THE NEW ERA OF ADA COMPLIANCE:
WHAT DOES IT MEAN FOR YOUR FRANCHISE SYSTEM?

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THE AMERICANS WITH DISABILITIES ACT

A. The Americans with Disabilities Act of 1990 Prohibits Discrimination Against Individuals with Disabilities

B. To Be Protected Under the ADA, a Person Must Be an Individual with a Disability or Associated with an Individual with a Disability

C. The ADA Amendments Act of 2008

1. Physical or Mental Impairment that Substantially Limits One or More Major Life Activities

2. Substantial Limitation Evaluated Without Regard to Mitigating Measures

3. History or Record of an Impairment

4. “Regarded as” Disabled

5. Disability to Be Construed Broadly

D. Conditions Specifically Excluded from Coverage Under the ADA

E. Individuals Who Exercise Rights Protected by the ADA or Assist Others in Exercising Their ADA Rights Are Protected from Retaliation

F. Title I v. Title III

1. Title I of the ADA Regulates Discrimination on the Basis of Disability with Respect to Employment

2. Title III of the ADA Regulates Discrimination on the Basis of Disability with Respect to Privately Owned Public Accommodations

TITLE III OF THE ADA PROHIBITS DISCRIMINATION IN PUBLIC ACCOMMODATIONS

A. Title III of the ADA Requires “Public Accommodations” and Commercial Facilities to Comply with Specific Regulations and Architectural Requirements

1. Title III covers businesses, nonprofit service providers, privately operated entities and transportation providers, and commercial facilities

2. Public accommodations are private entities that own, lease, lease to or operate facilities

3. Equal Participation and Benefit With an Integrated Setting
4. Separate or Modified Programs and Direct Threat Exclusion ............... 12

B. New Construction, Alteration, and Barrier Removal ........................ 13
   1. New Construction ....................................................................... 13
   2. Alterations to Existing Buildings .............................................. 13
   3. Barriers to Access in Existing Buildings must be removed if the
      Removal Is “Readily Achievable.” .............................................. 15
   4. Alternatives to Barrier Removal .............................................. 20

C. Examinations Offered by Private Entities ........................................ 20

D. Enforcement of Title III .................................................................. 20
   1. Enforcement by the Department of Justice .................................. 21
   2. Enforcement by Private Citizens .............................................. 22

III. ACCESSIBILITY REQUIREMENTS UNDER TITLE III ..................... 23
   A. 1991 Regulations: Title III ADA Standard for Accessible Design Before
      March 15, 2012 ........................................................................... 23
      1. Overview of Key Requirements .............................................. 23
      2. Historic Preservation Exception .......................................... 25
   B. New Regulations: ADA Standards for Accessible Design after March 15,
      2012 .......................................................................................... 25
      1. Revised ADA Standards ....................................................... 25
      2. Compliance Date of Revised ADA Standards – March 15, 2012 .... 26
      3. 2010 Standards of Accessible Design .................................... 26
      4. Overview of Key Changes .................................................... 26

IV. THE ADA IN THE FRANCHISE INDUSTRY ..................................... 29
   A. Title III Liability and Compliance Issues in the Franchise Context .... 29
      1. Is a Franchisor an “Operator” of a Franchised Unit Under Title III? .... 29
      2. What if the Franchisor also Operates as a Lessor to its
         Franchisees? ........................................................................... 33
Table Of Contents
(continued)

3. What if Either the Franchisor or Franchisee Contractually Assumes Responsibility for Certain ADA-Related Components of the Franchise? ..........................................................................................................................34

4. Loss Shifting – Indemnification and Insurance Considerations ...........35

5. “Readily Achievable” Determination Within Franchised Systems..........36

6. DOJ Investigations with Respect to Franchised Systems ....................37

7. Recent Title III Cases and DOJ Settlement Agreements and Consent Decrees.............................................................................................................................38

8. Obligations of Franchisors and Franchisees Under Title III..............40

B. Title I Liability Issues in the Franchise Context ........................................42

V. CONCLUSION ..................................................................................................................42

Appendix 1 - ADA UPDATE: A PRIMER FOR SMALL BUSINESS

Biographies
I. THE AMERICANS WITH DISABILITIES ACT

A. The Americans with Disabilities Act of 1990 Prohibits Discrimination Against Individuals with Disabilities.

The Americans with Disabilities Act (hereafter, the “ADA”) was enacted in 1990 to combat discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. The ADA was passed in response to congressional findings that individuals with disabilities had been and continued to be discriminated against on the basis of their disability. As stated, the purposes of the ADA are:

The Congress finds that—

(1) physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.\(^4\)

Passage of the ADA was hailed as a landmark in bringing individuals with disabilities within the protection of federal civil rights legislation.\(^5\)

The ADA is comprised of five titles, each regulating discrimination with respect to disability within various public and private sectors.\(^6\) Title I of the ADA prohibits discrimination on the basis of disability in employment.\(^7\) Title II covers activities of state and local governments, and public transportation services such as city buses and public rail transit.\(^8\) Title III of the ADA regulates disability discrimination with respect to public accommodations.\(^9\) Title IV addresses television and telephone access for individuals with hearing and speech disabilities.\(^10\) Title V encompasses miscellaneous provisions including prohibitions of retaliation and coercion.\(^11\)

After a brief overview of the ADA, this paper will discuss ADA Title III obligations in light of the Department of Justice’s recent amendments to its regulations carrying out the provisions of Title III. This paper will then focus on Title III of the ADA and its impact on franchised systems.

B. To Be Protected Under the ADA, a Person Must Be an Individual with a Disability or Associated with an Individual with a Disability.

The ADA defines “disability” with respect to an individual as: (1) “a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

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\(^4\) 42 U.S.C. § 12101(b).
\(^5\) In addition to the ADA, many other legislative enactments protect individuals from discrimination on the basis of disability. These acts include, but are not limited to: (1) The Telecommunications Act, 47 U.S.C. §§ 255, 251(a)(2), which requires manufacturers of telecommunications equipment to ensure that equipment and services are readily accessible to and useable by individuals with disabilities; (2) The Rehabilitation Act, 29 U.S.C. §§ 791, 793-94, which prohibits discrimination on the basis of disability with respect to programs conducted by federal agencies, in programs receiving federal funding, in federal employment, and in the employment practices of federal contractors; (3) The Individuals with Disabilities Education Act, 20 U.S.C § 1400 et seq., which requires public schools to make free public education available to eligible children with disabilities; (4) The Architectural Barriers Act, 42 U.S.C. § 4151 et seq., which requires that federally funded buildings, alterations to existing building, as well as buildings leased by federal agencies comply with federal standards of accessibility; (5) The Fair Housing Act, 42 U.S.C. § 3601 et seq., which prohibits housing discrimination on the basis of race, color, religion, sex, familial status, national origin, and also prohibits discrimination on the basis of disability; and (6) The Air Carrier Access Act, 49 U.S.C. § 41705, which prohibits discrimination against individuals with disabilities in air transportation by domestic and foreign air carriers.

\(^6\) 42 U.S.C. § 12101 et seq.
\(^7\) 42 U.S.C. §§ 12111-12117.
\(^8\) 42 U.S.C. §§ 12131-12165.
(2) a record of such an impairment; or (3) being regarded as having such an impairment. A person is disabled for purposes of the ADA if any one of the three criteria is met.


The ADA Amendments Act of 2008 (the “ADAAA”) was enacted on September 25, 2008 and took effect on January 1, 2009. The ADAAA reversed several Supreme Court rulings that had previously narrowed the scope of the ADA’s protection. Although the ADAAA did not change the ADA’s three-pronged definition of “disability,” it significantly expanded the definition of individuals “with disabilities” as defined under the Act. First, the ADAAA provides a statutory definition and relatively comprehensive enumeration of major life activities. Second, the ADAAA classifies “major bodily functions” as major life activities. Third, the ADAAA clarifies the “regarded as” prong of the definition. Finally, the ADAAA clarifies that disability is now evaluated without regard to most mitigating measures. Most significantly, the ADAAA expands the definition of disability by providing that the term “disability” shall be construed broadly to the “maximum extent permitted.”

The ADAAA changes the way in which ADA statutory terms are to be interpreted in several ways. “Disability” now includes impairments that are “episodic or in remission” if they would substantially limit a major life activity when active. Impairments such as epilepsy or diabetes are now included in the definition of “disability.” Individuals using mitigating measures such as hearing aids and medications, who were previously effectively excluded from coverage under the ADA, are also protected.

