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DOES YOUR BUILDING DISCRIMINATE AGAINST THE DISABLED? GUIDELINES FOR BRINGING EXISTING PUBLIC ACCOMMODATIONS INTO COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT

*James T. Yand**

I. INTRODUCTION

Beginning January 26, 1992, businesses open to the public must contend with a major civil rights bill entitled *The Americans with Disabilities Act of 1990* ("ADA").¹ Much concern has been expressed about the law's underlying vagueness and the level of compliance which administrative agencies and the courts will impose on businesses.² The broad sweep of the ADA offers little comfort to business owners and property managers trying to ensure that they are in compliance with the access requirements imposed by the law. The ADA thrives on sweeping general propositions, leaving specific

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1. 42 U.S.C. §§ 12101-12102, 12111-12117, 12131-12134, 12141-12150, 12161-12165, 12181-12189, 12201-12213; 47 U.S.C. 225 (West Supp. 1991). The purpose of the Act is to "provide a . . . national mandate for the elimination of discrimination against individuals with disabilities. . . ." 42 U.S.C. § 12101 (b)(1); see also Comment, *The Americans with Disabilities Act of 1990: New Legislation Creates Expansive Rights for the Disabled and Uncertainties for Employers*, 21 CUM. L. REV. 629 (1991); P. Yates, *ADA Promises Greater Access to Businesses*, 52 OSB Bull. 19 (Jan. 1992).

2. The legislative history of the ADA is contained in H.R. Rep. No. 485, 101st Cong., 2d Sess. 59, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 267, 298 [hereinafter "H.R. 485"] and includes the following remark: "A concern with the entire bill is its underlying vagueness and confusing new legal terms which will inevitably cause the law to be interpreted by the courts." However, President Bush remarked at the signing of the law: "Fears that ADA is too vague or too costly and will lead to explosion of litigation is [sic] misplaced." President's Statement on Signing the Americans with Disabilities Act of 1990, 26 *Weekly Comp. Pres. Doc.* 1165 (July 26, 1990), reprinted in 1990 U.S. CODE CONG. & ADMIN NEWS 601.

compliance to be determined on a case-by-case basis. Nevertheless, the purpose of this article is to offer insight into the "rules of the game" and identify some practical steps to follow in meeting the accessibility criteria.³

The ADA attempts to provide a comprehensive plan for mainstreaming disabled individuals into society.⁴ The legislation seeks to eliminate discrimination against disabled persons by granting them status as a protected class for purposes of employment, transportation, public accommodations and telecommunication services.⁵

The ADA is found in five titles of the U.S. Code. The focus here will be on the access requirements imposed on businesses open to the public contained in Title III.⁶ However, a brief overview of the various titles included in the ADA will give insight to the scope of the law.

II. OUTLINE OF THE ADA

The comprehensive mandate of the ADA is carried out in five distinct substantive titles. Title I prohibits employment-related discrimination as defined in more detail by the Equal Employment Opportunity Commission Regulations.⁷ The law places a duty of reasonable accommodation on the employer, including an obligation to make existing facilities accessible; to restructure jobs; to modify work schedules; to reassign to vacant positions; to modify or acquire equipment; to modify examinations and to provide readers and interpreters.

The duty on the employer is avoided only by showing that reasonable accommodation would result in "undue hardship" to the employer.⁸ "Undue hardship" is defined as any action that requires significant expenditure or difficulty when evaluated in light of certain enumerated factors regarding the nature and resources of the em-

3. The vast scope of the ADA makes it impossible to attempt any detailed legal analysis of Title III without consuming hundreds of pages. This work is intended to help educate the reader as to some of the legal issues that should be considered. Any specific legal questions should be directed to your attorney.

4. H.R. REP. NO. 485 (I), 101st Cong., 2d Sess. 24, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 268; H.R. REP. NO. 485 (II), 101st Cong., 2d Sess. 22, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 446; H.R. REP. NO. 485 (IV), 101st Cong., 2d Sess. 23, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 512.

