations reviewed and certified by the DOJ. That certification provides a presumption of compliance. For many years compliance with state law provided confidence of meeting the 1991 DOJ Standards in these states. However, the new 2010 Standards will require recertification; you must comply with the 2010 Standards if and when they are applicable in the absence of a new state certification.
- We are in a transition period between old and new regulations. On March 15, 2012 covered entities will be required to comply with the 2010 Standards for new construction and alterations. In making the transition to the new standards, DOJ allows entities to choose to comply with the 1991 Standards, the 2010 Standards, or – in the case of public entities – the Uniform Federal Accessibility Standards (UFAS), until the effective date of March 15, 2012. The DOJ has also allowed for a safe harbor. Under the safe harbor provision, elements in facilities that were built or altered in compliance with the 1991 Standards or the UFAS will not be required to comply with the new 2010 Standards until the elements

are altered on or subsequent to March 15, 2012. The determination of which standard to apply should be made on a building by building basis. You may not use both standards in one building even in the safe harbor period, between September 15, 2010 and March 15, 2012.

MANAGEMENT

Higher education and other public entities often have similar management structures, with a facilities department that likely includes maintenance and operations. Capital planning may be a separate group in the larger institutions, and coordination for ADA compliance may also be separate, in a different division. Any organization managing buildings must reach good decisions that account for ADA compliance using either internal expertise or professional assistance.

Three examples are: long-range or master planning, including whether to demolish or renovate buildings and other structures; planning for construction or alterations; and maintenance. ADA review and compliance should be ongoing and thorough with all three functions. Recommendations to achieve these goals are:

1. Many factors affect the decision of whether to demolish and rebuild, or whether to renovate, or some combination of both. Among them are cost, flood, and terrorism risks; user needs, including growth and other changes; obsolescence; architectural quality; location; condition of structure; seismic resistance; wind loading; deterioration of foundation; ability of infrastructure to meet current needs, such as local area networking, energy conservation and other sustainability needs; and fire safety. Building and facilities managers must also ensure that a thorough and accurate analysis of ADA compliance and accessibility is included in the list of considerations.
2. Project managers will struggle with ADA compliance. Architects working

for the institution may not be trained adequately, either. Find ways to assure those responsible for drafting project plans and specifications for your projects make decisions that meet ADA requirements, whether through training, review by the institution's ADA expert, or engaging a specialist as necessary.

3. Maintenance staff must maintain ADA compliance while executing repairs, such as using compliant replacement components when executing repairs. Simple examples are replacing old faucets and door hardware when old ones fail or are otherwise replaced. Training is required for maintenance personnel, as well, so they understand their role in maintaining accessible elements.

Success can be measured by technical and substantive compliance, support for compliance throughout the organization, and importantly, by the users of the improved facilities.

A SUBSTANTIVE OVERVIEW IN A NUTSHELL

Title II of the ADA (42 U.S.C. § 12131–12165) applies to public entities and requires access to programs. Title III of the ADA (42 U.S.C. § 12181–12189) applies to private entities and incorporates requirements for removal of barriers.

In adopting the 2010 Standards, DOJ has attempted to align the Standards more closely with existing codes, such as ANSI and IBC. The hope is this will make the Standards easier for facilities professionals to understand and follow.

In many cases, multiple codes or standards will apply. Building and facilities professionals are responsible for knowing all codes and standards that apply. The best practice is to build or renovate to the strictest standard or code. The responsibility for ADA compliance lies with the owner of the building; i.e., responsibility for compliance cannot be transferred to contractors, architects, etc. In all cases, new construction and alterations must meet ADA.

Fortunately, many excellent resources are available to assist you in navigating this complex regulatory terrain.

1. The United States Access Board publishes the ADA Accessibility Guidelines (ADAAG). The board provides technical assistance and training on the ADA Accessibility Guidelines/Standards as they apply in new construction and alterations. Contact information: www.access-board.gov; 800-872-2253; 800-993-2822 (TTY); e-mail: ta@access-board.gov; office hours are weekdays 10:00 - 5:30 ET (except Wednesday)
2. U.S. Department of Justice: www.ada.gov; 800-514-0301 or 800-514-0383 (TTY)
3. ADA Technical Assistance Centers: 800-949-4232 (voice/TTY)

CONCLUSION

The purpose of this article is not to answer all questions concerning the new 2010 ADA Standards. Rather, it is to give you a general overview, and help you formulate relevant and probing questions to assist you in getting the information you need with the tools available to you.

The importance of compliance with the ADA goes beyond the avoidance of governmental fines and adverse court judgments. Thorough and artful compliance with the ADA communicates an intent to include people of all abilities in your programs and facilities; it is simply good business. ☛

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