1. Physical or Mental Impairment that Substantially Limits One or More Major Life Activities.

a. What Is a Physical or Mental Impairment?

A “physical impairment” is defined as “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.” Individuals with disabilities including, but not limited to, heart conditions, high blood pressure, AIDS, epilepsy, diabetes, and sight, hearing, speech and mobility impairments have been protected under this definition.
A “mental impairment” is defined as “[a]ny mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” Traits or behaviors that may be linked to mental impairments are not themselves considered impairments under the ADA. For example, traits such as stress, irritability, and poor judgment are not “mental impairments.”

b. What Are Major Life Activities?

“Major life activities” are defined as “those basic activities, including major bodily functions that most people in the general population can perform with little or no difficulty.” Before the ADAAA, courts narrowly interpreted the definition of “major life activity.” The ADAAA substantially broadened the interpretation of “major life activities,” and incorporated a non-exhaustive list of major life activities, including activities such as “performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.” Further, whether an activity is “major” is now determined without respect to whether it is of “central importance to daily life.”

The ADAAA also includes “the operation of a major bodily function” in the definition of “major life activities.” Major bodily functions include: “functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.” As a result, virtually any form of cancer will constitute a disability, whether active or in remission.

c. What Is a Substantial Limitation?

A “substantial limitation” is one that “substantially limits’ the ability of an individual to perform a major life activity as compared to most people in the general population.” The

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26 “Intellectual impairment” is defined as a disability when: (1) “the person’s intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills, and (3) the disability originated before the age of 18.” EEOC: Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act, General Information About Intellectual Disabilities, (http://www.eeoc.gov/facts/intellectual_disabilities.html) (last visited June 6, 2011) (hereafter “EEOC Intellectual Disabilities”).
27 29 C.F.R. § 1630.2(h).
29 EEOC Psych. Guid., at Quest. No. 2.
30 29 C.F.R. § 1630.2(h); 29 C.F.R. § 1630.2(j); see, e.g., EEOC v. Autozone, 630 F.3d 635, 639, 23 A.D. Cas. 1841 (7th Cir. 2010) (holding that self-care, including dressing oneself, brushing hair, tying shoelaces, showering, and attending to oral hygiene, is a major life activity).
31 Kellogg v. Energy Safety Servs., Inc., 544 F.3d 1121, 1125-26, 21 A.D. Cas. 193 (10th Cir. 2008) (driving is not a major life activity), cert. denied, 129 S. Ct. 1916 (2009); Kampmier v. Emeritus Corp., 472 F.3d 930, 938, 18 A.D. Cas. 1607 (7th Cir. 2007) (endometriosis is not a disability under the ADA because the plaintiff is able to “perform the tasks central to most people’s lives, and this dooms her claim that she is suffering from a disability cognizable under the ADA”) (citation omitted); Gretillat v. Care Initiatives, 481 F.3d 649, 654, 19 A.D. Cas. 97 (8th Cir. 2007) (crawling, kneeling, crouching, and squatting are not major life activities).
33 Id.
35 29 C.F.R. § 1630.2(h).
36 Id.
ADAAA clarifies that an impairment does not need to prevent or severely restrict a major life activity to be considered “substantially limiting.” 37 Further, “an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.” 38

The Equal Employment Opportunity Commission (EEOC) has articulated factors to consider when determining whether a person is “substantially limited” with respect to a major life activity. 39 These factors include (1) the nature and severity of the impairment; (2) how long the impairment will last or is expected to last; (3) the impairment’s permanent or long-term impact, or expected impact. 40 However, the substantial limitation determination is not a definitive analysis; it is a fact-specific analysis based on the particular circumstances of the case. 41

2. **Substantial Limitation Evaluated Without Regard to Mitigating Measures.**

The ADAAA reverses the Supreme Court’s decision in *Sutton v. United Air Lines, Inc.*, which held that mitigating measures must be taken into account in determining whether an individual has a disability under the ADA. 42 The ADAAA provides that the “substantial limitation” determination must be conducted without reference to medications, assistive devices, or other mitigating measures. 43 As a result, an individual who is not substantially limited in the performance of any major life function while on medication may still be deemed “disabled” within the meaning of the ADA. 44 Conversely, the negative side effects of mitigating measures may be taken into account when determining whether an individual is disabled within the meaning of the ADA. 45 The ADAAA, however, does exclude ordinary eyeglasses and contact lenses from coverage under this exclusion. 46

3. **History or Record of an Impairment**

In order to establish a history or “record of impairment,” an individual must show a history of an actual mental or physical impairment that substantially limited a major life activity, or a misclassification or misdiagnosis as having had such an impairment. 47 However, an

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37 *Id.*
39 29 C.F.R. § 1630.2(j).
40 *Id.*
41 The EEOC’s regulations provide a list of impairments that will usually result in a determination that an individual is substantially limited in a major life activity. 29 C.F.R. § 1630.2(j). This list includes impairments such as deafness and blindness, intellectual disabilities, partial or complete absence of limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. *Id.*
42 527 U.S. 471, 9 A.D. Cas. 673 (1999).
44 *Id.*
45 *Id.*
46 *Id.*
47 EEOC Technical Assistance Manual Title I of the Americans with Disabilities Act, ¶ 100,120[¶100, 120 or ¶¶ 100, 120] at § 2.2(b) (CCH) (1996) (hereafter “EEOC Tech. Assist. Man.”). In EEOC v. R.J. Gallagher Co., the plaintiff had been promoted to president of his company when he was diagnosed with myelodysplastic syndrome (“MDS”). 181 F.3d 645, 9 A.D. Cas. 917 (5th Cir. 1999). The plaintiff underwent chemotherapy. *Id.* at 648. After treatment, the plaintiff’s cancer went into complete remission. *Id.* When the plaintiff returned to work, he was demoted and his compensation was reduced. *Id.* at 648. The court determined that even though the plaintiff’s MDS did not (continued...)
individual cannot use the “record of impairment” theory to gain coverage under the ADA if he or she fails to establish that he or she is substantially limited in any major life activity.\textsuperscript{48}

4. \textbf{“Regarded as” Disabled}

An individual is “regarded as” disabled if he or she is “perceived” as having a disability based on stereotypes, fears or misconceptions about disabilities.\textsuperscript{49} The ADAAA provides that an individual is “regarded as” having a disability if the employee establishes that he or she has been discriminated against because of an actual or perceived physical or mental impairment regardless of whether the impairment limits or is perceived to limit a major life activity.\textsuperscript{50} The ADAAA further clarifies that the “regarded as” prong does not apply to temporary and minor impairments where the impairment is expected to last less than six months.\textsuperscript{51} Finally, the ADAAA establishes that employers are not required to provide a reasonable accommodation to individuals who are covered only because they are “regarded as” disabled.\textsuperscript{52}

5. \textbf{Disability to Be Construed Broadly}

The ADAAA states that the definition of disability should be interpreted in favor of broad coverage for individuals.\textsuperscript{53} Such broad coverage is reflected in the provisions of the ADAAA, which provide a lower threshold than previously applied by the courts to qualify for ADA protection. As a result, the ADAAA makes it much easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute.

D. \textbf{Conditions Specifically Excluded from Coverage Under the ADA}

Individuals who currently use illegal drugs are excluded from coverage under the ADA.\textsuperscript{54} An individual is a “current” drug user if “the illegal use of drugs occurred recently enough to justify an employer’s reasonable belief that involvement with drugs is an ongoing problem.”\textsuperscript{55} The ADA does, however, protect rehabilitated illegal drug users.\textsuperscript{56} The ADA also excludes homosexuality, bisexuality, voyeurism, compulsive gambling, pedophilia, transsexualism, exhibitionism, and kleptomania from coverage.\textsuperscript{57}
E. Individuals Who Exercise Rights Protected by the ADA or Assist Others in Exercising Their ADA Rights Are Protected from Retaliation.

