

ADA

Public Accommodations

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THE AMERICANS WITH DISABILITIES ACT

Public Accommodations

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This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult your lawyer concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.

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he Americans with Disabilities Act (ADA) established a new protected class, aimed at ensuring that individuals with disabilities are more fully included in all segments of society. Title I of the ADA deals with the employment aspects of the law. The rights and obligations of employers under Title I were outlined in a previous booklet in this series.

ADA's Title III is entitled Public Accommodations and Services Operated by Private Entities. It requires owners and operators of businesses to accommodate disabled patrons, customers, and members of the public generally to the greatest extent possible. The purpose of Title III is to ensure that individuals with disabilities are able to participate more fully in society through improved access to public places including commercial establishments, hotels, shopping centers and entertainment and sporting events.

This booklet provides an overview of the requirements imposed on private entities to comply with this law. While in-depth coverage of Title III is not possible within this limited space, our goal is to provide a quick source of preliminary information for busy executives.

OVERVIEW OF THE LAW

Title III of the ADA prohibits certain private entities (“places of public accommodation”) from discriminating against individuals with disabilities by maintaining places of business that are physically inaccessible to the disabled or through policies which do not provide equal access. State and local governments are regulated by Title II of the ADA, while the federal government and federally funded activities are covered by Sections 501 and 504 of the Rehabilitation Act of 1973. (This booklet covers only Title III)

COVERAGE

The Act protects three categories of individuals with disabilities:

1. those who have a *physical or mental impairment* that substantially limits one or more major life activities. Physical or mental impairments can include such things as physiological disorders, cosmetic disfigurements, anatomical loss or psychological disorders.
2. those who have a *record* of a physical or mental impairment that substantially limits one or more major life activities; and
3. those who are *regarded* as having such an impairment, whether they actually have the impairment or not.

Major life activities include activities such as caring for one’s self, walking, seeing, hearing, speaking, breathing, learning and working. The term also includes bodily functions such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. Title III applies to all *public accommodations and to a lesser extent*

commercial facilities, and private entities offering *examinations or courses* for professional or trade purposes. Each is dealt with separately below.

PUBLIC ACCOMMO- DATIONS

A *public accommodation* is defined as a “private entity which affects commerce.” It typically includes all private businesses that offer goods and services to the public, although an establishment is not automatically considered a public accommodation merely because non-employees occasionally enter the facility.

If individuals frequent your facility to utilize your services, the areas open to the public should be accessible to persons with disabilities. In the case of a landlord and tenant, both have joint responsibility to ensure that their facility is accessible to individuals with disabilities. The landlord and tenant may both be liable in the event of a lawsuit regardless of any provision in a lease which stipulates differing levels of responsibility.

Definitions of Public Accommodations. Title III has defined places of public accommodation as the following :

- places of lodging – an inn, hotel, motel, or extended-stay hotel;
- establishments serving food or drink – a restaurant or bar;
- places of exhibition or entertainment – a motion picture house, theater, concert hall or stadium;
- places of public gathering – an auditorium, convention center or lecture hall;

- sales or rental establishments – a bakery, grocery store, clothing store, hardware store, shopping center. This applies to wholesale as well as retail sales businesses which sell to individuals but does not apply to wholesale establishments which sell only to other businesses;
- service establishments – a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office or professional office of a health care provider;
- stations used for specified public transportation – a terminal or depot;
- places of public display or collection – a museum, library or gallery;
- places of recreation – a park, zoo or amusement park;
- places of education – a nursery, elementary, secondary, undergraduate or post-graduate private school, or other place of education;
- social service centers – a day care center, senior center, homeless shelter, food bank or adoption agency; and
- places of exercise or recreation – a gymnasium, health spa, bowling alley or golf course.

Your facility must fall within one of these categories to qualify as a public accommodation, but the examples listed within each category are not exhaustive.

Moreover, a single area or part of an establishment may be classified as a place of public accommodation. For example, if a doctor maintains his or her office at home, that part of the home used as an office, including the entrance, restroom, and the office itself, is considered a public accommodation. By the same token, a rental office within an apartment complex is considered a public accommodation, but the individual apartments are not.

COMMERCIAL FACILITIES

Commercial facilities are defined as facilities operated by private entities. Commercial facilities must comply with the “new construction” and “alteration” sections of Title III but not with the general anti-discrimination provisions applicable to public accommodations or the barrier removal requirements, both of which are discussed below. If portions of a commercial facility are open to the public, that portion may be subject to the additional requirements which apply to public accommodations outlined in this booklet.

