

ADA Litigation: Hotels, Resorts And Inns — Beware

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The Americans with Disabilities Act 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.

Although the U.S. 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 and the lack of any notice provision. In 2015 alone, more than 5,000 ADA lawsuits were filed across the country. Defending an ADA lawsuit is an expensive proposition. At a minimum, a facility needs to hire and pay its own counsel, design and pay for the required modifications, pay the plaintiff's attorneys' fees and perhaps also indemnify its landlord and/or defend its tenants.



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Hotels, hotel chains, resorts, inns and motels are prime targets of ADA litigation and common targets of Department of Justice enforcement activities. This is because hotels, in particular, provide a Pandora's Box of potential violations: lawsuits can consist of a broad range of allegations including, but not limited to, violations at the check-in and concierge counters, guest rooms and bathrooms, parking lots, restaurants and pool/recreational facilities. With winter and spring break vacations on the horizon and summer vacations to follow soon after, hotels and resorts would be wise to make their facilities accessible now before a lawsuit forces them to do so.

Background: The ADA

Enacted in 1990, the ADA guarantees equal opportunity and equal access for individuals with disabilities in, among other places, public accommodations (places open to the general public), recreational facilities and places of employment. Title III of the ADA regulates "public accommodations, privately operated entities offering certain types of courses and examinations privately operated transportation and commercial facilities." [1] Public accommodations are facilities operated by private entities whose operations affect commerce. In essence, public accommodations are just about any store, restaurant or other service establishment anyone uses on a daily basis, including, but not limited to, places of

lodging, resorts and restaurants.[2]

The ADA prohibits public accommodations from denying individuals and classes of individuals the opportunity to “participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations or a place of public accommodation.”[3] The ADA also prohibits public accommodations from affording individuals or classes of individuals unequal opportunities to participate or benefit in a good, service, facility, privilege, advantage or accommodation.[4] Public accommodations may not give disabled individuals separate benefits, put them in unintegrated settings or deny them opportunities to participate in programs because of their disabilities. In essence, public accommodations must not discriminate in any sense of the word — be it by possessing physical barriers to access, excluding, segregating or treating unequally disabled individuals. Public accommodations must often put in place reasonable modifications to policies, practices and procedures for accommodating and/or serving disabled customers. These accommodations may include effective communication with people with hearing, vision or speech disabilities; and other access requirements.

Existing Facilities and Alterations

Most frequently, places of public accommodation in existing facilities (those built prior to Jan. 26, 1992) must remove physical barriers to access to their properties to the extent it is “readily achievable to do so.”[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 family-owned boutique hotel 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 premises are not “readily achievable” due to “difficulty and expense” is not likely to be a reasonable excuse for noncompliance. 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 property and programs change.

New Construction

New construction, which consists of facilities designed and constructed for first occupancy after Jan. 26, 1993, is subject to an even more stringent standard. Full compliance is required unless an entity can demonstrate that it is “structurally impracticable” to meet the requirements of the law.[8] “Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.”[9] Furthermore, even if performing one modification may be structurally impracticable, compliance with the ADA is required for any portion of the facility that can be made accessible to the extent that it is not structurally impracticable.[10]

Alterations

“Any alteration to a place of public accommodation or a commercial facility, after Jan. 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.”[11] The alteration standard is particularly pertinent to hotels: 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.”[12] “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.”[13] Additionally, “to the maximum extent feasible” means that the provisions of the ADA must be adhered to unless the nature of the existing facility makes it “virtually impossible to comply fully with the applicable accessibility standards through a planned renovation.”[14] 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.

Enforcement of the ADA

Both Department of Justice enforcement of the ADA and the number of private lawsuits aimed at enforcing the ADA have skyrocketed. The increase in private lawsuits 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 tremendous increase from 45 cases filed in 2009 to 181 filed in 2011 to 256 in 2014 — the numbers are increasing every year. Approximately 426 ADA accessibility lawsuits were filed in the Southern District of New York in 2015, a tremendous increase over the previous year and a nearly 950 percent increase in only six years. Nationwide, more than 5,000 ADA accessibility lawsuits were filed in 2015, and the number is sure to increase this year. No public accommodation is immune.

The lawsuits are costly and time consuming. Even if the parties are able to reach an early settlement, defendants are routinely required to: 1) pay their own attorneys to defend the lawsuit; 2) pay the plaintiff’s attorneys in the settlement; 3) pay to perform modifications, which can be costly; and in some cases, 4) indemnify and/or defend their landlord or property owner. Often the plaintiffs’ attorneys will insist on voluminous discovery which is ultimately without legal purpose. So what can a defendant do to comply with the law, minimize its risk of lawsuit and when a lawsuit is filed, defend itself in the most effective way possible?