5. See 42 U.S.C. § 12101 (West Supp. 1991).

6. 42 U.S.C. § 12182 (West Supp. 1991).

7. Americans with Disabilities Act of 1990, Title I, 42 U.S.C. §§ 12111-12117.

8. 42 U.S.C. § 12111 (10).

ployer's business.⁹

Title II mandates that public services provided by state and local governments be available to disabled persons. As part of making public services more accessible, Title II establishes lengthy, detailed and specific requirements of accessibility for publicly operated transportation services.¹⁰

Title III, which will be addressed in more detail in the next sections, requires accessibility for the disabled clients and customers of establishments open to the public.¹¹

Title IV is directed more narrowly towards the telecommunications industry and its impact upon the speech and hearing impaired.¹² This title requires telephone companies and other common carriers to provide "telecommunications relay services" that will enable an individual operating a telecommunications device for the deaf [TDD] to communicate with hearing individuals and not just other TDD users.¹³ Congress wanted telephone services for the speech and hearing impaired to be "functionally equivalent" to those available for the hearing population.

Finally, Title V contains various miscellaneous provisions covering the following:

- (1) A prohibition against retaliation by entities that discriminate against the aggrieved party;¹⁴
- (2) Allowance of attorney fees for proceedings brought under the Act;¹⁵
- (3) A grant to provide technical assistance for covered entities;¹⁶
- (4) An exclusion of persons currently using any illegal drugs from inclusion under the Act;¹⁷ and
- (5) A non-exhaustive list of other gender conditions that are not

9. *Id.* The ADA draws many of its standards from the Rehabilitation Act of 1973 which applied to the Federal Government, its contractors and the recipients of Federal funds. See 29 U.S.C. §§ 701-796i (1989); H.R. REP. NO. 485 (II), 101st Cong., 2d Sess. 23, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 304.

10. The Americans with Disabilities Act of 1990, Title II, 42 U.S.C. §§ 12131-12134, 12141-12150, 12161-12165.

11. The Americans with Disabilities Act of 1990, Title III, 42 U.S.C. §§ 12181-12189.

12. The Americans with Disabilities Act of 1990, Title IV, 47 U.S.C. § 225 (1991).

13. *Id.* at § 225(b).

14. 42 U.S.C. § 12203 (Supp. 1991).

15. 42 U.S.C. § 12205.

16. 42 U.S.C. § 12206; see also 55 Fed. Reg. 50,237-02 (1990) (proposed plan prepared by Department of Justice).

17. 42 U.S.C. § 12210. Persons who no longer use illegal drugs or are in a drug rehabilitation program are protected. *Id.*

protected disabilities under the Act.¹⁸

III. PROHIBITION AGAINST DISCRIMINATION IN EXISTING BUILDINGS

Title III applies to all "public accommodations," broadly defined by the Act to include most private businesses which offer goods or services to the public on-site.¹⁹ Businesses such as hotels, theaters, restaurants, shopping centers, retail stores, professional offices and private social services are mentioned as examples.²⁰ The Act does not cover strictly residential properties, private clubs or religious entities.²¹ Discrimination in multi-family housing on the basis of an individual's disability is covered by the Fair Housing Act of 1988.²²

"Disability" is defined as an impairment that substantially limits a major life activity. Major life activities include walking, hearing, speaking, breathing and working.²³ Disabilities can cover such diverse impairments caused by cancer, heart disease, diabetes, drug addiction, alcoholism and HIV infection.²⁴ It is not clear, however, whether the definition of disability would extend, for example, to an allergy created by cigarette smoking in an office building.²⁵ The outer limits of what impairments may constitute a disability under the Act will have to be tested on a case-by-case basis.²⁶ The impor-

18. 42 U.S.C. § 12211.

19. 42 U.S.C. §§ 12181(7), 12182-12183. Title III also imposes extensive accessibility requirements on private entities that provide public transportation. *Id.* at § 12184.

20. 42 U.S.C. § 12181(7); *see also* 28 C.F.R. § 36.104 (1991).

