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New ADA Service Access and Facility Design Changes Implemented by the Department of Justice

Most companies are familiar with the "thou shalt not discriminate in any employment practices or decisions" part of the federal Americans with Disabilities Act (ADA). Such companies thus should be aware that this law has been recently updated by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) in that the very definition of "who is disabled?" has been changed. (All employers with 20 or more employees are covered by the ADA as amended by the ADAAA. If you need information on the employment provisions (Title I) of the ADA, please contact your Miller & Martin attorney for a referral to our Labor and Employment Law Practice Group).

The ADA covers more than just employment relationships, however. The information we are providing today deals with **Title III** of the ADA, which provides that disabled individuals shall have equal access and enjoyment of public accommodations among all **covered private entities**. The reason for this update is that the Department of Justice (DOJ) has amended its Regulation and Design Standards regarding Title III of the ADA (as well as Title II, which deals with the equal access and enjoyment of public accommodations in the public/government sector), placing new requirements on private facilities. Similar to the EEOC's enforcement role regarding Title I of the ADA, the DOJ is responsible for enforcing Titles II and III of this federal law. For those entities which are covered by Title II of the ADA by virtue of being government entities, please contact your Miller & Martin attorney for a referral to our Labor and Employment Law Practice Group, and we will be glad to provide you with information concerning the DOJ's amendments which affect Title II. This alert again focuses on Title III, which impacts **private** building owners as well as property managers and tenants.

These changes will take effect on March 15, 2011. There is a grace period until March 15, 2012 regarding the new Design Standards. These are indicated by a "*2012*" notation below. As with the last Design Standards, which were issued back in 1991, these changes only impact new construction or alterations of existing facilities which affect a design element which is described below. New construction or such alterations will continue to be covered by the 1991 Design Standards until March 15, 2012. Facility owners may, of course, choose to use the 2011 Standards on any such building projects prior to March 15, 2012.

Wheelchair and Other Mobility Device Access.

The Department of Veterans' Affairs and several other groups which represent large disabled populations had urged the DOJ to treat "other mobility devices" the same as wheelchairs from an accessibility standpoint in the new Regulation and Design Standards. These groups gained some ground but were not completely successful in their efforts. Specifically, the new Regulation provides that:

- Wheelchairs must be permitted in all areas which are designed for pedestrian use. (This is true under the current 1991 Title III Design Standards as well).
- "Other power-driven mobility devices," such as scooters, were not given the same presumptive status as wheelchairs in the new Regulation or Design Standards, as the DOJ reserved the right of facility owners to show that these devices would (1) create a direct threat, (2) fundamentally alter their programs or activities, or (3)

create a safety hazard.

- If a facility owner cannot establish one of these three (3) points, then "other power-driven mobility devices" must be permitted in all areas which are designed for pedestrian use just like wheelchairs.

Effective Communication.

For those entities which are required to provide sign language or other auxiliary aids to the hearing impaired, the new Regulation provides that video remote interpreting (VRI) may be used in the place of a "live" interpreter.

Service Animals.

There was much debate on this topic in light of the development in some states of very broad public accommodation laws regarding service animals in the past year. However, the DOJ did not make the major changes in this area that some disability advocacy groups had hoped. The new Regulation provides that:

- A "service animal" is a dog which has been trained to work or perform specific tasks for the benefit of an individual with a disability.
- Dogs which provide "general companionship" or "emotional support" to a disabled individual are not "service animals."
- Trained miniature horses also may serve as an alternative to dogs, however, these are not included in the definition of "service animal" in the new Regulation so as to provide facility owners/operators with the flexibility to decide whether such an "alternative" would be appropriate in their particular setting or not.
- Other animals such as chimpanzees, which have been recognized as "service" or "companion" animals in some states, are not included in the new Regulation as either "service animals" or "alternatives to dogs."

Additional Provisions Unique to Certain Industries.

The new Regulation also contains new provisions regarding ticket sales for those whose businesses involve ticketed events, and reservations for those who offer overnight lodging. Condominium facilities which function somewhat like a hotel or inn in that individual owners can "rent out" their condos are expressly excluded from the new Regulation.

2012 There are also new Design Standards which are applicable to facilities which have stages (regarding access to the same and seating relative to the same) as well as to hotels and other "transient lodging" facilities.

Design Standard Changes. *2012*

- For those entities which provide on-premises exercise equipment, at least one of each type of exercise equipment must be on an accessible route and must be positioned so as to enable an individual with a disability to use the equipment.
- Changes also have been made which are unique to those operating golf courses, miniature golf courses, fishing piers or platforms, or providing recreational boating, swimming or wading pools, saunas or steam rooms, amusement rides or play areas (for children ages two and over).
- General accessibility changes include that the maximum "side reach range" has been reduced from 54 to 48 inches and cannot be any less than 15 (instead of 9) inches.
- In single-user restrooms, there must be clearance for both forward and parallel approach to the toilet. In most instances, this required clearance cannot include the door to the toilet area. In-swinging doors of a single-use toilet or bathing room may swing into the clearance area around any fixture (sink, toilet) as long as clear floor space is provided within the room beyond the door's arc (i.e., the disabled individual can move their wheelchair into the room, close the door, then with the door closed use the toilet or sink with proper clearance).

- The design requirements for assembly areas (theaters, arenas, etc.) have been revised to provide more specific guidance about the appropriate vertical and horizontal dispersion of wheelchair accessible seating, sightlines over standing spectators, and the provision of companion seating. In addition, lawn seating areas and exterior overflow areas without fixed seats must now connect to a wheelchair accessible route.
- The scoping of seating in large facilities also has been reduced. Specifically, the incremental scoping for wheelchair spaces and companion seats required in assembly areas with fixed seating has been reduced. Under the 1991 Design Standards, incremental scoping for assembly facilities with more than 500 seats was one additional wheelchair space and companion seat for each increase of 100 seats. Under the 2010 Standards, facilities with 501 to 5000 seats must provide only one additional wheelchair space for each additional 150 seats (or fraction thereof), and facilities with more than 5001 seats must provide one additional space for each 200 seats over 5001.
- Under the 1991 Standards, it was only necessary to design work areas so as to permit an employee using a wheelchair to approach, enter, and exit the work area. Under the 2010 Standards, it will be necessary for new or altered work areas to include wheelchair accessible common use circulation paths within employee work areas (i.e., areas where the employee has room to meet/work/converse with others in his/her work area), subject to certain specified exceptions.
- All wheelchair accessible routes connecting facility arrival points and wheelchair accessible building entrances must now coincide with or be located in the same general area as general circulation paths (i.e., areas where employees meet/work/converse together). Also, where a circulation path is interior, the required wheelchair accessible route must also be located in the interior of the facility.
- Where levels in a parking garage have direct connections for pedestrians to another facility, all of these direct connection areas also must be wheelchair accessible.

The new Regulation and Design Standards are detailed and voluminous. This alert thus provides only a summary of some of their provisions which are expected to have a widespread impact. As always, if you have any questions regarding this alert or these new DOJ documents, please feel free to contact [Stacie Caraway](#), [Chris Parker](#) or your [Miller & Martin attorney](#).

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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