Retaliation claims are permitted under the ADA.\(^{58}\) To establish a retaliation claim under the ADA, a claimant must establish (1) that he or she engaged in a statutorily protected activity; (2) that he or she suffered an adverse action; and (3) a causal connection between the two.\(^{59}\) The ADA also protects any individual who has “opposed any act or practice made unlawful by the ADA or who has made a charge under the ADA.”\(^{60}\) A claimant does not have to be a “qualified individual with a disability” as defined under the ADA in order to bring a retaliation claim.\(^{61}\)

F. Title I v. Title III

1. Title I of the ADA Regulates Discrimination on the Basis of Disability with Respect to Employment.

Title I of the ADA prohibits employers from (1) discriminating against qualified individuals with disabilities in all aspects of employment, including the terms of the job application procedures, hiring, firing, training, advancement or compensation, or with respect to any other terms, conditions or privileges of employment; (2) refusing to make reasonable accommodations for disabled individuals; or (3) discriminating against an individual because that person is associated with an individual with a disability.\(^{62}\) However, the ADA requires that an individual must (1) have a disability within the meaning of the ADA; (2) be qualified for the position sought or held; and (3) have suffered an adverse employment action because of his or her disability, in order to be protected.\(^{63}\) The plaintiff bears the burden of establishing that he or she is disabled within the meaning of the ADA.\(^{64}\)

a. Who Is Considered an “Employer” Under The ADA?

Title I applies to all private employers who have employed 15 or more employees for a minimum of 20 calendar weeks within the current or preceding calendar year.\(^{65}\) Title I also applies to state and local governments, employment agencies and labor unions.\(^{66}\) The federal government\(^{67}\) and independent contractors are excluded from ADA coverage.\(^{68}\)

\(^{58}\) See 42 U.S.C. § 12203(a) (“No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under this chapter.”).

\(^{59}\) Casna v. City of Loves Park, 574 F.3d 420, 426, 22 A.D. Cas. 129 (7th Cir. 2009).

\(^{60}\) Sheellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 188, 13 A.D. Cas. 1716 (3d Cir. 2003).

\(^{61}\) Carerras v. Sajo, Garcia & Partners, 596 F.3d 25, 36, 22 A.D. Cas. 1601 (1st Cir. 2010) (“Even if [plaintiff] fails to bring a successful disability claim under the ADA, a plaintiff may nonetheless assert a claim for retaliation.”); Squibb v. Mem’l Med. Ctr., 497 F.3d 775, 786, 19 A.D. Cas. 961 (7th Cir. 2007) (“The Act prohibits an employer from retaliating against an employee who has raised an ADA claim, whether or not that employee ultimately succeeds on the merits of that claim.”).


\(^{63}\) Bowers v. Nat’l Collegiate Athletic Ass’n, 475 F.3d 524, 537 (3d Cir. 2007); Burchett v. Target Corp., 340 F.3d 510, 516, 14 A.D. Cas. 1296 (8th Cir.2003).

\(^{64}\) Burchett, 340 F.3d at 517.

\(^{65}\) 42 U.S.C. § 12111.

\(^{66}\) Id.

\(^{67}\) Id. However, federal employees may sue for disability discrimination under the Rehabilitation Act of 1973, 29 U.S.C. § 794.

\(^{68}\) 42 U.S.C. § 12111(5)(B); see Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 14 A.D. Cas. 105 (8th Cir. 2003) (“The term ‘employer’ does not include the United States [or] a corporation wholly owned by the government of the (continued...)}
b. Who Is Considered an “Employee” Under the ADA?

To determine who is an employee for ADA purposes, courts consider how much control an alleged employer exhibits over the individual.69 More specifically, the Supreme Court of the United States has articulated six factors to consider in determining whether an individual is an employee.70 These factors are: (1) whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work; (2) whether and, if so, to what extent the organization supervises the individual’s work; (3) whether the individual reports to someone higher in the organization; (4) whether and, if so, to what extent the individual is able to influence the organization; (5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and (6) whether the individual shares in the profits, losses and liabilities of the organization.71 The determination as to whether a claimant is an “employee” for purposes of the ADA is a fact-intensive analysis based on the specific facts of the case.

c. Who Is a “Qualified” Within the Meaning of the ADA?

An individual is qualified for the position sought or held if he or she “satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and . . . with or without reasonable accommodation, can perform the essential functions of such position.”72 One may consider whether the individual satisfies the prerequisites for the job, and whether the individual can perform the essential functions of the job with or without reasonable accommodation.73 An employer may also consider the individual’s “education, work experience, training, skills, licenses, certificates,” and such other prerequisites as the ability to work with other people or good judgment.74 An employer must identify the essential functions of the job and determine whether they can be performed by the individual either unaided or with a reasonable accommodation.75 The ADA claimant bears the burden of establishing that he or she is qualified for the position sought or held within the meaning of the ADA.76

2. Title III of the ADA Regulates Discrimination on the Basis of Disability with Respect to Privately Owned Public Accommodations.

Title III of the ADA provides that covered entities may not discriminate against any individual with a disability with respect to providing services or facilities.77 As a result, covered entities must provide the same type and quality of care, services and access to facilities, notwithstanding an individual’s disability. As this paper will later address in more in detail,
numerous entities are covered under the public accommodations provisions of the ADA. These covered entities must make reasonable modifications so that individuals with a disability can enjoy the entities’ services and use its facilities as readily and effectively as those without disabilities. Examples of such modifications include not only physical modifications to make the place of public accommodation more accessible, but also such modified practices as permitting a sight-impaired individual to bring a service animal onto the premises or furnishing auxiliary aids to assist in communicating with an individual with a disability. The Title III obligations of public accommodations are discussed extensively in Section II, infra.

II. TITLE III OF THE ADA PROHIBITS DISCRIMINATION IN PUBLIC ACCOMMODATIONS

A. Title III of the ADA Requires “Public Accommodations” and Commercial Facilities to Comply with Specific Regulations and Architectural Requirements.

1. Title III Covers Businesses, Nonprofit Service Providers, Privately Operated Entities and Transportation Providers, and Commercial Facilities.

Title III of the ADA covers: (1) public accommodations, (2) commercial facilities, and (3) private entities that offer certain examinations and courses related to educational and occupational certification. Public accommodations are private entities that own, operate, lease, or lease to places of public accommodation. Commercial facilities are nonresidential facilities, including office buildings, factories, and warehouses, whose operations affect commerce. Commercial facilities do not include rail vehicles, aircrafts, or any facilities covered by the Fair Housing Act. Additionally, facilities expressly excluded from coverage under the Fair Housing Act, such as owner-occupied rooming houses providing living quarters for four or fewer families, would not be considered commercial facilities.

Title III of the ADA does not cover entities controlled by religious organizations (including places of worship), private clubs, and state and local governments. With respect to private clubs, courts have been most likely to apply the exemption and find that Title III does not apply in cases when (1) members exercise a high degree of control over club operations; (2) the membership selection process is highly selective; (3) substantial membership fees are charged; (4) the entity is operated on a nonprofit basis; and (5) the club was not founded specifically to avoid compliance with federal civil rights laws. Private clubs may also lose their exempt status to extent that the facilities of the private club are made available to patrons of a place of public accommodation. For example, a private country club that rents space in its facilities to a...
private day care center that is open to children of nonmembers would have Title III obligations with respect to the day care operation.\textsuperscript{88}

2. Public Accommodations Are Private Entities that Own, Lease, Lease to or Operate Facilities.

Public accommodations are required to maintain facilities that readily provide access to individuals with disabilities.\textsuperscript{89} The ADA provides an exhaustive list of 12 categories of public accommodations.\textsuperscript{90} To be considered a place of public accommodation, an entity must fall under one of these 12 categories.\textsuperscript{91} However, this list should be interpreted with some flexibility as the ADA simply provides illustrations of public accommodations that would fall under a category.\textsuperscript{92} For example, a place of public accommodation may be located in a private residence or home where portions of the home are used in a manner that would fall under one or more of the 12 categories.\textsuperscript{93}

The 12 categories of public accommodations are: (1) places of lodging; (2) establishments serving food or drink; (3) places of exhibition or entertainment; (4) places of public gathering; (5) sales or rental establishments; (6) service establishments; (7) public transportation terminals, (8) places of public display or collection; (9) places of recreation; (10) places of education; (11) social service center establishments; and (12) places of exercise or recreation.\textsuperscript{94}

a. Places of Lodging

This category includes inns, hotels, motels, or other place of lodging, except for owner-occupied establishments renting fewer than six rooms.\textsuperscript{95}

b. Establishments Serving Food or Drink

This category includes restaurants, bars, or other establishment serving food or drink.\textsuperscript{96}

c. Places of exhibition or entertainment

This category includes motion picture houses, theaters, concert halls, stadiums, or other places of exhibition or entertainment.\textsuperscript{97}