Examples of commercial facilities include:

- factories;
- warehouses;
- office buildings that do not contain entities defined as public accommodations;
- other buildings in which employment may occur;
- wholesale establishments that sell exclusively to other businesses; and
- private airports.

Aircraft, railroad locomotives, cabooses, freight cars, passenger cars, and any facility covered by the Fair Housing Act or specifically exempt from coverage under the Fair Housing Act are exempt from the definition of commercial facilities. Public accommodations and commercial facilities are both subject to Title III's requirements for new construction and alterations.

EXAMINATIONS AND COURSES

Title III requires private entities that offer examinations and courses related to applications, licensing, certification, or credentials for professional or trade purposes to be accessible to individuals with disabilities. If a course or examination cannot be offered in ways that accommodate individuals with disabilities, alternative accessible arrangements must be provided. In order to ensure that individuals with disabilities can take examinations, the necessary accommodations must be determined by looking at the particular circumstances and at the abilities of each individual.

In addition, examinations and courses must be offered at times and locations that are equally as convenient and occur as frequently as those offered to individuals without disabilities. For example, a nurse licensing exam that is administered in a warm, well-lit, second floor classroom is not accessible to an individual who uses a wheelchair. The Nursing Board may allow that individual to take the exam in a room located on the first floor as long as that room is also well-lit and heated.

EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS ORGANI- ZATIONS

A club classified as private pursuant to Title II of the Civil Rights Act of 1964 and religious organizations or entities controlled by religious organizations, are exempt from Title III's requirements. Despite the exemption, a private child care facility operating in space leased from a church would have to comply with Title III, although the church, or a day care facility run by the church would not. However, if the day care center operated in space *donated by a religious organization*, the exemption from coverage would apply to the private day care center as well as the church. A private club loses its exemption when the club is rented to an outside organization.

OBLIGATIONS IMPOSED ONLY ON PUBLIC ACCOMMO- DATIONS

Title III specifies that no individual with a disability may be discriminated against or denied the full use of “goods, services, facilities, privileges, advantages or accommodations” offered by a public accommodation. The phrase “goods, services, facilities, privileges, advantages or accommodations” applies to whatever type of goods or services your public accommodation provides to your customers and clients. The goal is to ensure that a public accommodation provides essentially the same opportunities to individuals with disabilities as it provides to all other individuals.

A. General Anti-Discrimination Prohibitions

A public accommodation must provide individuals with disabilities:

- equal opportunities to participate. For example, a restaurant cannot refuse to admit an individual simply because the individual has a mental impairment;

- opportunities to benefit from its goods and services. For example, theaters may not restrict individuals with disabilities to attendance at selected performances;
- benefits that are as close as possible to those received by all other individuals. However, separate programs for individuals with disabilities are permissible when necessary to ensure that they are provided with equal opportunities. Individuals with disabilities may not be required to accept “special” programs and cannot be excluded from regular programs. For example, a private health club may sponsor a separate basketball league for individuals who use wheelchairs. Despite the fact that such a league exists, an individual who uses a wheelchair cannot be denied the opportunity to participate in the regular basketball league unless some other limitation applies, such as the exclusion is necessary for the safe operation of the league.

In addition, your public accommodation must **not** apply standards to individuals with disabilities that have the effect of discriminating against them based on their disabilities.

Example: requiring a driver’s license as the only acceptable identification to cash a check would prevent disabled persons who cannot obtain a license from cashing a check.

B. Integrated Settings

Title III requires that goods, services, facilities, privileges, advantages and accommodations are provided to individuals with disabilities in the most integrated setting appro-

priate to their needs. Unfortunately, Title III provides only limited guidance regarding what constitutes the most integrated setting.

The concept of integration includes two basic principles:

- individuals with disabilities cannot be excluded, segregated or denied equal opportunities based on stereotypes, fears, patronizing attitudes or presumptions regarding their abilities, and
- any modifications made for persons with disabilities must be offered as a choice, not a “requirement.”

Generally, individuals with disabilities may not be required to participate in separate programs designed exclusively for them, nor may they be segregated from the larger society; they must have the same opportunities to participate in routine activities within the environment as all other citizens.

Public accommodations have the duty to maintain in working condition to the maximum extent feasible, the features that make the public accommodation physically accessible to individuals with disabilities. This includes maintaining accessible elevators, ramps, chair lifts, railings, parking spaces, routes, doors, etc. For example, a building manager of a three story building cannot turn off the elevators during normal business hours to cut costs, although he would be able to do so in order to provide routine maintenance.

