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AMERICANS WITH DISABILITIES ACT**The ADA and Offering Access to Swimming Pools and Other Recreational Facilities**

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1. BACKGROUND

The Americans with Disabilities Act (ADA) was enacted in 1990 to provide civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. The ADA guarantees equal opportunity and equal access for individuals with disabilities in public accommodations, recreational facilities, employment, transportation, state and local government services, and telecommunications. Title II of the ADA applies to state and local governments (public entities) and Title III applies to places of public accommodation, meaning businesses open to the general public.

On Sep. 15, 2010, the Department of Justice published the "2010 Standards for Accessible Design" (the

"2010 Standards") in the Federal Register, which revised, clarified, and updated the original 1990 ADA guidelines. Sections 242 and 1009 of these revised standards set minimum requirements for making swimming pools, wading pools, and spa pools accessible to people with disabilities. The revised requirements aim to ensure that individuals with disabilities will be able to enjoy the same recreational activities "at the same locations and with the same independence, ease and convenience as everyone else."¹

Two of the ADA Titles, Title II and Title III, apply to recreational facilities and, specifically, pools. Title II of the ADA protects people with disabilities from being excluded from or being denied participation in state and local government programs, services, or activities because a facility is inaccessible or unusable. As such, all programs, services, and activities when viewed in their entirety must be accessible to people with disabilities unless doing so would result in a "fundamental alteration in the nature of the program or in an undue financial and administrative burden."² To determine how an entity will comply with the 2010 Standards and which pools must be made accessible, the Department of Justice suggests that public entities consider the following factors: (1) how to provide swimming programs in the most integrated setting appropriate; (2) the various ways people participate in the programs; (3) locations where the programs are offered; (4) what programs are

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¹ www.ada.gov/pools_2010.htm

² *Id.*

offered at each pool and to which constituencies; and (5) which pools are accessible and to what extent.³

Title III of the ADA requires that places of public accommodation remove physical barriers in existing pools to the extent it is “readily achievable to do so.” Places of “public accommodation” include hotels, resorts, swim clubs, and sites of events open to the public.⁴ This does not include community pools associated with private residential communities that are limited to the exclusive use of residents and their guests, but does include swimming pools/clubs situated in residential communities that are made available to the public for rental or use.⁵

“Readily achievable,” in turn, means “easily accomplishable and able to be carried out without much difficulty or expense.”⁶ The “readily achievable” standard takes numerous factors into consideration including: (1) the nature and relative cost of making the modification(s); (2) the overall resources of the site or sites involved; (3) the geographic separateness and relationship of the site(s) to any parent entity; (4) the overall resources of any parent entity; and (5) the type of operation of any parent entity.⁷ For example, “readily achievable” for a small boutique hotel’s existing pool may mean one thing while for a large, international hotel chain, it will mean something different; a large hotel chain claiming that modifications to its pools are not “readily achievable” due to “difficulty and expense” is not likely to be a reasonable excuse for non-compliance. Regardless, the Department of Justice recognizes that compliance with the ADA is an ongoing obligation and public accommodations may need to alter or modify their equipment and accessibility over time as the needs and structure of their pools and programs change.

The Department of Justice, Civil Rights Division, Disability Rights Section has issued a publication which summarizes the new regulations and provides guidance as to compliance with them. Some of that information is set forth below. The publication, in its entirety, can be found at www.ada.gov/pools_2010.htm.

2. EXISTING VERSUS NEW FACILITIES The 2010 Standards apply differently to facilities that existed before and after the ADA was enacted and specifically, before and after enactment of the 2010 Standards.

a. Existing Facilities “Any alteration to a place of public accommodation or a commercial facility, after January 26, 1992, should have been made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities.”⁸ “Alteration is defined extremely broadly to include remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangements in the plan configuration of walls and full-height partitions.”⁹ Normal maintenance, reroofing, painting or wallpapering, asbestos removal or changes to mechanical and electrical

systems are not alternations unless they affect the usability of the building or facility.¹⁰ Additionally, “to the maximum extent feasible” means that the provisions of the ADA must be adhered to unless “the nature of the facility makes it virtually impossible to comply fully with the applicable accessibility standards through a planned renovation.”¹¹ This means that for existing construction, if a facility was modified or altered in almost any way, such alteration should have been performed so as to make the facility compliant with the ADA.

b. New Facilities The 2010 Standards require that all pool facilities built by state and local governments, public accommodations, and commercial facilities built after the effective date of the new rule must be accessible to people with disabilities. Similarly, if a pool facility is altered – meaning a physical change is made to a swimming pool which affects or could affect the usability of the pool – those alterations must comply with the 2010 Standards to the “maximum extent feasible.” Full compliance is not required only where an entity can demonstrate that it is “structurally impracticable” to meet the requirements.¹² Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of the terrain prevent the incorporation of accessibility features.¹³

3. NEW REGULATIONS The 2010 Standards require that swimming pools with 300 or more linear feet of wall (“Large Pools”) have two accessible means of entry, at least one of which is a pool lift or sloped entry. Where more than one means of access is provided into the water, the Department of Justice recommends that the means be different to better serve the varying needs of disabled individuals. Accessible means of entry include:

- Swimming pool lifts complying with Section 1009.2, the requirements for which include the pool lift location, seat location, clear deck space, seat height, seat width, armrests and footrests, operation, submerged depth, and lifting capacity;
- Sloped entries complying with Section 1009.3, the requirements for which include the submerged depth and handrails;
- Transfer walls complying with Section 1009.4, the requirements for which include clear deck space, wall height, wall depth and length, surface texture, and grab bars;
- Transfer systems complying with Section 1009.5, the requirements for which include a transfer platform, transfer space, the height of the transfer platform, transfer steps, surface of the system, and grab bars; and
- Pool stairs complying with Section 1009.6.