\textsuperscript{88} ADA Title III DOJ Technical Assistance Manual § III-1.60000.
\textsuperscript{89} 42 U.S.C. § 12182.
\textsuperscript{90} 42 U.S.C. § 12181(7); ADA Title III DOJ Technical Assistance Manual § III-1.20000.
\textsuperscript{91} ADA Title III DOJ Technical Assistance Manual § III-1.20000.
\textsuperscript{92} Id. For example, a vacation timeshare property may be deemed a place of public accommodation depending on how much the time share resembles or operates as a hotel or other place of lodging. Id. The DOJ has clarified, however, that an individual time share owner does not become a public accommodation by privately renting out his or her week. Department of Justice Letter by John R. Dunne, Assistant Attorney General, April 20, 1992.
\textsuperscript{93} ADA Title III DOJ Technical Assistance Manual § III-3.12000.
\textsuperscript{94} 42 U.S.C. § 12181(7).
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
d. **Places of Public Gathering**

This category includes auditoriums, convention centers, lecture halls, or other place of public gathering.\(^{98}\)

e. **Sales or Rental Establishments**

This category includes bakeries, grocery stores, clothing stores, hardware stores, shopping centers, or other sales or rental establishments.\(^{99}\)

f. **Service Establishments**

This category includes laundromats, dry cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of an accountant or lawyer, pharmacies, insurance offices, professional offices of health care providers, hospitals, or other service establishments.\(^{100}\)

g. **Public Transportation Terminals**

This category includes transportation terminals, depots, or other stations used for specified public transportation.\(^{101}\)

h. **Places of Public Display or Collection**

This category includes museums, libraries, galleries, or other places of public display or collection.\(^{102}\)

i. **Places of Recreation**

This category includes parks, zoos, amusement parks, or other place of recreation.\(^{103}\)

j. **Places of Education**

This category includes nurseries, elementary, secondary, undergraduate, or postgraduate private schools, or other place of education.\(^{104}\)

k. **Social Service Center Establishments**

This category includes day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, or other social service center establishments.\(^{105}\)

\(^{98}\) Id.

\(^{99}\) Id.

\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) Id.

\(^{103}\) Id.

\(^{104}\) Id. Public schools would be covered under the provisions of Title II rather than Title III.

\(^{105}\) Id.
I. Places of Exercise or Recreation

This category includes gymnasiums, health spas, bowling alleys, golf courses, or other places of exercise or recreation.\footnote{106}

3. Equal Participation and Benefit With an Integrated Setting

As of January 26, 1992, public accommodations were required to comply with nondiscriminatory requirements that prohibit exclusion, segregation, and unequal treatment.\footnote{107} Title III prohibits the discriminatory denial of services to individuals with disability.\footnote{108} Title III further provides that individuals with disabilities must have an equal opportunity to benefit from the goods and services offered by a place of public accommodation.\footnote{109} Title III also provides that, to the extent possible, public accommodations must provide individuals with disabilities the ability to participate and benefit in an integrated setting or program most closely resembling that of “mainstream” American society.\footnote{110}

4. Separate or Modified Programs and Direct Threat Exclusion

Title III permits some exceptions to the mandated right of equal participation and benefit in public accommodations. For example, a public accommodation may offer separate or modified programs for individuals with disabilities where a separate program is necessary and the program is specifically designed to meet the needs of the individuals with the disabilities for whom they are provided.\footnote{111} Furthermore, a public accommodation may exclude an individual with a disability from participation if that individual’s participation would pose a “direct threat” to the health or safety of others.\footnote{112}

In order to apply the “direct threat” exclusion, a public accommodation must determine that an individual poses a significant risk to others that “cannot be eliminated or reduced to an acceptable level by reasonable modifications to the public accommodation’s policies, practices, or procedures or by the provision of appropriate auxiliary aids or services.”\footnote{113} The determination as to whether a person poses a direct threat to the health or safety of others cannot be based on generalizations or stereotypes, but rather must be based on the specific circumstances, including the nature of the activity at issue and the actual abilities and limitations of the individual.\footnote{114} Further, the determination must be based on current medical facts, including: (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.\footnote{115}

\footnote{106}Id.\
\footnote{107}42 U.S.C. § 12182; ADA Title III DOJ Technical Assistance Manual § III-3.00000.\
\footnote{108}42 U.S.C. § 12182; ADA Title III DOJ Technical Assistance Manual § III-3.30000. However, compliance obligations for newly constructed facilities were deferred until January 26, 1993, one year following the ADA’s general effective date.\
\footnote{109}42 U.S.C. § 12182; ADA Title III DOJ Technical Assistance Manual § III-3.40000.\
\footnote{110}42 U.S.C. § 12182.; ADA Title III DOJ Technical Assistance Manual § III-3.41000; ADA Title III DOJ Technical Assistance Manual § III-3.42000.\
\footnote{111}ADA Title III DOJ Technical Assistance Manual § III-3.41000.\
\footnote{112}ADA Title III DOJ Technical Assistance Manual § III-3.80000.\
\footnote{113}28 C.F.R. §§ 36.104, 36.208; ADA Title III DOJ Technical Assistance Manual § III-3.80000.\
\footnote{114}Id.\
\footnote{115}Id.
B. New Construction, Alteration, and Barrier Removal

Public accommodations are subject to the new construction and alteration requirements of the ADA, as well as barrier removal requirements. Commercial facilities are subject to the new construction and alterations requirements, but not barrier removal. In some circumstances, an alteration in one area of a facility may trigger a duty to make other areas accessible.

1. New Construction

Facilities constructed and designed for first occupancy after January 26, 1993 are covered under the new construction provisions of the ADA. Newly constructed places of public accommodation and commercial facilities must be accessible to individuals with disabilities (i.e., in compliance with the ADA Accessibility Guidelines) to the extent that it is not “structurally impracticable.” Compliance will be considered “structurally impracticable” only in rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. For example, if a landowner intends to build on land in which one section is level, another section is extremely steep, and a third is marshland, the marshland area of the property is the only section which may meet the structurally impracticable exception. Even when the structurally impracticable exception applies, portions of a facility that can be made accessible must still be made accessible.

Additionally, the DOJ regulations provide exemptions based on the particular characteristics of new construction. For example, elevators do not have to be installed in facilities under three stories or with fewer than 3,000 square feet per floor, unless the facility is a shopping center or mall, professional office of a health care provider, or station used for public transportation.

2. Alterations to Existing Buildings

Alterations made to existing places of public accommodation and commercial facilities after January 26, 1992 must be accessible to the maximum extent feasible. Alterations are defined as a change to a building or facility made by, or on behalf of, or for the use of a public accommodation or commercial facility that affects the usability of the building or facility. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in the plan or configuration of walls or full height

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116 ADA Title III DOJ Technical Assistance Manual §§ III-1.0000, 1.3000.
117 Id.
119 ADA Title III DOJ Technical Assistance Manual § III-5.00000.
120 Id.
121 Id.
122 Id.
123 Id.
124 ADA Title III DOJ Technical Assistance Manual § III-5.4100 defines “shopping center or mall” as either (1) a building with five or more “sales or retail establishments,” or (2) a series of buildings on a common site, either under common ownership or common control or developed together, with five or more “sales or retail establishments.”
125 42 U.S.C. § 12183(b); ADA Title III DOJ Technical Assistance Manual § III-5.40000.
126 28 C.F.R. § 36. 402; ADA Title III DOJ Technical Assistance Manual § III-6.00000. The DOJ regulations define an “existing” facility as one “in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.” 28 C.F.R. § 36. 104.
127 Id.
partitions. If, for example, a property owner begins a renovation or remodel of an existing facility and determines that a doorway must be relocated, the new doorway must meet Title III guidelines. Generally, normal maintenance or redecoration is not considered an alteration unless it affects the usability of the building or facility.