You may not deny access to goods or services to individuals with disabilities because your insurance carrier has indicated that insurance coverage does not apply (or rates will increase) if individuals with disabilities are allowed to enter your facility.

You may deny goods or services to individuals with disabilities if their participation would result in *direct threat to the health and safety of others*, but only when this threat cannot be eliminated through an alteration of policies, practices or procedures, or providing auxiliary aids and services

The decision regarding whether an individual with a disability poses a “direct threat” must be individualized and based on reasonable judgments that rely upon up-to-date medical evidence or the best available evidence to determine:

- the nature, duration and severity of the threat;
- the probability that the threat will occur; and
- whether reasonable modifications of policies, practices or procedures will diminish the threat.

Example: A little league baseball organization violated the ADA by banning a wheelchair bound coach from the field based on safety considerations, without first making an “individualized and reasonable assessment.”

C. Specific Requirements

Title III contains specific examples of conduct which violates the general rule prohibiting discrimination. For example:

1. Eligibility Criteria

You may not impose special eligibility criteria that deny individuals with disabilities full and equal enjoyment of your goods and services, unless it can be shown that the criteria are necessary in order to provide the goods and services or to ensure the safe operation of your public accommodation. Safety requirements may not be based on speculation, generalizations or stereotypes.

2. Modification of Policies

You must make reasonable modifications in policies, practices, or procedures which allow you to provide goods and services to individuals with disabilities, unless the modifications would drastically change (“fundamentally alter”) the goods, services and privileges.

Example: A car rental company has a policy that cars will not be rented to a customer unless the customer has worked at his present job for at least one year. A disabled individual with other sources of income applies to rent a car. The ADA requires the company to modify its policy to permit rentals by customers with other adequate sources of income such as social security, disability benefits or veterans’ benefits.

In addition, while you need not provide personal services or devices to individuals with disabilities, you must allow individuals with service animals such as guide dogs to have access to your facility unless doing so would fundamentally alter or jeopardize the safe operation of your facility.

3. Auxiliary Aids and Services

You must provide auxiliary aids and services to allow communication by disabled individuals who have impairments such as vision, hearing or speech impairments that substantially limit the individual’s ability to communicate, unless it can be shown that they would *fundamentally alter* the nature of your goods and services or pose an “undue burden,” defined as a significant difficulty or expense. The goal is to ensure effective communication. The type of auxiliary aid required to ensure such communication will vary depending upon the length and complexity of the communication involved.

A “fundamental alteration” is a modification that is so significant that it changes the basic characteristics of the

goods, services, privileges, advantages or accommodations offered. Examples of auxiliary aids include, but are not limited to, qualified interpreters, note takers, video remote interpreting services, telecommunication devices for individuals with hearing impairments (TDDs), Brailled materials and open or closed captioning. TDDs must be provided when customers, clients, patients or participants, such as hospital patients and hotel guests, are allowed to make outgoing calls on a regular basis.

Example: A deaf individual goes to his physician after experiencing symptoms of a mild heart attack for a thorough examination and a battery of tests and requests an interpreter. The physician should arrange for a qualified interpreter since one is likely necessary for effective communication.

Example: A restaurant may provide a menu in Braille for a sight-impaired patron, or require that a wait staffer read the menu to the person.

4. Barrier Removal

You must remove physical barriers and communication barriers that are structural in nature whenever it is *readily achievable* to do so. The obligation to remove these types of barriers is continuing and a barrier removal that may not be readily achievable at one point may later be required when there is a change in circumstances which makes barrier removal possible.

A physical barrier is a part of your facility that hinders access by people with disabilities. ATMs, vending machines, telephones, drinking fountains, mirrors and operable parts that are mounted at a height that is not “reachable” to individuals using wheelchairs are some examples. Deep pile carpeting, which may hinder access to people using wheelchairs and crutches, is another example.

A communication barrier that is “structural in nature” is a physical barrier that is a crucial part of the structure of your facility. Examples of such barriers include conventional signs which are usually inaccessible to those who have vision impairments, and the absence of adequate sound buffers in noisy areas that would reduce the noise, which makes it difficult for individuals with limited hearing to hear. Communication devices such as TDDs, telephone handset amplifiers and digital check out displays are auxiliary aids; therefore, failure to provide them is not a communication barrier that is structural in nature.

“Readily achievable” is defined as easily accomplishable and able to be carried out without much difficulty or expense. The obligation to remove existing barriers does not apply to areas of a facility used only by employees, such as work areas. (However, barrier removal may be a reasonable accommodation required under Title I when necessary to accommodate an applicant or employee). In determining whether barrier removal is readily achievable, courts will consider factors such as the nature and cost of the removal, the overall financial resources of the public accommodation, and the effect of the barrier removal on the expenses and resources of the facility.

