AMENDMENTS TO THE ADA--
WHAT YOU NEED TO KNOW

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WHAT YOU NEED TO KNOW TO COMPLY WITH A BROADER AMERICANS WITH DISABILITIES ACT

By Bruce L. Adelson
With the passage of the Americans with Disabilities Act (ADA) Amendments Act of 2008 (2008 Act), recent court decisions and federal enforcement actions, public lawyers need to reacquaint themselves with this complicated law. From the requisite number of accessible parking spaces, to the height of public water fountains, to meeting accessibility requirements when purchasing new public transportation vehicles, public lawyers’ ongoing familiarity with the ADA will help government entities that they represent avoid costly compliance pitfalls.

**ADA Background**

Signed into law in 1990, the ADA prohibits discrimination on the basis of disability in employment, state and local government services, public accommodations, commercial facilities, transportation, and telecommunications.

Additionally, the ADA prohibits disability discrimination by programs or activities receiving federal financial assistance.\(^1\) If a program or activity is found to have engaged in disability discrimination, it can lose its federal funding. This obligation applies to “all of the operations” of federally assisted entities that receive any amount of federal financial assistance.\(^2\)

The passage of the 2008 Act\(^3\) overturned several U.S. Supreme Court decisions and expanded upon the original law’s protections. Additionally, recent court decisions and federal enforcement actions illustrate the ADA’s broad reach.

**The ADA: Three Titles and Many Regulations**

The ADA’s primary coverage comes from three statutory sections. Title I requires employers with 15 or more employees to provide disabled workers with an equal opportunity to benefit from their employment-related opportunities. For example, Title I prohibits discrimination in recruitment, hiring, promotions, training, pay and workplace social activities. It also restricts job interview questions about an applicant’s disability before a job offer is made. Title I also mandates that employers make reasonable accommodations for the physical or mental limitations of disabled employees unless such accommodations would result in undue hardships to the employer.

People alleging violations of Title I must first seek relief from the U.S. Equal Employment Opportunity Commission (EEOC) by filing complaints within 180 days of the date of discrimination or within 300 days if they would result in undue financial and administrative burdens. However, they must still make “reasonable modifications” to their policies, practices, and procedures where necessary to avoid discrimination unless they can demonstrate that doing so would fundamentally alter the nature of the service, program or activity they provide. Such modifications may include alterations to a facility’s physical plant, such as the removal of physical barriers, and the provision of handicapped-accessible buses and other transport vehicles.

**State and local governments must follow specific architectural standards in the new construction and alteration of their buildings.**

Title II also covers public transportation services, such as city buses, public rail transit and public airports. Government transportation agencies must comply with requirements for accessibility in newly purchased vehicles; make good faith efforts to purchase or lease used handicapped-accessible buses; remanufacture buses in a handicapped-accessible manner; and, unless it would result in an undue burden, provide paratransit where they operate fixed-route bus or rail systems. Paratransit services pick up and drop off dis-

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ADA Enforcement
The U.S. Department of Justice (DOJ) can bring suit to enforce Titles II and III. DOJ can sue to eliminate a pattern or practice of discrimination or to address situations where the discrimination raises issues of public importance. Private individuals may also file administrative complaints of ADA violations with DOJ. ADA complaints to DOJ can be referred to an internal mediation procedure to resolve the dispute. Private plaintiffs may also file suit in federal court to enforce the ADA. They may file suit without first filing complaints with DOJ or without obtaining right-to-sue letters from the department. Private plaintiffs may recover monetary damages and attorneys’ fees if they prevail in court.

abled individuals who are unable to use the regular transit system independently.

The ADA’s Title III prohibits discrimination by places of public accommodation and commercial facilities against individuals with disabilities:

“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

Public accommodations are defined as private entities that own, lease or operate places of public accommodation, including hotels, restaurants, retail stores, movie theaters, private schools, convention centers, doctors’ offices, homeless shelters, transportation depots, zoos, funeral homes, day-care centers, sports stadiums and fitness clubs. Transportation services provided by private entities are also covered by Title III. Under Title III, the U.S. Department of Justice (DOJ) may assess civil penalties of up to $55,000 for the first violation and $110,000 for any subsequent violation.

Public accommodations must comply with nondiscrimination requirements that prohibit exclusion, segregation and unequal treatment of disabled people. Part of this compliance requires public accommodations to remove barriers in existing buildings when this can be accomplished without much difficulty or expense. Federal regulations also require ADA training for employees and contractors regarding compliance with Titles II and III.

Federal agencies have promulgated various regulations to implement the ADA. For example, the U.S. Department of Transportation has regulations concerning the purchase, use and maintenance of machines capable of lifting wheelchairs onto public buses.