21. 42 U.S.C. § 12187; *see also* 42 U.S.C. 2000a(e)(1981). A private setting such as a home or business not open to the general public may become a public accommodation by offering services such as a day care in the home or having a "open house" or presentation open to the public. *See* 42 U.S.C. 2000a(e)(1981). At such events, steps must be taken to comply with the requirements of Title III.

22. 42 U.S.C. § 3604 (Supp. 1991).

23. 28 C.F.R. § 36.104. Disability includes those persons who are regarded as having an impairment, such as AIDS, even though the person is capable of performing normal activities. *Id.* The Act also protects those persons related to or associated with a disabled person from discrimination because of that association, such as the of a person with AIDS. *See* 42 U.S.C. § 12112(b)(4).

24. 28 C.F.R. § 36.104.

25. 28 C.F.R. § 36.104; Section by Section Analysis and Response to Comments, 56 Fed. Reg. 35544, 35549 (1991). ("Many commenters [on the proposed regulations] asked that environmental illness (also known as multiple chemical sensitivity) as well as allergy to cigarette smoke be recognized as disabilities. The Department, however, declines to state categorically that these types of allergies or sensitivities are disabilities. . . .").

26. *Id.* The regulations prepared by the Department of Justice emphasize the case-by-case approach. However, conditions that have been found to be "handicaps" under the Rehabilitation Act should provide some guidance.

tant point to remember is that a disability encompasses much more than the person in the wheelchair and therefore careful thought must be given to the access needs of a wide variety of individuals qualifying under the Act.

A. *Providing Access to Existing Buildings*

Existing places of public accommodation must, before January 26, 1992, remove architectural barriers and communication barriers that are structural in nature where such removal is "readily achievable,"²⁷ which means it is easily accomplishable and able to be carried out without much difficulty or expense. There is no bright line test or safe harbors for what is considered readily achievable. The size and economic resources of the business will be factors in determining what can and should be done without undue economic burden.²⁸ Where existing structures cannot be changed or altered without incurring substantial expense, the building owner or tenant may need to provide auxiliary aids and services as a substitute.

For example, a bank that cannot provide easy access to its entrance may locate a buzzer at the front door, alerting a specially trained employee to open the door and assist the handicapped person with their banking business. A dry cleaner with steps leading to the establishment may provide car to door pickup and delivery service for the disabled client in lieu of constructing a ramp. Retail stores may be required to provide a price tag reader for a person with a vision impairment or with limited height. A restaurant may have a waiter read the menu to blind patrons in place of providing menus in braille. Under no circumstances, however, should a service fee be charged to the disabled person for the cost of the special service,

27. 42 U.S.C. § 12182 (b)(2)(iv).

28. H.R. 485 sets forth various factors to be considered in determining whether an action is readily achievable:

(1) The overall size of the business of a covered entity with respect to the number of employees; the number, type, and location of its facilities; the overall financial resource of the entity and the financial resources of its facility or facilities involved in their removal of the barrier;

(2) The type of operation or operations maintained by a covered entity, including the composition and structure of the workforce, in terms of such factors as functions of the workforce, geographic separateness and administrative relationship to the extent that such factors contribute to a reasonable determination of readily achievable; and

(3) The nature and cost of the action needed.

H.R. 485 at 392.

unless such charge is routinely included for all customers.²⁹

In addition to removing barriers to access, a public accommodation must make reasonable modifications in its policies, practices and procedures (such as eliminating a policy barring all pets from entry, including service animals used by disabled persons); eliminate discriminatory eligibility criteria (such as requiring a driver's license to purchase merchandise because it discriminates against disabled persons who do not drive); provide auxiliary aids and services, unless the aid or service imposes an "undue burden" on the business,³⁰ and undertake to make only accessible new construction and alterations.³¹

The Department of Justice regulations include the following examples of steps to remove barriers:

