



Retail Industry Update

## Changes In ADA Accessibility Standards Are On The Way

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On July 26, 1990, President George H.W. Bush signed into law the Americans with Disabilities Act (ADA). The ADA provided broad anti-discrimination prohibitions against disabled individuals in several areas, including employment, state and local government services and facilities, public accommodations and telecommunications.

Title III of the ADA contained proscriptions in the public accommodations area, which refer to establishments that cater to the public, such as department stores, and other retail businesses. To implement them, the Department of Justice (DOJ) issued regulations and adopted architectural standards issued by the Federal Access Board. These guidelines, called the ADA Accessibility Guidelines or ADAAG, took effect in 1991, imposing heightened standards for alterations begun after January 26, 1992 and new construction concluded in 1993 and after.

During the succeeding 20 years, Title III's provisions have been enforced both by the DOJ and by private suits where a prevailing plaintiff not only gets an order making facilities accessible, but also attorneys' fees.

On the 20<sup>th</sup> anniversary of the ADA, Attorney General Eric Holder issued a notice that the DOJ was adopting a new Rule, and replacing the 1991 ADAAG with a 2004 version issued by the Access Board ("2010 Standards"). The Rule and the standards are phased into effect in two stages. The DOJ Rule becomes effective six months after its publication in the Federal Register, while the 2010 Standards become effective 18 months after publication of the Rule in the Federal Register. The Rule was published in the Federal Register on September 15, 2010, so the effective dates are March 15, 2011 for the Rule and March 15, 2012 for the 2010 Standards.

Any new construction in which the last building permit is issued or certified (depending upon the jurisdiction) on or after March 15, 2012, or any alterations commenced on or after March 15, 2012 must comply with the 2010 Standards. New construction or alterations commenced on or after the effective date of the Rule, but before the effective date of the 2010 Standards, can either be done in conformance with the old or the 2010 Standards. Importantly, elements that were in compliance with the 1991 ADAAG as of March 15, 2012 do not have to be brought up to compliance with the 2010 Standards unless they are subsequently altered.

Set out below is a summary of some of the major changes to the architectural standards which are likely to impact retail businesses.

## **Reach Ranges**

No changes were made for forward reaches, but the side-reach ranges are lowered from a maximum of 54 inches (to the highest operable part) to 48 inches and raised from a minimum of 9 inches (to the lowest operable part) to 15 inches. This will affect a number of elements in stores, including:

- fuel-dispenser handles, card readers and the like in convenience stores;
- open food merchandise such as hot dogs, drink dispensers, condiments, etc.; and
- hand dryers and soap- and paper-towel dispensers in accessible restrooms.

All of these items must be placed so that the highest operable part is no higher than 48 inches above the finished floor and no deeper from the face than 10 inches. If the object is more than 10 inches from the counter front for example, the reach range is less – 44 inches for objects within 10 to 24 inches of the front.

## **Common Use Circulation Path In Employee Work Areas**

Unlike the 1991 Standards, the 2010 Standards require accessible common use circulation paths within employee work areas. This will apply primarily to new construction and does not create a barrier-removal obligation for existing facilities. There are some exemptions:

- employee work areas or portions of employee work areas that are less than 300 sq. ft. and are elevated seven inches or more above the ground or finished floor where elevation is essential to the function of the space; and
- employee work areas that are less than 1,000 sq. ft. and are defined by permanently installed partitions, counters, casework or furnishings (for example, the employee side of service counters and kitchens in quick service restaurants).

Perhaps the most likely impact on retail businesses is that this new standard will require one accessible circulation path into a stock room. It does not require that each aisle in the stockroom itself be accessible. Moreover, this is more likely to apply to new construction since for alterations it may be technically infeasible to create a common use circulation path.

## **Accessible Routes From Site Arrival Points To Accessible Facilities**

There must be accessible routes from all site arrival points to the accessible facilities they serve if the route between them will be used by pedestrians.

## **Number Of Accessible Entrances**

The 1991 Standards required that 50% of entrances be accessible. Thus, for a small store with two entrances, only one had to be accessible. The 2010 Standards require that 60% of the entrances be accessible – and fractions are rounded up. Thus, where there are two entrances, both would have to be accessible. Where there are three entrances, two must be accessible, and where there are four, three must be accessible. Generally, the alteration of an existing facility will not require creation of another accessible entrance unless it impacts a primary function area, and an accessible path of travel must be provided to it.

## **Accessible Restrooms**

The 2010 Standards provide some regulatory relief to employers. For example, men's restrooms with only one urinal will no longer be required to provide an accessible urinal. Also, the 2010 Standards allow greater flexibility for the placement of the centerline of the wheelchair accessible toilet (between 17 and 19 inches from the wall to the centerline, as opposed to the old 18 inches to the centerline).

But the ability to install a lavatory immediately adjacent to the water closet has been eliminated from the 2010 Standards. To allow for side transfers, the 2010 Standards prohibit lavatories from overlapping the clear floor space at water closets. It is possible to design an accessible restroom that is no larger but without the lavatory adjacent to the water closet, partly because the 2010 Standards allow items like grab bars, dispensers, coat hooks and shelves to overlap the clear floor space necessary to approach the various elements.

### **Checkout Aisles and Sales-And-Service Counters**

For the first time, the 2010 Standards establish different accessible lengths for counters based on the type of approach provided. If it is a forward approach, the accessible portion of the counter must be at least 30 inches long and no higher than 36 inches with knee and toe space. If it is a parallel approach, the Standard remains at 36 inches wide and no higher than 36 inches.

All in all, there are hundreds of changes from the 1991 ADAAG to the 2010 Standards. And the Department of Justice is more aggressively enforcing the Act's provisions. Moreover, there is already a heightened awareness among advocacy groups and the disabled community at large, and many plaintiff's lawyers are learning that Title III lawsuits can generate significant fees.

The time to act is now. Retailers should begin to put together a plan for ensuring that current facilities comply with the 1991 ADAAG, or are brought into compliance before the effective date of the 2010 Standards and that newly constructed or altered facilities are compliant with the 2010 Standards by the effective date.