In addition, DOJ has promulgated the ADA Standards for Accessible Design (Standards). These Standards encompass literally hundreds of structural requirements for places of public accommodation and commercial facilities during “the design, construction, and alteration of such buildings.” The Standards identify the features that must be accessible to disabled people under the ADA; the ways to make them accessible; the number of features that must be accessible; and the specific measurements, dimensions and other technical information needed to make the features accessible.

For example, the Standards specify the number of accessible parking spaces required relative to the total number of spaces in a parking lot or other parking facility, the height of Braille-language information, and the height of water flow from a public drinking fountain. The Standards’ specifications are mostly mandatory. Any failure to abide by their requirements constitutes a violation of the ADA.

The ADA Amendments Act of 2008
Prior to the 2008 Act, the term disability was generally interpreted narrowly. Indeed, the Supreme Court held that the ADA’s disability definition must be “interpreted strictly” to create a demanding standard for those people attempting to qualify as disabled. With this strict interpretation standard, the Court determined that to be “substantially limited in performing a major life activity” and thus qualify for ADA protection, a person must have “an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives.”

The 2008 Act expressly repudiates this holding and rejects the Court’s constricted interpretation of the statute’s disability definition. The 2008 Act states that it is the intent of Congress that a “broad scope of protection” be afforded to the ADA’s remedial language and definitions rather than the Supreme Court’s “strict interpretation” standard.

In addition, the 2008 Act states that the Court’s Toyota Motor Manufacturing, Kentucky, Inc. v. Williams standard effectively created an “inappropriately high level of limitation necessary to obtain coverage under the ADA.” The 2008 Act essentially shifted the onus for showing compliance with the law’s mandates back to the organizations covered by the ADA rather than subscribing to the Court’s view that disabled people must satisfy problematically high standards to be eligible for the law’s protections.

The 2008 Act also rejected attempts by courts and federal agencies, especially the EEOC, to use narrow definitions of major life activities when determining whether an individual’s impairment would be considered a disability and thus covered by the ADA. The 2008 Act makes clear that major life activities must be broadly defined to encompass as many activities as possible.

In keeping with its mandate to broaden the ADA’s scope, the 2008 Act also prohibits the consideration of “mitigating measures” such as medications, hearing aids and mobility devices when determining whether an individual has a disability and is thus protected by the ADA. Again, Congress overturned a Supreme Court decision that had narrowed the 1990 act’s protections. In Sutton v. United Airlines, Inc., the Court held that a person whose physical
or mental impairment is “corrected by medication or other measures” does not have an impairment that “substantially limits a major life activity” and thus is neither disabled nor protected by the ADA. The 2008 Act rejected this approach. The new law states that whether a person’s impairment substantially limits a major life activity shall be determined without considering the mitigating measures’ beneficial effects. Therefore, a person’s access to and use of medications and mobility devices will have no bearing on whether the person is disabled and thus protected by the ADA.

The Sutton Court also decided that someone whose symptoms are “episodic” or who is currently in remission and not symptomatic is not “substantially limited” in activities and is thus not disabled. The 2008 Act reverses this decision as well, stating that an impairment that is episodic or in remission is still a disability as long as it “substantially limits” a major life activity when it is active.

2008 Lower Court Decisions and Key DOJ Enforcement Actions

The ADA requires covered entities to provide auxiliary aids to ensure effective communication with deaf and hard-of-hearing individuals as well as the visually impaired. The ADA ensures that hearing-impaired people not miss important information available to others through, for example, a public address system. Auxiliary aids and services to provide such access must be made available except where they constitute an undue burden or fundamentally alter the public entity’s program.

The following DOJ regulation defines the term “auxiliary aid & services comprehensively:

- Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

A 2008 federal district court decision is instructive on the ADA’s accessibility requirements for the hearing-impaired. In Feldman v. Pro Football Inc., a case of first impression concerning the provision of equal access by hearing impaired patrons to aural information broadcast at sports stadiums, the court held that the Washington Redskins professional football team had violated the ADA by not providing their hearing-impaired fans with sufficient means to “full and equal” enjoyment.

The Redskins’ stadium is a place of “public accommodation” and is covered by Title III of the ADA. In pertinent part, the court held that the Redskins must provide deaf and hard-of-hearing fans with equal access to all aural information broadcast over the stadium’s public address system.

The Court is not persuaded by Defendants’ argument that the law only requires them to provide assistive listening devices. Plaintiffs have represented, and Defendants do not disagree, that assistive listening devices are useless to these Plaintiffs. Thus, these devices cannot possibly ensure effective communication with Plaintiffs. The Court cannot ignore the broader mandates of the ADA and its implementing regulations.