Examples of barrier removal that may be readily achievable include: installing ramps; making curb cuts in sidewalks and entrances; repositioning shelves; repositioning telephones; widening doors; installing raised toilet seats; installing audible alarms; and creating designated accessible parking spaces.

Several priorities in determining which barriers to modify first are:

- access from public sidewalks, parking or public transportation;
- access to those areas of a public accommodation

where goods and services are made available to the public;

- access to restroom facilities; and
- any other remaining barriers which prevent an individual with a disability from using a public accommodation's goods and services.

If barrier removal is not readily achievable, you must take "alternate measures" to make goods and services available if such measures are readily achievable. Examples of readily achievable alternate measures include providing home delivery or curb service, relocating activities to accessible areas, or the use of portable ramps. Individuals with disabilities may not be charged for the costs required to provide such alternate solutions.

Existing places of assembly such as theaters, conference rooms or auditoriums, are required to provide a reasonable number of wheelchair seating spaces and aisle seats with removable armrests for individuals with disabilities. The wheelchair seating must be dispersed throughout the seating area and must adjoin an accessible path. The seating should allow individuals with disabilities to sit with their companions and to have seating that is indistinguishable from the general seating. When such seating is impossible, you may provide portable seating so that individuals in wheelchairs may sit with their companions.

In addition to complying with Department of Transportation regulations, public accommodations that provide transportation to their customers, such as shuttle buses offered by hotels, private companies, shopping centers, schools and resorts, must remove barriers to the extent that it is readily achievable. However, such a public

accommodation is not required to retrofit hydraulic or air lifts in order to comply with the ADA.

5. Retaliation

A public accommodation may not retaliate against disabled individuals who exercise their rights under the ADA or those who help others assert their rights.

6. Limitation on Title III Obligations

You are not required to provide individuals with disabilities personal devices such as eyeglasses, hearing aids, personal aids, personal services or to alter inventory to make items available for disabled individuals that you would not carry under ordinary circumstances.

OBLIGATIONS IMPOSED ON BOTH COMMERCIAL FACILITIES AND PUBLIC ACCOMMO- DATIONS

Both public accommodations and commercial facilities must comply with the new construction and alteration portions of Title III. The ADA does not require new construction or alterations be undertaken but does require that, when you construct or alter a facility, the construction or alterations must comply with its requirements.

A. New Construction

The new construction provision requires that newly constructed facilities scheduled for first occupancy after January 26, 1993, regardless of size, must be *readily accessible to* and *usable by* individuals with disabilities to the extent that it is not *structurally impracticable*. If a building was occupied before January 26, 1993, it is not covered by Title III's new construction requirements. The "structurally impracticable" exception is very limited and rarely applied.

"Readily accessible" and "usable by" means that your

facility or part of your facility can be approached, entered and used by individuals with disabilities.

Compliance with this provision will be considered structurally impracticable only when the unique characteristics of the land, such as constructing a building on stilts in a marsh, prevent the implementation of accessibility standards. If providing access to individuals with one type of a disability (e.g. physical impairments) is structurally impracticable, accessibility still must be provided for individuals with all other types of disabilities. Standards for accessibility are contained in the ADA Accessibility Guidelines (ADAAG) which are set forth in an Appendix to Title III and 2010 ADA Standards for Accessible Design. The applicable standard will depend on the date of the building construction or alterations.

Work areas must be constructed so that individuals with disabilities can approach, enter and exit the area. This does not require all individual work stations be fully accessible at the time of construction.

For new construction, elevators are not required in facilities that have less than three stories or with fewer than 3,000 square feet per floor, unless the facility is a shopping center, shopping mall, contains the professional office of a health care provider, or a station used for public transportation. A shopping mall is either 1) a building with five or more *sales or retail establishments*, or 2) a series of buildings on a common site with five or more sales or *retail establishments*.

Those stores listed in the fifth category of places of public accommodation (those listed on page 4 of this booklet) such as a bakery, grocery store, hardware store, etc. are included within the phrase “sales and retail establishments.” For example, a strip of stores with a grocery, clothing store, restaurant, dry cleaner, bank and a pharmacy is not a “shopping center or mall” because only two of the

stores are listed in the fifth category of places of public accommodation.

B. Alterations

Alterations to public accommodations and commercial facilities which commenced after January 26, 1992 must be made so the altered area is “readily accessible to” and “usable by” individuals with disabilities, to the maximum extent feasible.