With no lawsuit pending, a hotel or resort should be proactive; engage an attorney to arrange for a comprehensive review, advise on making the property accessible and protecting itself from a lawsuit.

Hotels and Resorts: Top “Weak Spots”

With, relatively speaking, large spaces and many amenities, hotels, motels, inns and resorts are prime targets for private ADA litigation and DOJ enforcement activity. The ADA standards require accessibility for individuals with a wide variety of different disabilities, such as persons who are blind or vision impaired, people who are deaf or hard of hearing, persons with limited use of hands or arms, individuals with mobility impairments, persons who use wheelchairs and people who have combinations of disabilities. Thus, the standards include requirements that address the different needs of persons with each of these types of disabilities.

Below is a nonexhaustive list of examples of accessibility target areas:

- If a hotel contains a parking lot, the parking lot must be accessible. That means that it must have, for example, and not by way of exhaustive list, a certain number of accessible parking spaces, proper signage, curb cuts, ramps, sidewalks, crosswalks and accessible routes throughout.
- The building entrance and lobby must be examined. Possible accessibility targets there include the doorway and entryway, registration and check-in counters and any other service counters.
- The hotel or resort must have an accessible route throughout its interior; that includes to/from any accessible guest rooms, restaurants, gift shops or stores and all other guest amenities.
- Public restrooms must be accessible; that means that, among other things, there must be the proper number of accessible stalls, as well as at least half a dozen other items inside the stall or restroom, including the location of the toilet, presence and location of grab bars and the size and layout of the toilet stall or room.
- Accessible guest rooms are another major potential target. A hotel must have a certain number of accessible guest rooms, including those with roll-in shower stalls and those which are outfitted for guests who are deaf or hard of hearing. Among the dozens of other requirements for guest rooms are proper doorways and doors, door hardware, maneuvering space, room controls, closets and guest room bathrooms (along with all of its elements).
- Restaurants and/or food service areas must have, among other things, accessible service counters, tables and seating, paths of travel.
- There are many other areas of hotels and resorts which are susceptible to accessibility violations, including, but not limited to, marinas or boating areas, gym areas, golf facilities, play and water play areas, pools and spas.

Department of Justice: Recent Hotel Targets

The Department of Justice has also targeted hotels recently. As recently as January of this year, the Department of Justice published a voluntary compliance agreement between the United States of America and Omni Hotels Management Corp.[15] The agreement requires the Omni New Haven at Yale hotel to undertake myriad modifications to the hotel, including, but not limited to: a) implementing a policy to provide variation in type of accessible guest rooms; b) providing additional rooms accessible to persons with hearing impairments; c) making several alterations to the accessible guestrooms, including to the closets, bathrooms, showers and grab bars; d) making specific alterations to 10 of its accessible guest rooms including providing proper clear floor space, modifying the closet rod and shelf, modifying the path of travel throughout the rooms and modifying the bathroom and bathtub; e) providing unobstructed forward and side reach ranges to the brochure display; and f) performing many modifications to the lobby area restrooms.[16]

Also recently, in December 2015, the Department of Justice entered into a settlement agreement with Marriott International Hotels Inc. and Ritz-Carlton (Virgin Islands) Inc. to resolve an investigation and compliance review of the Ritz-Carlton St. Thomas.[17] Although the modifications required under that agreement are not publicly available, one can assume that they are similar to those required of the Omni: physical modifications to

guest rooms, provision of additional or variation in type of accessible guest rooms, modifications to restrooms and hotel service counters and, in the case of a resort, potentially modifications to its pool and resort amenities.

In essence, hotels, motels, inns and resorts would be best served by addressing potential accessibility violations proactively. Most violations are easier to remedy on one's own terms — without a private plaintiff or the Department of Justice requiring certain modifications. A good offense is the best defense.

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[1] A Guide to Disability Rights Laws. U.S. Department of Justice, Civil Rights Division.

[2] 28 CFR Part 36, Subpart B, § 36.104 (definition "place of public accommodation.")

[3] § 36.202

[4] §§ 36.202, 36.203

[5] § 36.304(a)

[6] § 36.104 (definition "readily achievable"); see also § 36.304

[7] Id.

[8] 28 CFR Part 36, § 36.401(c)(1).

[9] Id.

[10] Id.

[11] 28 CFR. Part 36, § 36.402(a)(1)

[12] Id. at § 36.402(b)(1)

[13] Id.

[14] Id. at § 36.402(c)

[15] Voluntary Compliance Agreement between The United States of America and Omni Hotels Management Corporation, posted Jan. 5, 2016.

[16] Id.

[17] Settlement Agreement Between The United States of America and Marriott

International Hotels Inc. and Ritz-Carlton (Virgin Islands) Inc. Under the Americans With Disabilities Act, dated Dec. 18, 2015.

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