The plain language of Title III discredits Defendants’ argument that additional auxiliary aids and services are unnecessary because the only integral information is the game play, which can be understood by deaf and hard of hearing fans simply by watching the game. Title III requires Defendants to provide “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” available at FedEx Field. Defendants provide more than a football game; they also provide public address announcements, advertisements, music, and other aural information to hearing fans at FedEx Field. Presumably Defendants provide this aural information to hearing fans for a reason. This aural information is a good, service, facility, privilege, advantage, or accommodation. Without some form of auxiliary aid or service, Plaintiffs would not have equal access to this information. On the face of the statute, the Court believes and concludes that Title III of the ADA requires Defendants to provide deaf and hard of hearing fans equal access to the aural information broadcast.

2008 ADA Regulations Delayed

In June 2008, the U.S. Department of Justice (DOJ) proposed revisions to its ADA regulations, including DOJ’s ADA Standards for Accessible Design. DOJ’s 2008 Notice of Proposed Rulemaking suggested amending and clarifying several parts of its regulations that implement Titles II and III of the ADA. The public comment period for the proposed regulations ended on August 18, 2008. Many commenters endorsed the proposed rules, which appeared headed for final approval. However, on January 21, 2009, the Obama administration withdrew the proposed regulations pending review by officials appointed by President Obama. It is unknown when such review will occur. Withdrawal of the proposed rules does not affect existing ADA regulations, which remain in full force.
of a public entity..." is broad enough to encompass programming provided by a public agency, even programming provided, for example, by a television program that is shown by a government agency. Also in 2008, there were several developments concerning health care providers' compliance with the ADA that should resonate with public lawyers. These cases demonstrate the importance of an overall ADA compliance strategy and the perils of violating this powerful civil rights mandate.

In a case involving Concord Hospital in New Hampshire, six complainants alleged that the hospital failed to provide them with appropriate services, such as sign language interpreters, to communicate with healthcare professionals; instead, they had to use legally inadequate means to communicate. Concord Hospital entered into a consent agreement with DOJ, agreed to pay $100,000 in a settlement with six hearing-impaired people, agreed to change hospital procedures to accommodate people with hearing disabilities, and subjected itself to DOJ supervision. In Concord Hospital is also required to develop and adopt a detailed ADA compliance plan. The plan, for example, mandates that the hospital enter into a contract with a company that can provide qualified sign language interpreters within an hour of contact in at least 80 percent of situations. Finally, in Boyer v. Tift County Hospital Authority, a federal district court in Georgia denied the defendant's motion for summary judgment, alleging ADA Title II discrimination. The court also refused to dismiss the plaintiff's claim for intentional infliction of emotional distress.

The court found that the public hospital did not provide the plaintiff, who is hearing-impaired, with an interpreter when she requested one for approximately one month after she entered the hospital. The court held thus:

Both parties present evidence that Plaintiff's son, Lamar, contacted [Defendant] to request a certified sign language interpreter. This contravenes Defendant's assertion that it was not on notice that Plaintiff desired the services of an interpreter. This case is replete with evidence that Plaintiff desired a certified interpreter. Plaintiff's son inquired multiple times [about an interpreter]. ... Noticeably absent from Defendant's argument in support of effective communication is any mention of the interpreters it did attempt to bring in.

In essence, Defendant's argument can only be then that it complied with Title II of the ADA and the supporting regulations' mandate of effective communication because a deaf patient consented to the procedures she underwent at the hospital. Defendant cites the availability of Plaintiff's children to act as interpreters, and Plaintiff's ability to communicate through writing.
messages and reading lips. The Court disagrees with Defendant’s assessment.30

Conclusion

The year 2008 revealed the enormous challenges facing public lawyers and their clients concerning ADA compliance. A thorough understanding of the ADA’s many regulations, the 2008 Act and recent court decisions will help ensure proper observance of this important law. ■

Endnotes

1. Under the ADA, discrimination is prohibited against "qualified individuals with disabilities." An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected. See U.S. Equal Employment Opportunity Commission and U.S. Department of Justice Civil Rights Division, Americans with Disabilities Act Questions and Answers, available at www.ada.gov/gandaeng.htm.


9. Id. § 1.

10. Id. § 4.1.2(5).

11. Id. §§ 4.30.4., 4.10.5.

12. Id. § 4.15.3.


14. Id. at 199 (emphasis added).

15. 534 U.S. 184.


20. See e.g., 28 C.F.R § 35.101 et seq.

21. 28 C.F.R. § 35.104.


23. Id. at 708.


28. A similar consent agreement between DOJ and Health East can be found at www.ada.gov/healtheast.htm. HealthEast operates a system of medical facilities. One of its facilities, St. Joseph’s Hospital in St. Paul, Minnesota, is the subject of this agreement for ADA violations.


30. Id., slip op. at 5.

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