Dealing with the new 2010 ADA Standards for Accessible Design: Part 2

This article is the second of a two-part series about the 2010 ADA Standards for Accessible Design (2010 Standards). Many thanks to hotel architect Harry Wheeler of Group One Partners, Inc. for last month's excellent article about design issues with the 2010 Standards. This month's article will focus on ADA compliance and enforcement and offer some practical tips for hotel owners.

Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of "goods, services, facilities, privileges, advantages or accommodations" by any person who owns, leases or operates a place of "public accommodation," such as a hotel. The ADA regulates architectural features that may impose an "architectural barrier" to access by disabled people. In addition, policies and procedures of hotel operations, such as online reservation systems, procedures regarding service animals and accessible guest room availability are also regulated under the 2010 Standards.

Prior to March 15th, 2011, the 1991 ADA Standards for Accessible Design (1991 Standards) set the minimum standard for ADA compliance. After a one-year transition period, compliance for most sections of the 2010 Standards became mandatory on March 15th, 2012. Information regarding compliance extensions for particular elements of the 2010 Standards (i.e., pool/spa accessibility) can be found at www.ada.gov. In addition, certain states have imposed their own accessibility standards, which may be more stringent than the federal standards. An attorney licensed in the state in question can offer state-specific information.

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The ADA imposes different requirements for 1.) removal of architectural barriers in an existing facility, 2.) construction of a new facility and 3.) alterations to an existing facility. If a facility was built or altered, or if architectural barriers were removed, in compliance with the 1991 Standards, then further modification under the 2010 Standards is generally not required under the so-called "safe harbor." However, if an existing facility does not comply with the 1991 Standards or the 2010 Standards, such architectural barriers must be removed when it is "readily achievable" to do so, even without a pending alteration. The ADA defines "readily achievable" as "easily accomplishable without much difficulty or expense", as determined on a case by case basis. An experienced ADA lawyer can provide further guidance on what "readily achievable" means in a particular situation. In addition, elements included in the 2010 Standards but not covered by the 1991 Standards, such as pool lifts, do not qualify for the safe harbor and must comply with the 2010 Standards.

Any new building with a building permit issued on or after March 15th, 2012 must comply with the 2010 Standards. Planned alterations must, in most cases, also comply with the 2010 Standards on an element by element basis. If such alterations affect a "primary function area," a "path of travel" to such area (including restrooms, telephones and drinking fountains) must also comply with the 2010 Standards. However, the cost of improving a "path of travel" is capped at 20% of the alteration costs of the primary function area.

Now for some practical tips. First, don't buy an ADA lawsuit. With the arrival of the 2010 Standards, it is essential to perform thorough due diligence before purchasing a hotel, including confirming that the hotel is not the subject of an ADA lawsuit or DOJ investigation. Engage an experienced ADA consultant to survey the property and determine what architectural barriers may exist and/or whether existing policies and procedures comply with the ADA. If such investigations reveal potential ADA liability, ask the seller to correct potential ADA violations, or seek a purchase price reduction, escrow holdback and/or post closing indemnification.

The Department of Justice (DOJ) has enforcement responsibility under the ADA. However, since the ADA allows private claims against businesses with prevailing parties potentially recovering their attorney's fees, most ADA enforcement cases are brought by private plaintiffs. Such plaintiffs, working in conjunction with a small cadre of lawyers, initiated approximately 3,000 ADA cases nationwide in 2011. Whether one views these lawsuits as a shakedown or a laudable civil rights crusade, they are happening; and will likely increase with the arrival of the 2010 Standards.

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If named as a defendant, or potential defendant in ADA litigation, the first step should be to engage experienced ADA counsel. Experienced ADA lawyers have systems to reduce costs, need to perform less legal research, and may have a successful track record with your particular plaintiff and/or the judge hearing the case. If the adverse party is the DOJ (and the claim involves a single location), you can expect to have settlement negotiations before the case goes to court, since unlike private litigants, the DOJ must attempt to settle before initiating litigation.

If the litigation involves a private plaintiff, however, one should be prepared to fight in court. Private ADA plaintiffs sometimes have limited budgets per case and abandon claims against defendants who resist. Defendants who give in to the urge to quickly capitulate are also sometimes targeted multiple times. However, the best reason to fight is that the plaintiff's case may be quickly dismissed by reason of threshold subject-matter jurisdictional issues. For example, to have "standing," a plaintiff must prove that it encountered a barrier that prevented access to a public accommodation, and that there is sufficient likelihood that such plaintiff will again be wronged in a similar way. For serial "hit and run" plaintiffs, many of whom have sued dozens of different properties, this is a high hurdle to clear, especially if the defendant corrects the alleged violations. In addition, a case may be rendered moot where the effect of an ADA violation has been "irrevocably eradicated" with no reasonable expectation that it will re-occur. Thus, if violations are quickly corrected (usually with the help of an ADA consultant), a plaintiff's claim may be quickly dismissed with no attorney's fees being awarded, since the plaintiff would clearly not be the "prevailing party."

About this month's author

Joshua Bowman is a partner in Sherin and Lodgen LLP's real estate department. Over the past decade, Bowman has represented many of the region's most active hospitality owners, operators and developers with acquisitions, dispositions, financings, development projects and franchise issues involving hospitality properties all over the country.

Bowman has been listed as a Massachusetts Rising Star by the publishers of Boston Magazine every year since 2005, is listed in Madison's Who's Who and is admitted to practice law in Massachusetts and New York.

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