

DOES YOUR COMMERCIAL PROPERTY PRESENT ARCHITECTURAL BARRIERS TO THE DISABLED?

BY: ROBERT G. DEVINE

Introduction

The federal Americans with Disabilities Act, or the ADA, is a wide-ranging Act that provides comprehensive civil rights protections for individuals with disabilities. It addresses different types of discrimination in various contexts, including discrimination in employment (Title I), public services (Title II), public accommodations (Title III), and telecommunications (Title IV).

Title III of the ADA prohibits a private entity from discriminating against an individual on the basis of disability in the operation of its business. One of the major requirements of Title III is that the physical features of a business must be designed so that persons with disabilities have equal access to its use and enjoyment. In other words, the design and structure of a business must be “readily usable and accessible by persons with disabilities,” or the business must remove its structural “barriers.”

A business’s failure to comply with Title III requirements can subject it to costly litigation and legal liability. It may be held liable for equitable relief, monetary damages, civil penalties up to \$100,000 per violation, and/or attorney’s fees and costs. This article provides an introductory overview of the accessibility and barrier removal obligations under Title III, to whom these obligations apply, and under which circumstances they do and do not apply. This law firm regularly consults with commercial property owners to help protect against exposure for alleged non-compliance by creating contractual protections and in responding to any litigation asserting such a claimed architectural barrier.

Does my business have Title III obligations?

Title III applies to private entities, which include places of public accommodation, commercial facilities, and entities offering certain examinations and courses; they do not include religious entities or private clubs. A commercial facility is a facility intended for nonresidential use and whose

operations will affect commerce, such as a mall, strip shopping center, office building, factory, or warehouse. All new construction and alterations in commercial facilities must be accessible under the ADA, but existing commercial facilities as of the effective date of the ADA in regards to Title III in January 1992 do not have barrier removal obligations.

A public accommodation is a place whose operations affect commerce and falls within at least one of the following twelve categories:

- places of lodging, such as hotels, motels, and inns, except for owner-occupied establishments renting fewer than six rooms;
- establishments serving food or drink, such as restaurants and bars;
- places of exhibition, such as theaters, concert halls, and stadiums;
- places of public gathering, such as auditoriums and conventions centers;
- sales or rental establishments, such as bakeries, grocery stores, clothing stores, hardware stores, and shopping centers;
- service establishments, such as laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, professional offices, pharmacies, and hospitals;
- public transportation stations;
- places of public display, such as museums, libraries, and galleries;
- places of recreation, such as parks, zoos, and amusement parks;
- places of education;
- social service establishments, such as day care centers and senior citizen centers; and
- places of recreation, such as gymnasiums, bowling alleys, and golf courses.

Places of public accommodation have both accessibility and barrier-removal obligations.

What are accessibility and barrier-removal obligations?

A facility or a portion of a facility is “readily accessible and usable” when it can be approached, entered and used by individuals with disabilities easily and conveniently. “Barriers” are features that limit or prevent people with disabilities from obtaining the goods or services offered. The applicability of accessibility and barrier removal obligations vary depending upon whether the facility is newly constructed, has new alterations, or is an existing facility.

All construction and alterations made after the effective date of the ADA, referred to as “new construction” and “alterations,” must be “readily accessible and usable.” A facility or a portion of a facility that is constructed to meet the federal ADA design standards for accessibility is considered readily usable and accessible with respect to construction.

An “alteration” is a change to a building or facility that affects its usability, such as remodeling and renovation, but generally does not include normal maintenance, reroofing, painting or wallpapering. When alterations are made that could affect the usability of a “primary function area,” an area where a major activity takes place, not only must the entity make the primary function area accessible, but the entity must also make the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, accessible. Primary function areas include lobbies, offices, work areas, and customer service areas, but do not include areas like employee lounges, mechanical rooms, restrooms, and janitorial closets.

“Existing facilities,” those public accommodations that were in existence prior to the ADA’s effective date, do not have to make their facilities “readily usable and accessible.” They do, however, have the obligation to remove “barriers”: architectural barriers and communication barriers that are structural in nature. An architectural barrier is a physical element that impedes access by people with disabilities, such as a sink that is mounted too high for people in wheelchairs, or a conventional doorknob that impedes access by people with limited manual dexterity. A communication barrier that is structural in nature is a barrier that is an

integral part of the physical structure of a facility, such as an audible alarm system that is inaccessible to people with hearing impairments.

Examples of barrier removal measures include installing ramps, rearranging furniture, widening doors, and installing flashing alarm lights. The barrier removal requirement only applies to places of public accommodation, not commercial facilities generally, and does not extend to areas of a facility that are used exclusively for employee work areas.

How do I know if my business is accessible or barrier-free?

The ADA Accessibility Guidelines for Buildings and Facilities are the federal design standards for accessibility and barrier-removal. They contain general standards for building and site elements, such as parking, ramps, bathrooms, signage, operating mechanisms, and alarms, and additional standards that apply specifically to restaurants, medical care facilities, mercantile facilities, libraries, and transient lodging. The technical requirements of the standards are well beyond the scope of this article, but below are highlights of a few examples from the general standards.

The standards for parking have minimum requirements regarding location, number, and design. If 25 spaces exist, for example, then there must be at least one accessible space; if 500 spaces exist, then there must be at least nine accessible spaces. An accessible space must be a minimum width of 96 inches and a maximum surface slope of two percent in all directions. It must have an accessible aisle and be located on the shortest accessible route of travel from the parking area to an accessible entrance.

