

The Americans with Disabilities Act's ATM Standards

What Store Owners Need to Know

By George J. Kroculich

Since the March 2012 effective date of the new Americans with Disabilities Act (ADA) standards regulating automated teller machines (ATM), it is estimated that plaintiffs have filed over 100 class action lawsuits in federal district courts across the country. The plaintiffs in these actions claim that almost half of the nation's 400,000 ATMs are inaccessible to individuals with disabilities and, consequently, these individuals allege that they have been the victims of discrimination.

The United States Census Bureau estimates that almost 19% of the adult, non-incarcerated population, or approximately 54 million people, suffer from some form of disability. Because the new ADA regulations cover all ATMs and because of the extent of the United States population who suffer from disabilities, a store owner who has installed an ATM on the store's premises may face an increased litigation risk if the ATM is noncompliant with the new regulations.

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On July 26, 1990, President George H.W. Bush signed into law the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* The ADA is designed as a comprehensive civil rights law aimed at prohibiting discrimination based on disability. Title III of the ADA protects individuals with disabilities from discrimination in places of public accommodation and provides that places of public accommodation must be readily accessible to, and usable by, individuals with disabilities. In addition to other forms of relief, Title III encourages private lawsuits to enforce the provisions of Title III by allowing a successful plaintiff to recover attorneys' fees and costs, which could be a significant amount.

In 1991, after the enactment of the ADA, the Department of Justice (DOJ) issued rules governing the implementation of Title III (the 1991 Accessibility Guidelines). These 1991 Accessibility Guidelines provided a minimum baseline to ensure that places of public accommodation were accessible to individuals with disabilities. Almost immediately after the publication of the 1991 Accessibility Guidelines, the DOJ began to revise these guidelines. On July 23, 2004, the DOJ published the revisions to 1991 Accessibility Guidelines (the 2004 Revisions). The DOJ officially



adopted the 2004 Revisions in 2010 (the 2010 ADA Standards).

2010 ADA STANDARDS

Chapter 7 of the 2010 ADA Standards includes many of the salient requirements for ATMs including:

- **Speech-enabled ATMs.** The operating instructions and orientation, visible transaction prompts, user input verification, error messages and all displayed information for full use shall be accessible to and independently usable by individuals with vision impairments. The ATM shall deliver speech through a mechanism

that is readily available to all users, including but not limited to, an industry standard connector or a telephone handset. In addition, speech shall be recorded or digitized human or synthesized.

- ***Tactilely discernible input controls.*** The 2010 ADA Standards mandate that at least one tactilely discernible input control shall be provided for each function. Where provided, key surfaces not on active areas of display screens shall be raised above surrounding surfaces. Where membrane keys are the only method of input, each shall be tactilely distinct from the other keys.
- ***Height and display requirements.*** The 2010 ADA Standards require that the display screen on an ATM shall be visible from a point located 40 inches above the center of the clear floor space in front of the machine. Characters displayed on the ATM's screen shall be in a sans serif font and shall be 3/16 of an inch high. Moreover, the characters displayed on the ATM shall contrast with the screen's background. The contrast may be either light characters on a dark background or dark characters on a light background.
- ***Braille instructions.*** An ATM must offer braille instructions for initiating the speech mode.

With certain exceptions, all places of public accommodation must comply with the 2010 ADA Guidelines. However, if a place of public accommodation provides its customers with more than one ATM, the 2010 ADA Standards do not require each ATM to be compliant. Rather,

at least one ATM at each location must comply.

GRACE PERIOD

The 2010 ADA Guidelines included a grace period until March 15, 2012 to comply with the new criteria. Failure to comply with the new requirements by this deadline could expose a store owner to litigation risk. The ADA includes multiple avenues to pursue claims of discrimination against stores operating noncompliant ATMs. First, the DOJ is empowered to conduct compliance audits. If a compliance audit detects a violation, the DOJ may impose civil fines of up to \$55,000 for the first offense and up to \$110,000 for subsequent offenses. The DOJ can audit an institution of any size. While it is expected that the DOJ will focus its enforcement efforts on larger institutions, in an era of heightened compliance scrutiny, even a single complaint of discrimination filed with the DOJ may be enough to trigger a compliance audit.

Moreover, the ADA authorizes both civil and private lawsuits, fines and penalties. In the current group of filed class action lawsuits, the plaintiffs generally have sought both injunctive relief and declaratory relief. The plaintiffs have asked the federal district court to grant an injunction directing the named defendant to take all necessary steps to become fully compliant with the 2010 ADA Standards. Additionally, the plaintiffs have requested the court to issue a declaration stating that the defendants have failed to comply with the 2010 ADA Standards. Finally, plaintiffs have included claims of discrimination based on state-law civil rights statutes. Many times, these statutes

authorize courts to award damages for violations of civil liberties or reimbursement of attorneys' fees and litigation costs.