When alterations are made to a “primary function area,” such as the lobby or area of a facility where “major activity takes place,” not only must the primary function area be made accessible, but the path of travel to the altered area also must be made accessible. Primary function areas include both customer service and work areas. The “path of travel” is the “continuous route connecting the altered area to the entrance.” As a result, not only the altered area, but also the path of travel to the altered area, including restrooms, telephones, and drinking fountains serving the altered area, must be readily accessible to and usable by individuals with disabilities. Generally, however, alterations to windows, hardware, controls, electrical outlets, and signage in primary function areas do not trigger the path of travel requirement.

The path of travel shall be made accessible to the extent such changes do not require incurring disproportionate costs. Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost to make the path of travel accessible exceeds 20 percent of the cost of the alteration to the primary function area. However, even when an alteration is deemed disproportionate to the overall cost, the covered entity must still make alterations to the “extent that [the facility] can be made accessible without incurring disproportionate costs.”

The DOJ regulations provide guidance on which elements should be given priority. “In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:” (1) an accessible entrance; (2) an accessible route to the altered area; (3) at least one accessible restroom; (4) accessible telephones; (5) accessible water fountains; and (6) accessible parking, storage, and alarms.

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128 Id.
129 Id.
130 Id.
132 Id.
133 Id.
134 Id.
135 Id.
136 Id.
137 Id.
138 Id.
139 28 C.F.R. § 36.403.
140 ADA Title III DOJ Technical Assistance Manual § III-6.20000.
3. **Barriers to Access in Existing Buildings Must Be Removed if the Removal Is “Readily Achievable.”**

Public accommodations must remove “architectural barriers” and “communication barriers that are structural in nature” in existing facilities, when it is “readily achievable” to do so.141 Architectural barriers are “physical elements of a facility that impede access by people with disabilities.”142 Communication barriers that are “structural in nature” are barriers that are an “integral part of the physical structure of a facility,” including conventional signage and audible alarm systems.143 These barriers generally preclude access to people who have hearing and/or vision impairments.144 Structural communication barriers also include physical partitions that impede communication, and inadequate sound buffering (failing to reduce levels of ambient noise that often serve as a significant impediment to individuals which hearing impairments impaired individuals).145 Examples of barrier removal measures include installing ramps at a facility’s entrance or installing grab bars in a restroom.146 Barrier removal is an ongoing obligation, which is not tied to undertaking new construction or alterations.147 Furthermore, barrier removal applies only to places of public accommodation, not to commercial facilities.148

a. **Readily Achievable Standard**

“Readily achievable” means it is easily accomplishable and able to be carried out without much difficulty or expense.149 In determining whether an action is readily achievable, factors to be considered include: (1) the nature and cost of the action; (2) the overall financial resources of the site or sites involved in the action, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements that are necessary for safe operation, including crime prevention measures, or the impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity; (4) if applicable, the overall financial resources of any parent corporation or entity, including the overall size of the parent corporation or entity with respect to the number of its employees and the number, type, and location of its facilities; and (5) if applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.150 Thus, whether barrier removal is “readily achievable” will be determined in light of the nature and cost of the removal and the financial resources available to the covered entity and any legally responsible parent corporation or entity.

Determinations as to whether barrier removal is “readily achievable” are to be made on a case-by-case basis.151 However, the DOJ regulations contain a list of 21 examples of modifications that may be readily achievable:

142 ADA Title III DOJ Technical Assistance Manual § III-4.41000.
143 *Id.*
144 *Id.*
145 *Id.*
146 28 C.F.R. § 36.304.
147 *Id.*
148 *Id.*
150 *Id.*
151 *Id.*
(1) installing ramps;
(2) making curb cuts in sidewalks and entrances;
(3) repositioning shelves;
(4) rearranging tables, chairs, vending machines, display racks, and other furniture;
(5) repositioning telephones;
(6) adding raised markings on elevator control buttons;
(7) installing flashing alarm lights;
(8) widening doors;
(9) installing offset hinges to widen doorways;
(10) eliminating a turnstile or providing an alternative accessible path;
(11) installing accessible door hardware;
(12) installing grab bars in toilet stalls;
(13) rearranging toilet partitions to increase maneuvering space;
(14) insulating lavatory pipes under sinks to prevent burns;
(15) installing a raised toilet seat;
(16) installing a full-length bathroom mirror;
(17) repositioning the paper towel dispenser in a bathroom;
(18) creating designated accessible parking spaces;
(19) installing an accessible paper cup dispenser at an existing inaccessible water fountain;
(20) removing high pile, low density carpeting; or
(21) installing vehicle hand controls.152

b. When is a Specific Change To Remove Architectural or Other Barriers to Accessibility “Readily Achievable” Within the Meaning of the ADA?

Litigation has ensued in some cases in which a covered entity argued that barrier removal is not “readily achievable.”

(i) Spector v. Norwegian Cruise Line Ltd.

In Spector, the Supreme Court of the United States held that the provision of the ADA requiring barrier removal if “readily achievable” did not apply where barrier removal would bring a vessel into noncompliance with the International Convention for the Safety of Life at Sea (“SOLAS”), any other international legal obligation, or pose a direct threat to the health or safety of others.153 The defendant, Norwegian Cruise Lines, operated cruise ships departing from ports in the United States.154 The plaintiffs were disabled individuals155 who purchased tickets on the defendant’s cruise line.156 The plaintiffs filed suit arguing that the defendant’s cruise ships were in violation of “Title III’s prohibition against discrimination in places of ‘public accommodation’ and in ‘specified public transportation services.’”157 The plaintiffs asserted that Title III required the defendant to make “reasonable modifications” to accommodate disabled

152 Id.
154 Id. at 126.
155 Including their companions. Id. at 126.
156 Id.
157 Id. (internal citations omitted).
individuals and required the defendants to remove “architectural barriers, and communication barriers,” where such removal is “readily achievable.” 158

The district court held that Title III applies to the defendant’s cruise ships, but also found that the plaintiffs’ claims with respect to barrier removal could not go forward because “the agencies charged with promulgating architectural and structural guidelines for ADA compliance…had not done so for cruise ships.” 159 As a result, the district court granted the defendant’s motion to dismiss the barrier removal claims. 160 On appeal, the Court of Appeals for the Fifth Circuit held because Title III did not contain a specific provision applicable to foreign-flag vessels, the district court’s dismissal of the plaintiffs’ barrier removal claims was proper. 161

The Supreme Court of the United States held first that Title III applied to the defendant cruise ships. 162 “Although the statutory definitions of ‘public accommodation’ and ‘specified public transportation’ do not expressly mention cruise ships, there can be no serious doubt that the [defendant] cruise ships in question fall within both definitions under conventional principles of interpretation.” 163 The Court reasoned that cruise ships offer public accommodations and transportation services to millions of United States residents annually, and that a large number of disabled individuals “take advantage of these cruises or would like to do so.” 164 “To hold there is no Title III protection for disabled persons who seek to use the amenities of foreign cruise ships would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled.” 165

However, the Court also held that application of Title III’s barrier removal requirement to the defendant’s cruise ships would not be “readily achievable” because it “likely would interfere with the internal affairs of foreign ships.” 166 Further, a “permanent and significant modification to a ship’s physical structure” may make it “impossible for a ship to comply with all the requirements different jurisdictions might impose.” 167 More specifically, the Court reasoned that because Title III directs that the “readily achievable” determination takes into account “the impact … upon the operation of the facility,” a barrier removal requirement under Title III that would bring a vessel into noncompliance with SOLAS, or any other international legal obligation, would create serious difficulties for the vessel. 168 Further, barrier removal would have a substantial impact on the ship’s operation, and would likely threaten the safety of its passengers. 169 As a result, the Court held that “Title III’s own limitations and qualifications prevent the statute from imposing requirements that would conflict with international obligations or threaten shipboard safety.” 170

158 Id. at 126-27 (internal citations omitted).
159 Id. at 127.
160 Id.
161 Id. at 128.
162 Id. at 129.
163 Id.
164 Id. at 131.
165 Id.
166 Id. at 135.
167 Id.
168 Id. at 135-36 (internal citations omitted).
169 Id.
170 Id. at 142.
(ii) **Gathright-Dietrich v. Atlanta Landmarks, Inc.**