- (1) Installing ramps;
- (2) Making curb cuts in sidewalks and entrances;
- (3) Repositioning shelves;
- (4) Rearranging tables, chairs, vending machines, display racks, and other furniture;
- (5) Repositioning telephones;
- (6) Adding raised markings on elevator control buttons;
- (7) Installing flashing alarm lights;
- (8) Widening doors;
- (9) Installing offset hinges to widen doorways;
- (10) Eliminating a turnstile or providing an alternative accessible path;
- (11) Installing accessible door hardware;
- (12) Installing grab bars in toilet stalls;
- (13) Rearranging toilet partitions to increase maneuvering space;
- (14) Insulating lavatory pipes under sinks to prevent burns;
- (15) Installing a raised toilet seat;
- (16) Installing a full-length bathroom mirror;
- (17) Repositioning the paper towel dispenser in the bathroom;
- (18) Creating as needed accessible parking spaces;
- (19) Installing an accessible paper cup dispenser at an existing in-

29. See 28 C.F.R. §§ 36.303(f), 36.305, 36.307, 36.213. However, reasonable and completely refundable deposits are not considered surcharges prohibited by the Act.

30. 28 C.F.R. § 36.303.

31. H.R. 485 at 305. New construction and major renovations must be designed and constructed to be reasonably accessible to and useable by people with disabilities. Elevators need not be installed if the building has less than three stories or has less than 3,000 square feet per floor except if the building is a shopping center, shopping mall, offices for health care providers or if the Attorney General decides that other categories of buildings require the installation of elevators. *Id.* at 305. The accessibility guidelines developed by the Architectural and Transportation Barriers Compliance Board ("ATBCB") should be consulted for all new construction and alterations.

accessible water fountain;

(20) Removing high pile, low density carpeting; or

(21) Installing vehicle hand controls.³²

Some additional suggestions for compliance not listed in the regulations would include: (1) providing close caption for video displays; (2) using braille and raised letter signage; (3) providing TDD with public telephones; (4) installing signage to indicate accessible routes and features within the building; (5) instructing building managers to be aware of persons with disabilities so necessary steps can be taken to make them feel welcome; and (6) adopting policies requiring prompt reporting of any acts of harassment or violence against disabled persons.³³

The Department of Justice regulations also suggest that businesses take measures to comply with barrier removal in accordance with the following order of priority:

(1) First, a public accommodation should take measures to provide access to a place of public accommodation from public sidewalks, parking or public transportation. These measures include, for example, installing an entrance ramp, widening entrances, and providing accessible parking spaces.

(2) Second, a public accommodation should take measures to provide access to those areas of a place of public accommodation where goods and services are made available to the public. These include, for example, adjusting the layout of display racks, rearranging tables, providing brailled and raised letter character signage, widening doors, providing visual alarms, and installing ramps.

(3) Third, a public accommodation should take measures to provide access to restroom facilities. These measures include, for example, removal of obstructing furniture or vending machines, widening of doors, installation of ramps, providing accessible signage, widening of toilet stalls, and installation of grab bars.

(4) Fourth, a public accommodation should take any other measures necessary to provide access to the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation.³⁴

32. 28 C.F.R. § 36.304.

33. Although safety criteria may be considered in developing policies and rules, it "must be based on actual risk and not on speculation, stereotypes or generalizations about disabilities." H.R. 485 at 388. A retail shopping center may, for example, prohibit wheelchairs on escalators if elevators are provided.

34. 28 C.F.R. § 36.304(c).

The burden to ensure that a building complies with the ADA falls on the landlord, tenant, and property manager. Each can be potentially liable for their acts of discrimination against the disabled.

The ADA allows the landlord and tenant to allocate responsibility for meeting the access requirements through contract.³⁵ Initially, it would be advisable for property owners or their managers to review their tenant leases to determine if allocation of the responsibility imposed by the ADA is handled under the current lease. If not, the landlord will need to meet with the tenant to develop the appropriate allocation of responsibility and expense. This may also be an area of negotiation for landlords and tenants to address in all future leases.