The 2010 Standards separately address small pools with less than 300 linear feet of wall (“Small Pools”), which are required to have one accessible means of entry, provided it is either a pool lift or a sloped entry.

There are a few exceptions to these requirements: Wave action pools, leisure rivers, sand bottom pools,

³ *Id.*

⁴ *Id.*

⁵ www.ada.gov/qa_existingpools_titleIII.htm

⁶ www.ada.gov/pools_2010.htm

⁷ *Id.*

⁸ 28 C.F.R. Part 36, § 36.402(a)(1)

⁹ *Id.* at § 36.402(b)(1)

¹⁰ *Id.* at § 36.402(b)(2)

¹¹ *Id.* at § 36.402(c)

¹² 28 C.F.R. Part 36, § 36.401(c)(1)

¹³ *Id.*

and other pools where user access is limited to one area are only required to have one accessible means of entry (provided that the accessible means of entry is a pool lift, a sloped entry or a transfer system complying with Section 1009).

In addition to the general standards applicable to pools, the 2010 Standards provide specific means of compliance for the following specific recreational pool types:

- **Wading pools** are required to have one accessible means of entry in the form of a sloped entry complying with Section 1009.3.

- **Spa pools** must provide a pool lift, transfer wall, or transfer system (complying with Section 1009).

Additionally, the internal areas of recreational facilities – locker rooms, saunas, and steam rooms – where provided, must be accessible, having the usual accessible features of any internal place of public accommodation, including appropriate entrances and exits, turning space, properly weighted doors and doors with proper hardware, lavatories with proper toilets, grab bars, sinks, toilet paper dispensers, paper towel dispensers, pipe coverings, doors, etc., and, where provided, an accessible bench. Specific regulations also apply to facilities containing exercise machines and equipment (Section 1004, *et seq*) and golf facilities (Section 1006, *et seq*).

4. OTHER NOTABLE REGULATIONS Businesses should note that, in an effort to encourage compliance with the ADA, Section 44 of the IRS Code allows for a tax credit for small businesses and Section 190 of the IRS Code allows for a deduction for all businesses.

The tax credit under Section 44 of the Code is available to businesses with total revenues of \$1,000,000 or less in the last tax year, or 30 or fewer fulltime employees.¹⁴ The credit can cover 50 percent of the eligible access expenses in one year up to \$10,250, with a maximum credit of \$5,000. This credit can be used to offset expenditures including those associated with improving accessibility via barrier removal and alterations.

The tax deduction is available to all businesses with a maximum deduction of \$15,000 per year. A business may claim this deduction for expenses associated with alterations and barrier removal.

5. WHAT TO EXPECT a. Compliance Deadlines

- **On or after March 15, 2012:** Deadline for all *newly constructed or altered facilities* of public entities to comply with the 2010 Standards.

- **On or after March 15, 2012:** Deadline for all *existing facilities* of public entities and public accommodations, *except pools*, to comply with the 2010 Standards.

- **Jan. 31, 2013:** Recently extended deadline for all *existing pools* of public entities and public accommodations to comply with the 2010 Standards. This deadline was extended the first time while the DOJ allowed for a “comment period” during which misunderstandings regarding compliance could be addressed. After reviewing the comments, the DOJ determined that a second extension (now to Jan. 31, 2013) was necessary to allow additional time for compliance.

The Department of Justice will release a technical assistance document “in the near future” to help pool owners understand compliance with the 2010 Standards.

b. Private Enforcement of ADA Regulations Although the Department of Justice has the power to enforce the regulations of the ADA, the number of private lawsuits aimed at enforcing the ADA has skyrocketed across the country over the past few years. That is no doubt due to a provision in the Act which provides for attorneys’ fees to the plaintiff’s attorney. The Southern District of New York alone has seen a 75 percent increase from 45 cases filed in 2009 to 181 filed in 2011. One hundred and two ADA accessibility lawsuits already have been filed in the Southern District of New York in 2012, putting 2012 on a pace for having over 200 ADA accessibility lawsuits in the Southern District of New York alone. These accessibility lawsuits have been aimed primarily at access to the goods and services of places of public accommodation such as stores, restaurants, coffee shops, and the like. Once the new regulations concerning pools and recreational facilities go into effect, however, we expect to see an increase in the number of lawsuits filed against such facilities for non-compliance with the ADA. Pool, spa, and recreational facilities would be advised to start devising compliance plans and instituting such plans now, before the regulations take effect and the plaintiff’s bar starts down the path of enforcement via lawsuit – which is costly and time consuming. Defending an ADA lawsuit is an expensive proposition. At a minimum, a facility needs to hire and pay counsel, pay for the modifications, pay the plaintiff’s attorneys’ fees, and perhaps also indemnify its landlord. The Department of Justice essentially has created a window for recreational facilities to comply with its requirements by extending the compliance deadline. Performing modifications now to bring a facility into compliance is a worthwhile endeavor.

¹⁴ www.ada.gov/qa_existingpools_titleIII.htm