In *Gathright-Dietrich*, the Eleventh Circuit held that barrier removal would not be considered “readily achievable” for the purpose of Title III if it would threaten or destroy the historic significance of a building.\(^{171}\) There, theater patrons brought action against the historic Fox Theater (the “Fox”), alleging violation of Title III of the ADA.\(^ {172}\) The plaintiffs filed suit under Title III of the ADA alleging that they and other patrons using wheelchairs had been “denied access to events at the Fox comparable to the access given to non-wheelchair patrons.”\(^ {173}\) The plaintiffs asserted that (1) certain areas designated for patrons using wheelchairs were physically inaccessible; (2) the quality of their access is inferior; and that (3) barriers existed in the Fox.\(^ {174}\) The Fox argued that the ADA did not mandate removal of any “alleged architectural barriers.”\(^ {175}\)

The court held that the plaintiffs have “the initial burden of production to show (1) that an architectural barrier exists; and (2) that the proposed method of architectural barrier removal is ‘readily achievable.’”\(^ {176}\) If the plaintiffs meet this burden, the defendant must then establish that barrier removal is not “readily achievable.”\(^ {177}\) The plaintiffs submitted seating proposals involving the addition of at least 27 wheelchair seating positions, and the modification of existing wheelchair locations.\(^ {178}\) However, the plaintiff’s proposals neglected to provide any detail with respect to the costs of the modifications and additions.\(^ {179}\) The plaintiffs also failed to “provide any evidence of the number of seats lost, the number of wheelchair and companion seats gained, where they could be located, what it would cost to implement them, or what effect they could have economically or operationally on the theater.”\(^ {180}\) Finally, the court noted that the plaintiffs “also failed to provide expert testimony to assure the feasibility of their proposed seating modifications and did not, in any meaningful way, address the engineering and structural concerns associated with their proposals or the effect that those proposals would have on the historic features of the theater.”\(^ {181}\)

The court noted that the Fox contained historic features “ranging from its seating configuration, to its simulated night-sky ceiling, to its faux painting techniques, to its original DC current-run elevators with AC converters.”\(^ {182}\) At the time, the Fox had been added to the National Register of Historic Places list and had been designated a National Historic Landmark by the United States Department of the Interior and the Fox was also one of only nine buildings in its state to be designated a Landmark Museum Building.\(^ {183}\)

The court held that the plaintiffs failed to establish that removal of the alleged barriers could be accomplished without much difficulty or expense.\(^ {184}\) Further, the plaintiffs failed to provide evidence that changing the seating configuration in the Fox would not affect the historic

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\(^{171}\) *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1275, 18 A.D. Cas. 126 (11th Cir. 2006).

\(^{172}\) Id. at 1271.

\(^{173}\) Id. at 1272.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) Id. at 1273.

\(^{177}\) Id.

\(^{178}\) Id. at 1274.

\(^{179}\) Id.

\(^{180}\) Id. at 1274.

\(^{181}\) Id. at 1274-75.

\(^{182}\) Id. at 1271.

\(^{183}\) Id.

\(^{184}\) Id. at 1275.
nature of the theater. Removal of the seats would also affect the Fox’s ability to compete with other venues. For all of these reasons the Eleventh Circuit held that barrier removal was not “readily achievable,” as required by Title III of the ADA.

(iii) **Lieber v. Macy’s West, Inc.**

In *Lieber*, the District Court for the Northern District of California held that a department store’s failure to maintain 36-inch accessible routes to fitting rooms and “cashwraps” in areas of renovation and to provide physical access to moveable merchandise racks by removing barriers that were “readily achievable” violated Title III of the ADA. These barriers included (1) restrooms with features, such as toilet paper dispensers, towel dispensers, soap dispensers, and seat cover dispensers, mounted at heights that exceeded ADA Accessibility Guideline requirements; (2) lack of proper signage at entry doors; (3) locking devices that required grasping, pinching, or twisting of the wrist; and (4) other features that affected the usability of the restroom for people with mobility disabilities. The plaintiffs also argued that department store fitting rooms failed to comply with ADA accessibility requirements. For example, some fitting rooms contained noncompliant benches and door handles. The plaintiffs also argued that areas of the department store that were being renovated contained inaccessible routes.

The court held that areas of the department store “that were and are being renovated” were subject to the new construction/alterations standards of the ADA. As a result, the court held that the department store was obligated to remove various barriers in such renovated areas regardless of whether such barrier removal was otherwise “readily achievable.”

With respect to barrier removal, the court found that many noncompliant barriers were present. The department store had “failed to make any effort to modify or even review its stock planning and display practices to assess the feasibility of alternative methods that would improve access.” The court also noted that access could have been improved by simply adjusting placement of merchandise display units and/or providing clerks to retrieve inaccessible merchandise. The court further noted that improved access would not have fundamentally altered the nature of the department store’s business.

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185 *Id.*
186 *Id.*
187 *Id.*; see also Speciner v. NationsBank, N.A., 215 F. Supp. 2d 622, 624-27 (D. Md. 2002) (holding that the construction of a ramp at a street entrance of a historic building to provide wheelchair access was not readily achievable under ADA where bank showed it was unlikely to obtain city permission to construct the ramp in light of traffic and safety considerations, and that it was problematic whether an aesthetically tolerable design could be constructed at a reasonable cost)
189 *Id.* at 1067. The plaintiffs also claimed that the access barriers violated the California Disabled Person’s Act and the California Health and Safety Code.
190 *Id.*
191 *Id.*
192 *Id.*
193 *Id.* at 1066-67.
194 *Id.* at 1074.
195 *Id.*
196 *Id.*
197 *Id.* at 1072.
198 *Id.* at 1079-81.
199 *Id.*
was unable to meet its burden\textsuperscript{200} to provide a “reliable analysis of the potential economic effects of widening the pathways” and could not establish that removal of noncompliant barriers was not “readily achievable.”\textsuperscript{201} As a result, the court held the department store liable for violating Title III of the ADA and specifically mandated actions for the store to take to improve access.\textsuperscript{202}

4. Alternatives to Barrier Removal

If barrier removal is not readily achievable, Title III identifies alternative steps that may be required.\textsuperscript{203} Examples of alternative measures include: (1) providing goods and services at the door, sidewalk, or curb; (2) providing home delivery; (3) retrieving merchandise from inaccessible shelves or racks; or (4) relocating activities to accessible locations.\textsuperscript{204} However, extra charges may not be imposed on individuals with disabilities to cover the costs incurred in implementing these alternatives to barrier removal.\textsuperscript{205}

C. Examinations Offered by Private Entities

Title III also regulates certain examinations or courses offered by private entities, such as those related to licensing, certification, or credentialing for education, professional, or trade purposes.\textsuperscript{206} Title III requires that these examinations or courses be given to individuals with disabilities in an accessible manner.\textsuperscript{207} For example, a covered entity may be required to modify the examination format or provide additional time to a disabled individual.\textsuperscript{208} A private entity must ensure that the examinations are carried out in a manner that does not disadvantage a disabled individual because of his or her disability.\textsuperscript{209} Under some circumstances, a covered entity may also be required to provide auxiliary aids such as interpreters or qualified readers.\textsuperscript{210}

D. Enforcement of Title III

With respect to enforcement of Title III, there are two major means of enforcement: (1) complaints to, and lawsuits by, the Department of Justice (DOJ); and (2) private lawsuits by individuals.\textsuperscript{211} The DOJ enforces Title III and its implementing regulations governing public accommodations and state and local government services.\textsuperscript{212} Individuals subject to discrimination on the basis of disability may also file private lawsuits.\textsuperscript{213}

\textsuperscript{200} The court stated that plaintiffs “bear the burden of establishing the existence of access barriers” throughout the defendant’s facility and of “putting forward reasonable modifications.” \textit{Id.} at 1077. The burden then shifts to the defendant to “show that the requested modifications would fundamentally alter the nature of its public accommodation.” \textit{Id.}
\textsuperscript{201} \textit{Id.} at 1072-73.
\textsuperscript{202} \textit{Id.} at 1081-82.
\textsuperscript{203} ADA Title III DOJ Technical Assistance Manual § III-4.50000.
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} 42 U.S.C. § 12189; 28 C.F.R. § 36.309.
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} ADA Title III DOJ Technical Assistance Manual § III-4.6000
\textsuperscript{209} 42 U.S.C. § 12189; 28 C.F.R. § 36.309.
\textsuperscript{210} \textit{Id.}
1. **Enforcement by the Department of Justice**

a. **DOJ has the Authority to Issue Regulations and Standards and to Provide Technical Assistance, and to Enforce Title III Through Investigation and Litigation.**

The ADA authorizes the Attorney General, through the DOJ, to establish regulations to carry out the provisions of Titles II and III.\(^{214}\) Pursuant to the ADA, the Architectural and Transportation Barriers Compliance Board (ATBCB) – another federal agency generally known as the “Access Board” – also issues guidelines to ensure that buildings, facilities, and transit vehicles are accessible and usable by people with disabilities.\(^{215}\) The ADA states that the Access Board shall “issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design” for Titles II and III of the ADA.\(^{216}\) These guidelines are known as the ADA Accessiblity Guidelines and provide the basis of many of the accessibility requirements enforced by the DOJ.