An alteration is defined as any change that affects or could affect the usability of or access to a building or facility. For example, if the flooring in a store is being replaced, the new floor must comply with the ADAAG requirements for non-slip surfaces and carpeting.

The definition of alteration includes, but is not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement of structural parts or elements, and changes or rearrangement of walls and full-height partitions. Normal maintenance, changes to mechanical and electrical systems, painting, reproofing and asbestos removal are not considered alterations.

“Readily accessible to” and “usable by” individuals with disabilities means that a facility or part of a facility can be approached, entered and used by individuals with disabilities. All alterations must comply with the ADAAG.

When alterations are made to a “primary function area,” an accessible path of travel to the changed area, and the bathrooms, telephones and water fountains which service that area, must be created to the extent that the cost of the added accessibility is not out of proportion to the overall cost of the original alteration. “Primary function area” is an area where a major activity takes place, such as the customer service and work areas in public accommodations and offices and work areas in commercial facilities.

The cost is disproportionate if it exceeds 20% of the original alteration.

For example, the customer service area of a dry cleaner and the area behind the counter are primary function areas. If the cost exceeds 20%, the path of travel should be made accessible to the extent that any disproportionate costs are not incurred. Widening doorways, installing ramps, making bathrooms accessible, lowering telephones and relocating water fountains are several examples of alterations that can be considered when determining whether the 20% disproportionality test has been met. However, the path of travel requirement does not apply to alterations to windows, hardware, controls, electrical outlets and signs in a primary function area.

Any alterations made to public accommodations eligible for listing on the National Register of Historic Places or buildings which have been qualified as “historic” under state or local law must comply, to the maximum extent feasible, with the ADAAG. If access to a public accommodation which is a historic property cannot be accomplished without destroying or threatening the property’s historic significance, you may follow alternative methods of accessibility. Title III does not apply this alternative method exception to commercial facilities.

Elevators are not required in facilities that have less than three stories or with fewer than 3,000 square feet per floor, unless your facility is a shopping center, shopping mall, contains a professional office of a health care provider or a station used for public transportation. If your facility is not eligible for this exemption, you still may not be required to install elevators if the cost of installation is out of proportion with the cost of the overall alteration.

ENFORCEMENT OF TITLE III'S PROVISIONS

Private individuals who are discriminated against in violation of Title III may file a private lawsuit for injunctive relief. Injunctive relief can include either an order requiring you to change your facility to make it readily accessible to and usable by individuals with disabilities, or an order requiring you to provide an auxiliary aid or service, change a policy or furnish an alternative method of accessibility.

Private individuals who reasonably believe that they are about to be discriminated against as a result of any new construction or alterations which will not be accessible, may sue to force you to stop or change the construction or alteration.

The Attorney General may also bring lawsuits in instances of overall public importance or where a pattern or practice of discrimination is alleged. Only the Attorney General may seek monetary damages and penalties not to exceed \$55,000 for the first violation or \$110,000 for any subsequent violation. The Attorney General may not seek punitive damages.

A court may award attorneys' fees regardless of what type of violation of Title III is alleged.

In the event of a civil lawsuit by the Attorney General, the court shall consider any good faith effort or attempts you make in an effort to comply with Title III when determining the amount of monetary damages that should be assessed against you.

CONCLUSION

With a law as complex and detail-oriented as Title III of the ADA, it is not sufficient merely to attempt to treat individuals with disabilities in the same manner as you treat members of society at large. You must actively take steps to avoid violating Title III when contemplating any new construction or alteration of existing facilities, including meeting with your architects and construction company to ensure that all plans are in compliance with the ADAAG. A post-completion survey is also recommended to ensure that the work was properly completed.

If you own, operate, lease to or from a public accommodation, it is crucial that you review all policies and procedures to determine if any of them have the effect of excluding individuals with disabilities from access to your facility or from the goods and services you offer. Review how information is communicated to your customers and clients to decide whether any auxiliary aids should be made available to individuals with hearing, speech or vision impairments.

Also, refer to the ADAAG to determine whether your facility has any barriers to access and whether the parking spaces, service counters, paths of travel, restrooms, telephones and water fountains among other things, are accessible to individuals with disabilities. If any barriers exist, remove them as soon as possible. To help limit the possibility of litigation, regular accessibility reviews should be conducted.

Only after instituting preventative measures such as those outlined above can you reduce the likelihood that your facility is violating one or more of the provisions of the ADA.

For further information about these contents, please contact any office of Fisher & Phillips LLP or visit our website at www.laborlawyers.com

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