LIMITED EXEMPTION AND GRACE PERIOD

The primary exception to the regulations and defense available to ATM owners who have been accused of discrimination against individuals with disabilities by owning or operating noncompliant ATMs is to argue that implementation of such requirements would result in an "undue burden." The burden is on the ATM owner to seek the exemption and prove the burden. "Undue burden" has been defined to mean either significantly difficult or expensive. However, a precise standard of what constitutes significantly difficult or expensive has not been established.

Rather, courts have used a case-by-case analysis to determine whether implementation of the 2010 ADA Standards constitutes an undue burden. Some factors that a court may consider when determining whether compliance would result in an undue burden include the nature and cost of the action required and the store's overall resources. However, this is a very subjective standard. It is also important to remember that a defendant who successfully asserts an undue burden defense is not excused from compliance with the 2010 ADA Standards. Rather, a successfully asserted undue burden defense only allows a store owner to delay implementation of the standards. In fact, presenting a court with a strategic plan and timeline of when the ATMs will become ADA compliant is a factor that a court would consider in its evaluation of the undue burden defense.

SAFE-HARBOR DEFENSE

The 2010 ADA Standards include a safe-harbor defense to certain claims; however, the communication requirements included in the ATM regulations do not qualify for this defense. The safe-harbor exception provides that ATMs built in compliance with the 1991 Accessibility Guidelines would not have to meet the 2010 ADA Standards by the implementation deadline of March 15, 2012. The safe-harbor provision applies to the structural features of an ATM including the height of operable parts and bins, if provided, for envelopes, waste paper or other items. However, this safe-harbor exception does not apply to the communication standards because the DOJ has classified these elements as auxiliary aids and services.

Because auxiliary aids and services do not constitute structural elements, the DOJ finds that, as a result, the safe-harbor exception does not apply. Finally, it is not a defense to argue that because a store owner leases an ATM, he or she cannot be held liable. If the ATM is located in a store, the store owner certainly would be named as a defendant in an ATM discrimination suit. If a store owner leases an ATM, he or she should contact the ATM owner to make sure that the ATM is ADA compliant.

PRACTICAL STEPS TO ENSURE COMPLIANCE

Even though many lawsuits have been filed alleging discrimination, there are several steps that a store owner who owns or leases an ATM

on the store premises can take to reduce his or her exposure to litigation.

- Have an ADA-trained expert inspect and evaluate the ATM. While it may not be an inexpensive option to have an inspector trained in ADA accessibility standards, the cost of hiring such an expert would certainly be significantly cheaper than being named as a defendant in a federal class action lawsuit.
- Do not assume that newly purchased ATMs are ADA compliant. Communicate with the ATM vendor to ensure that any newly purchased ATM is ADA compliant.
- If you are having difficulty implementing the 2010 ADA Standards, contact an attorney. An attorney can assist in evaluating how courts have applied the undue burden defense and applying the facts of your situation to how the law has developed. An attorney can also assist in preparing a budget, strategic plan for how the store will become ADA compliant and a timeline implementing the strategic plan.
- Establish proper training procedures. Developing a protocol to allow staff to appropriately and quickly respond if a customer complains about a lack of accessibility will help in two ways. First, a training protocol will assist in demonstrating that the store is ADA compliant. Second, effective and prompt customer service may satisfy the custom-

er and prevent a lawsuit before it gets started.

While the 2010 ADA Standards have led to an increased concern over ATM compliance, it would also be a good opportunity to review your store's overall compliance with the ADA, which has significant guidance and regulations over places of public accommodation. Prudent practice dictates periodic review to ensure continued compliance with the most recent versions of the requirements.

CONCLUSION

Since March 2012, the ADA has required all ATMs to be compliant with the 2010 ADA Standards. After the effective date of the 2010 ADA Standards, individuals with disabilities have begun filing class action lawsuits to enforce the provisions of these guidelines. While there is no way to insulate oneself completely from being named as a defendant in a lawsuit, there are several concrete steps that a store owner can take to minimize his or her risk of exposure. Inspecting all ATMs in the premises to ensure compliance and consulting with an attorney to develop an implementation plan and schedule if the ATMs are not in compliance are concrete steps that a store owner can take to reduce his or her exposure to discrimination claims based on noncompliance with the 2010 ADA Standards.

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