As a general rule of thumb, the landlord will be held primarily responsible for compliance in common areas while the tenant will be responsible for her own space.³⁶

The property owner will also have to undertake responsibility for maintaining handicapped facilities such as special ramps or elevators. A temporary interruption of service may be tolerated but a continuing interruption may result in liability under the Act.³⁷

Although the requirements of the ADA are pervasive, it is important to keep in perspective that the specific requirements to accommodate a person's disability are not absolute. They are required only if the accommodation meets the standard of reasonableness for that business. Therefore, if good faith steps are taken to remove the most obvious barriers to accessibility without incurring considerable expense, the property owner has already taken a big step in complying with the law and avoiding potential litigation.

Property owners are also encouraged to talk with their customers who are disabled to gain ideas on what further steps can be taken. If the property owner is not acquainted with any disabled individuals, then it would be equally beneficial to get in contact with a local organization that represents the disabled for input and suggestions.³⁸ In Oregon, for example, nonprofit groups like the Oregon

35. H.R. 485 at 397-98.

36. *Id.* at 398; 28 C.F.R. § 36.201(b) ("As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.").

37. 28 C.F.R. § 36.201 ("allowing obstructions or 'out of service' equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance.").

38. H.R. 485 at 396. Further information can be obtained from the Civil Rights Division, U.S. Department of Justice, Washington, D.C. 20530. Telephone Information Line (202)

Advocacy Center intend to establish educational programs covering compliance with Title III.³⁹

IV. ENFORCEMENT ACTIONS

Money damages are generally not available as a remedy under Title III, absent involvement by the Attorney General in the case. The business will be ordered by the court to comply with the law and pay reasonable attorney fees and litigation expenses to the plaintiff.⁴⁰

An injunction issued by the court could have much greater impact in context of new construction, since the plaintiff is entitled to bring the action to prevent further construction if the litigant reasonably believes that the ADA requirements are not being met.⁴¹ This provision stands as a loaded weapon in the hands of certain groups opposing development of commercial properties, if they can find ADA violations as a means to stop construction.

The Department of Justice also has a role to play in Title III enforcement. If the Attorney General gets involved in a case, the court can award a civil penalty of up to \$50,000 for the first violation and \$100,000 for subsequent violations. Additionally, the Attorney General can request that the court award money damages to an aggrieved party.⁴²

Given these possibilities, it is in the best interest of property owners to start complying with the law now and to avoid the potential publicity over an alleged violation of the Act caused by the filing of a lawsuit. Once the honeymoon period for complying with the ADA is over, the Attorney General's office will undoubtedly look for some high profile cases to litigate as a message to the business community that it must take the provisions of the ADA seriously.⁴³

514-0301; (202) 514-0381 (TDD).

39. Other educational resources are available from trade associations such as BOMA (Building Owners and Managers Association); professionals such as attorneys, architects, engineers and planners specializing in ADA compliance; governmental agencies including the Department of Justice, National Council on Disability and the EEOC; and nonprofit organizations such as the federally-funded Center for Independent Living. To ease compliance, Congress has created a small-business tax credit of 50% for any compliance beyond \$250.00 to a maximum of \$10,250.00. 26 U.S.C. §44 (1991).

40. *Id.* at 423, 489-91, 496. Attorney fees will be awarded to the plaintiff unless the suit was frivolous, unreasonable or groundless. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

41. H.R. 485 at 489.

42. 42 U.S.C. § 12188(b).

43. An exemption from civil actions exists for small businesses (25 or fewer employees and gross receipts of \$1,000,000 or less) for the first six months Title III goes into effect. *See*

V. CONCLUSION

Because the ADA requires businesses to think differently about the way they serve disabled persons, it is virtually certain there will be a large number of Title III violations, which in turn will spawn a large number of civil actions to enforce the law. A simple audit using the suggestions outlined herein can be performed on existing buildings to identify many of the architectural and structural barriers to access. Talking with disabled individuals will undoubtedly reveal many more suggestions for changes. By taking the initiative now, businesses and property owners can learn the lessons of the ADA without incurring the cost of expensive litigation.

The Americans with Disabilities Act of 1990, Pub. L. 101-336, §310. A one-year exemption exists for businesses with 10 or fewer employees and gross receipts of \$500,000 or less. *Id.*