For restrooms, the standards include requirements for everything from the number of accessible toilet stalls to the design and location of the doors, paper dispensers, and sinks. Toilet stalls, for example, have requirements regarding the following: height, width and clear floor space; size and arrangement of the toilet; grab bars; flush controls; and toilet dispensers. The flush control must be hand-operated or automatic, mounted on the wide side of toilet areas no more than 44 inches above the floor, operable by hand, and must operate under a maximum force of five pounds. Sinks must be mounted with the counter or rim no higher than 34

inches above the floor, with a maximum depth of 6.5 inches; have accessible faucets; have a knee clearance underneath of at least 27 inches high, 30 inches wide, and 19 inches deep; and not have exposed pipes or abrasive objects underneath. There must also be a clear, accessible floor space in front of the sink of at least 30 by 48 inches to allow forward approach, and it must extend a maximum of 19 inches underneath the sink.

In all areas required to have an accessible route, the ground and floor surface must comply with requirements regarding slope and surface-type. The requirements vary depending upon the severity of the surface's change in level: changes in level up to ¼ inch may be vertical and without edge treatment; changes in level between ¼ and ½ inch must be beveled and have a slope to the bevel of no greater than 1:2; and changes in level greater than ½ inch must have a ramp.

The standards for ramps include specifications regarding slope and rise, width, handrails and landing area. For example, the maximum slope of a ramp for new construction is 1:12 and the cross slope can be no greater than 1:50. The maximum rise for any run is 30 inches. If the ramp's run has a rise greater than six inches or a horizontal projection greater than 72 inches, then it must have accessible handrails on both sides. As with all other surfaces on an accessible route, the surface of the ramp must also be accessible with a level landing area of at least 36 inches provided.

Who is responsible for making a public accommodation accessible and barrier-free?

Any private entity that owns, operates, leases or leases to, a place of public accommodation is subject to the full range of Title III requirements, which includes both accessibility and barrier removal obligations. Thus, not only can the owner of a public accommodation be held liable for its failure to make its public accommodation accessible, but so can the landlord, tenant, and person in control of the public accommodation. Landlord and tenants may allocate responsibility among themselves through lease agreements, but such agreements are only effective between the parties; thus, all parties may still be held fully liable under the law.

Are accessibility and barrier removal obligations absolute?

Generally, a private entity must fully comply with Title III standards for accessibility and barrier-removal. There are, however, some exceptions and circumstances where the standards are relaxed.

In new construction, full compliance with accessibility requirements is not required where it would be "structurally impracticable." This exception only applies in those rare circumstances when the unique characteristics of the terrain prevent the incorporation of accessibility features.

Alterations do not need to strictly comply with federal standards if doing so would be "technically infeasible," which occurs when constraints on the site's existing structural conditions prohibit full and strict compliance with the federal design standards. Cost is not a relevant consideration. When strict compliance is technically infeasible, the business is not exempt from its accessibility obligations; rather, alterations must be made accessible to the "maximum extent feasible."

Alterations to provide an accessible path of travel serving a primary function area are required only to the extent that their cost is not "disproportionate" to the cost of the overall alteration, that is, when such costs exceed 20 percent of the cost of the original alteration to the primary function area. In the event that such costs are disproportionate, the entity is not entirely relieved of its accessibility obligations. Rather, the entity must make the path of travel accessible to the extent possible without incurring disproportionate costs, giving priority to those elements that provide the most access. An accessible entrance, for example, is the most important priority, whereas a drinking fountain is among the least.

Barrier removal is only required where it is "readily achievable"—where it is easily accomplishable and able to be carried out without much difficulty or expense. Whether removal is readily achievable is determined by the courts on a case-by-case basis after applying a factor test, which considers, among others, the nature and cost of the action, the overall size and financial resources of the site, and its type of operations. If removal of the barrier results in a significant loss of selling or serving space, then it is not readily achievable.

First priority in barrier removal must be given to measures that will enable individuals with disabilities to “get in the front door.” If barrier removal is not readily achievable, then the public accommodation must make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods, so long as such methods are readily achievable and do not pose a significant health and safety risk. Examples of alternative measures include: providing goods and services at the door, sidewalk, or curb; retrieving merchandise from inaccessible shelves; or relocating activities to accessible locations.

The barrier removal obligation is a continuing one. Therefore, barrier removal that was not readily achievable at first may later be required because of changed circumstances, such as an increase in a business’s financial resources.

Alterations to historic properties must comply, to the maximum extent feasible, with the historic property provisions of the federal standards. Under these provisions, alterations should be performed in full compliance with the alterations standards for other types of buildings, unless doing so would threaten or destroy the historic significance of a feature of the building.

Conclusion

The commercial property owner needs to be aware of its obligation under Title III of the ADA not only in regards to new construction, but also as to alterations. Private causes of action are available to the disabled deprived of the benefit of using a place of public accommodation by an architectural barrier. In responding to any lawsuit, the preparation of a defense involves developing an architectural or engineering expert review along with consideration to any special feature of the property. Although strategies exist to respond to these lawsuits which not only permit the court to order injunctive relief, *i.e.* direct remediation, but also attorneys fees are permitted to the disabled patron as a prevailing party if the architectural barrier exists, pro-action to avoid the lawsuit is

most beneficial. Carefully crafted contracts calling out responsibility for ADA Title III compliance can offer the property owner protection from the risk. Examples of such contract protection include indemnity provisions in construction contracts and leases.

Bob Devine is a partner in the Litigation Department and resides in our Cherry Hill, NJ office. He has handled cases involving catastrophic loss matters, construction litigation, employment law, professional liability, products liability, premises liability and transportation law. For more information, please contact Bob at 856.317.3647 or deviner@whiteandwilliams.com.

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