The ADA Accessibility Guidelines contain general design standards for building and accompanying elements such as parking, accessible routes, ramps, stairs, elevators, doors, entrances, drinking fountains, bathrooms, controls and operating mechanisms, alarms, signage, telephones, fixed seating and tables, assembly areas, automated teller machines, and dressing rooms.\(^{217}\) The Guidelines also include specific compliance standards for restaurants, medical care facilities, mercantile facilities, libraries, and lodging facilities.\(^{218}\)

The ADA requires that the DOJ issue regulations that are consistent with the Access Board’s guidelines.\(^{219}\) As a result, the DOJ regulations incorporate the ADA Accessibility Guidelines and any construction, including renovations to existing facilities, must comply with the Access Board’s ADA Accessibility Guidelines.\(^{220}\) The District Court for the Southern District of New York noted, in *Civic Association of Deaf of New York City v. Giuliani*, that the DOJ’s regulations and ADA Accessibility Guidelines “are to be given controlling weight, unless they are arbitrary, capricious, or clearly contrary to the statute.”\(^{221}\)

The DOJ has also issued a Technical Assistance Manual to assist operators in understanding their Title III obligations.\(^{222}\) The Technical Assistance Manual presents the ADA’s Title III obligations in a simplified format and explains the DOJ’s regulatory authority pursuant to the ADA.\(^{223}\) The Technical Assistance Manual also answers many common questions and illustrates scenarios in which Title III obligations may or may not arise.\(^{224}\)

\(^{214}\) 42 U.S.C. § 12186(b).
\(^{215}\) 42 U.S.C. § 12186.
\(^{216}\) 42 U.S.C. § 12204.
\(^{218}\) Id.
\(^{219}\) 42 U.S.C. § 1234(c), 12186(c).
\(^{222}\) ADA Title III DOJ Technical Assistance Manual, Introduction.
\(^{223}\) Id.
\(^{224}\) Id.
The DOJ may initiate investigations or compliance reviews in two situations. First, the DOJ may conduct an investigation or review when an individual requests that the DOJ initiate an investigation. The DOJ may also initiate, on its own accord, an investigation or compliance review when an allegation of discrimination has been made, or the DOJ believes there has been a Title III violation.

Following a compliance review or investigation, the ADA authorizes the Attorney General to file a civil suit in federal court. Title III states that the Attorney General may file suit if he/she has “reasonable cause to believe that” (1) there exists a pattern or practice of discrimination on the basis of disability, or (2) any person or groups of person have been discriminated against on the basis of disability and that discrimination raises an issue of public importance.

Although there is no criminal liability under the ADA, the penalties may be severe if the Attorney General files suit and prevails. A court may award equitable relief, such as by entering temporary, preliminary, or permanent injunctions. A court may also require a covered entity to provide auxiliary aids or services, modify its discriminatory policies or practices, or make facilities readily accessible to individuals with disabilities.

A court may award, at its discretion, other relief such as monetary damages and civil penalties. Civil penalties range from $55,000 for a first violation to $110,000 for any subsequent violation. Monetary damages do not include punitive damages; moreover, a court may take into consideration any good faith efforts on the part of a covered entity in determining what amount of civil penalty, if any, is appropriate.

2. Enforcement by Private Citizens

When a person has been subject to discrimination on the basis of disability or has reasonable grounds to believe that he or she will be subjected to discrimination because of a violation of the ADA, he or she may file a civil action. Currently, Title III does not require a claimant to exhaust administrative remedies or provide notice of ADA deficiencies prior to initiating a lawsuit. As a result, individuals are not required to bring an administrative charge with a federal agency prior to filing suit.
In lawsuits by private plaintiffs, remedies are limited to equitable relief, such as the entry of permanent or temporary injunctions and restraining orders. A court may also award attorney’s fees. Alternatively, the court may award attorney’s fees against a plaintiff if the plaintiff brings a frivolous suit. With respect to individual suits, compensatory damages and civil penalties are not available.

III. ACCESSIBILITY REQUIREMENTS UNDER TITLE III


When the ADA was first signed into law in 1991, the DOJ implemented regulations for Titles II and III of the ADA (the “1991 Regulations”). The 1991 Regulations contained the ADA Standards for Accessible Design (“1991 Standards”), which were based on the Access Board’s Accessibility Guidelines. The 1991 Standards provided a series of technical guidelines related to general accessibility and also included specific accessibility requirements related to particular business formats. For example, the 1991 Standards discuss general scoping and technical requirements with respect to various elements of spaces, such as accessible routes, parking, windows, bathrooms, drinking fountains, signage, dressing and fitting rooms, etc. However, the 1991 Standards also provide specific accessibility requirements for (1) restaurants and cafeterias; (2) medical care facilities; (3) businesses and mercantile establishments; (4) libraries; (5) transient lodging; and (6) transportation facilities.

1. Overview of Key Requirements

   a. Policies and Procedures

Covered entities may not utilize policies and procedures that directly or inadvertently make it difficult or impossible for an individual with a disability to access goods and services. As a result, the ADA requires businesses to make reasonable modifications in order to accommodate individuals with disabilities. In most circumstances, modifications involve comparatively minor adjustments in policies or procedures. However, a covered entity is not required to make any changes that would alter the essential nature of its business. Examples, of such required modifications include:

237 28 C.F.R. § 36.505.
238 See Hubbard v. Sobreck, 554 F.3d 742, 745-47, 21 A.D. Cas. 673 (9th Cir. 2009) (award of attorney’s fees to the defendant reversed; when claims are brought under both the ADA and a parallel state law which permits awarding attorney’s fees against plaintiffs bringing non-frivolous suits, the ADA preempts and precludes such awards).
240 28 C.F.R. Pt. 36, App. A (1991 DOJ Regulations). For purposes of this paper, we have chosen to provide a brief overview of the 1991 and 2010 Standards. However, for more information about the specific technical requirements of Title III, please see the 2010 DOJ ADA Title III Regulations and 2010 ADA Standards for Accessible Design. See (http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf); (http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards_prt.pdf).
241 id.
242 Scoping refers to how many particular elements in a facility need to be made accessible.
243 id.
244 id.
(1) a day care with scheduled meal times permitting an individual with diabetes to bring food for an extra snack to eat when necessary; (2) a grocery store that assigns a store clerk to assist a disabled customer by retrieving merchandise from high shelves; or (3) a clothing store, despite a policy permitting only one person at a time in a dressing room, allowing a person with a disability to bring a companion into the dressing room to assist with trying on clothes.

b. Service Animals

Many facilities generally do not permit animals on their premises. However, a policy excluding all pets may exclude individuals with disabilities using dogs as service animals. The DOJ regulations require that a covered entity permit a service animal on its premises when the service animal is being used to assist a disabled individual. For example, individuals who are blind or deaf or have low vision often use dogs to guide or alert them. Individuals with mobility-related disabilities may use dogs to pull their wheelchairs. Individuals with conditions such as epilepsy may use a dog to warn them of an imminent seizure. Service animals must be harnessed or leashed unless these devices interfere with the service animal's ability to assist the disabled individual.

Businesses may exclude service animals if the dog is out of control and the handler cannot regain control, or if the dog is not housebroken. However, the disabled individual must still be permitted onto the premises if a service animal is excluded.

c. Wheelchairs or Power-Driven Mobility Devices

Individuals with disabilities that affect mobility use a variety of devices such as walkers, canes, braces, or wheelchairs or power-driven mobility devices. Covered entities must allow individuals with disabilities to use these devices in all areas where non-disabled individuals are allowed to go. As a result, covered entities may also have to modify their facilities in order to permit such devices to access certain areas of their facility.

d. Effective Communication

Covered entities are required to remove barriers that inhibit effective communication with disabled individuals. Based on the particular services being offered, a covered entity may need to provide a sign language interpreter for a hearing impaired individual, an oral interpreter for an individual with a speech impediment, or some other aid to assist in effective communication.

