

# On The Drawing Board: New ADA Access Rules

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Most employers are familiar with Title I of the Americans with Disabilities Act, which prohibits discrimination in employment against persons with disabilities. Less familiar to most employers is Title III of the ADA. Title III requires that "places of public accommodation" and "commercial facilities" be designed, constructed or altered so that they are accessible to the disabled. A "place of public accommodation" is a privately owned business that provides commercial goods and services to the public. Retail stores, hotels, restaurants, banks, and service establishments are all public accommodations. "Commercial facilities" are those intended for non-residential use and whose operations affect commerce. Such facilities include factories, warehouses, office buildings and most other workplaces.

Public accommodations and commercial facilities designed or constructed after January 26, 1993, or altered after January 26, 1992, must comply with certain regulations published by the Justice Department known as the ADA Architectural Guidelines for Buildings and Facilities, or "ADAAG." ADAAG sets technical specifications for certain elements of a facility, like entrances, paths of travel, bathrooms, primary function areas, parking, and elevators. Additionally, ADAAG contains "scoping" standards to specify how many accessibility features must be incorporated and under what circumstances these features are required. For instance, ADAAG requires that at least 50 percent of all public entrances must be accessible. Full compliance with the ADAAG standards for new buildings or altered areas is mandatory except in limited cases where compliance is structurally impracticable, disproportionately expensive, or, in the case of historic properties, cannot be achieved without substantially impairing the facility's historic features.

The ADAAG standards were first issued in 1991. On July 23, 2004, the U.S. Access Board, an independent executive agency charged with developing ADA accessibility standards, issued comprehensive changes to the ADAAG. While the changes have yet to be issued as binding regulations by the Justice Department, business owners, landlords, tenants, contractors and architects should all familiarize themselves with the proposed revisions to the ADAAG, as well as with their overall obligations under Title III of the ADA.

### **Title III Primer**

Under Title III of the ADA, the degree of accessibility to a covered facility depends on the date of the design and construction of the facility. For example, places of public accommodations (but not commercial facilities) built before January 26, 1993 are required only to remove architectural

barriers to disabled access where such removal is "readily achievable." Whether barrier removal is "readily achievable" depends on the difficulty and cost of the barrier removal. That standard, in turn, requires an analysis of all circumstances: the nature of the changes; the covered entity's type, size and financial position; and any cost/benefit burden placed on the entity.

In the case of places of public accommodation and commercial facilities built after January 26, 1993, such facilities must be readily accessible to and usable by individual with disabilities in full compliance with ADAAG standards, except where the requirements are structurally impractical to meet. The "structurally impracticable" exception is very narrow and will apply to only certain terrain characteristics which prevent incorporating accessibility standards. For example, constructing a building on stilts over marshland and making it accessible to wheelchair users may be "structurally impracticable." Of course, this does not prevent the facility from having other accessible features. Wheelchair accessibility may be structurally impracticable for a building built on stilts, but that does not relieve the owner from designing the building to provide for access to individuals using crutches or the sight and hearing impaired.

If a place of public accommodation or commercial facility built before January 26, 1993 is altered, the alterations must comply with the construction standards in ADAAG to the maximum extent feasible. Alterations would include remodeling, renovation, reconstruction, historic restoration, and changes or rearrangement of structural parts or elements or in the configuration of walls. Excluded from this definition are normal maintenance items, like painting, rewiring electrical systems or asbestos removal, which do not ordinarily affect a building's usability. If the altered area is an area of the facility that contains a "primary function," then the "path of travel" to that area—that is, the passage by which the primary function area is approached, entered and exited—as well as restrooms, water fountains and telephones serving that area must be readily accessible. A "primary function" is a major activity of which the facility is intended. "Primary areas" would include the dining area of a cafeteria, the meeting room in a conference center, or the assembly and production room of a manufacturing plant.

Many business owners who lease space—like retail tenants in shopping malls—wrongly assume that the owner of the property is solely responsible for ADA Title III compliance. In truth, both the landlord and the tenant of a public accommodation have full responsibility for complying with Title III. While Title III does permit a landlord and tenant to allocate responsibility in the lease for ADA compliance through, for example, indemnification provisions, such allocation does not affect their liability under the ADA. Furthermore, employers who are involved in or have control over the design, construction or alteration of their facilities may thereby become liable if the design, construction or alteration does not comply with ADAAG requirements. For example, a manufacturer who hires a contractor to build a facility according to the manufacturer's specifications will be liable under Title III if the contractor fails to comply with ADAAG design and construction guidelines.

## Proposed ADAAG Changes

The most significant change in the new ADAAG concerns employee work areas. The existing guidelines require that for covered facilities there must be an accessible route to an employee work area which allows employees with disabilities to approach, enter and exit the area. Disability advocates claimed that the current ADAAG only gets a person with a disability to the door of a work area and denies that person access through the work area and to his or her assigned work station. To address that problem, the new ADAAG guidelines require that there be an accessible circulation route within work areas that are larger than 1,000 square feet. Among other things, the new ADAAG guidelines set the required width for such routes, door-closing speeds, the force required for opening doors, and the permissible slopes of such circulation routes.

Under the existing ADAAG regulations, any newly constructed facility or alteration to an existing facility that affects the facility's "primary area" must ensure that the paths of travel to that area are readily accessible. Acknowledging that many multi-use buildings may have multiple primary areas, the new ADAAG clarifies that "primary" does not necessarily mean "the one and only." For example, a hospital may have many primary areas, such as operating rooms, labs, and nurses' stations. For new construction or alterations to a multi-use facility, the ADAAG rules require that all such areas have accessible paths of travel and, depending on the size, circulation routes as well. Changes to the restrooms, water fountains and telephones serving those areas will also be required.

Business owners, landlords, and tenants—as well as the contractors and architects they hire to design, build or renovate their facilities—should review and incorporate the new ADAAG changes in connection with their designs and construction plans. The new ADAAG will, if nothing else, have an impact on the usability of space that is being built or modified. Unless the new ADAAG guidelines are considered and incorporated into current design and construction plans, covered businesses may face expensive alterations and retrofits to their facilities once the ADAAG changes become law.

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