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246 Id. 247 Id. 248 Id. 249 Id. 250 Id. 251 Id. 252 Id. 253 Id. 254 Id. 255 Id. 256 Id. 257 Id.
e. Accessibility

Disabled individuals often face architectural or structural barriers that make access to the goods or services offered by covered entities difficult or impossible.\textsuperscript{258} For example, (1) parking spaces with no access aisle make it difficult to use a wheelchair lift; (2) facilities with steps at the entrance make it difficult for an individual in a wheelchair or other mobility device to enter the premises; (3) facilities with narrow aisles or doorways make it difficult for mobility devices to pass through; and (4) facilities with counters that are too high, or restrooms that are too small to access with a mobility device, make it generally difficult for disabled individuals.\textsuperscript{259} The ADA requires covered entities to make structural alterations and remove architectural barriers to ensure that disabled individuals are not denied equal access to facilities because of their disabilities.\textsuperscript{260}

2. Historic Preservation Exception

The ADA regulations provide that alterations with respect to certain historic facilities need only comply with the ADA Accessibility Guidelines “to the maximum extent feasible.”\textsuperscript{261} The ADA Accessibility Guidelines state that “if it is determined that it is not feasible to provide physical access to an historic property … in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided.”\textsuperscript{262}


1. Revised ADA Standards

Recently the DOJ amended its regulations implementing Title III (the “2010 Regulations”).\textsuperscript{263} These amendments incorporate the DOJ’s 2010 Standards of Accessible Design\textsuperscript{264} (the “2010 Standards”) and make the new Title III regulations more consistent with current policies and practices of the DOJ.\textsuperscript{265} The 2010 Regulations also address issues that have arisen since the ADA was passed and provide rules that are more in line with current technological advancements. These revisions took effect on March 15, 2011.\textsuperscript{266}

Although the 2010 Standards retain many of the original provisions in the 1991 Standards, they do contain some significant differences.\textsuperscript{267} The 2010 Regulations also set out different compliance dates by which entities covered by the ADA are required to meet the requirements of the 2010 Standards.\textsuperscript{268}

\begin{footnotesize}
258 \textit{id.}
259 \textit{id.}
260 \textit{id.}
261 28 C.F.R. § 36.405
262 \textit{id.}
263 \textit{id.}
266 \textit{id.}
268 \textit{id.}
\end{footnotesize}
2. **Compliance Date of Revised ADA Standards – March 15, 2012**

Covered entities engaging in new construction, alterations, or barrier removal will have a choice between the 1991 Standards and the 2010 Standards between September 15, 2010 and March 15, 2012. Covered entities engaging in new construction or alterations that should have complied with the 1991 Standards, but have not done so by March 15, 2012, must comply with the 2010 Standards. On and after March 15, 2012, all newly constructed, altered facilities, and barrier removals must comply with the 2010 Standards. A public accommodation may use only one standard for removing barriers in a facility; a public accommodation cannot, for example, choose the 1991 Standards with respect to one aspect of barrier removal and the 2010 Standards with respect to another.

3. **2010 Standards of Accessible Design**

The 2010 Standards include various changes from the 1991 Standards. First, the 2010 Standards include specific requirements for facilities including (1) amusement parks; (2) recreational boating facilities; (3) golf and miniature golf facilities; (4) swimming pools; and (5) children’s play areas. The 2010 Standards also change the 1991 Standards with respect to reach range requirements, restroom clearances, assembly area design and scoping requirements, locations of accessible routes, ATM and fare machine accessibility, and transient lodging guest rooms.

4. **Overview of Key Changes.**

   a. **“Safe Harbor” Provision (new)**

   The 2010 Regulations include a “safe harbor” provision providing that elements in covered facilities that were built or altered in compliance with the 1991 Standards are not required to be brought into compliance with the 2010 Standards until the elements are subject to a planned alteration. The 2010 Regulations also include a similar safe harbor provision with respect to alterations associated with the path of travel to a primary function area.

   b. **Ticketing (change to regulations)**

   The 2010 Regulations require venue operators to accommodate individuals with disabilities who acquired inaccessible seating from a secondary ticket market only in circumstances where there is unsold accessible seating for that event. The regulations also provide guidance with respect to: (1) the sale of tickets for accessible seating; (2) the sale of season tickets; (3) the hold and release of accessible seating to non-disabled individuals;

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270 Id.
271 Id.
272 Id. For example, a facility cannot choose the 1991 Standards for accessible routes and the 2010 Standards for restrooms.
274 Id.
277 28 C.F.R. § 36.302(f).
(4) ticket pricing; (5) prevention of the fraudulent purchase of accessible seating; and (6) the ability to purchase multiple tickets when buying accessible seating.  

**c. Service Animals (change to regulations)**

The 2010 Regulations provide a specific definition for the term “service animal.” “Service animal” is defined as a dog that has been individually trained to do work or perform tasks for the benefit of an individual with a disability. Dogs that are not trained to perform tasks to the benefit of disabled individuals are not service animals. “Comfort,” “therapy,” or “emotional support animals” do not meet the definition of a service animal under the new regulations. The 2010 Regulations specifically state that other animals, wild or domestic, do not qualify as service animals. However, the 2010 Regulations do provide that trained miniature horses may be used as alternatives to dogs, subject to certain limitations.

The 2010 Regulations also explain that when it is unclear that a dog is a service animal, a business may inquire as to whether the animal is required because of a disability and what work or task the animal been trained to perform. No other inquiries are permitted. The 2010 Regulations also clarify that individuals with mental disabilities who use service animals trained to perform tasks to their owner’s benefit are protected by the ADA.

**d. Wheelchairs and Other Power-Driven Mobility Devices (change to regulations)**

The 2010 Regulations distinguish between wheelchairs and “other power-driven mobility devices.” The regulations define “other power-driven mobility devices” to include a range of devices not designed for individuals with mobility impairments, but which are often used by individuals with disabilities. The regulations provide that wheelchairs and other devices designed for use by people with mobility impairments must be permitted in all areas open to pedestrians. Other power-driven mobility devices must be permitted unless a covered entity can establish that use of the device may produce legitimate safety concerns. Factors listed in making the determination as to whether other power-driven mobility devices can be used in a specific facility include: (1) the type, size, weight, dimensions, and speed of the vehicle; (2) the facility’s volume of pedestrian traffic; (3) the facility’s design and operational characteristics; (4) whether legitimate safety requirements can be established to permit the safe operation of the device; and (5) whether use of the device creates a substantial risk of harm.

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278 Id.
279 28 C.F.R. § 36.302(c).
280 Id.
281 Id.
282 Id.
283 Id.
284 Id.
285 Id.
286 Id.
287 28 C.F.R. § 36.311.
288 Id.
289 Id.
290 Id.
291 Id.
e. **Effective Communication (change to regulations)**

The 2010 Regulations identify that the effectiveness of an auxiliary aid will depend on the (1) nature; (2) length; (3) context; and (4) complexity of the communication.\(^{292}\) Further the DOJ regulations provide that a “public accommodation shall furnish appropriate auxiliary aids” to companions who are individuals with disabilities.\(^{293}\) The DOJ regulations define “companion” as “a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation and, who, along with such individual, is an appropriate person with whom the public accommodation should communicate.”\(^{294}\) For example, a hospital may in appropriate circumstances be required to furnish auxiliary aids to the deaf spouse of a hospital patient, even if the patient is not disabled within the meaning of the ADA.

The 2010 Regulations also expand the definition of auxiliary aids to include video remote interpreting\(^{295}\) (“VRI”) and exchange of written notes as a kind of auxiliary aid that may be used to assist in communicating with disabled individuals.\(^{296}\) The DOJ regulations also include screen readers, Braille displays, and electronic aids as auxiliary aids for persons with disabilities.

f. **Reservations Made by Places of Lodging (change to regulations)**

The 2010 Regulations establish new requirements for reservations made by places of lodging, such as hotels and motels.\(^{297}\) Specifically, the regulations include procedures that will allow individuals with disabilities to make reservations for accessible rooms in the same manner as other guests.\(^{298}\) In turn, covered entities qualifying as places of lodging will be required to (1) identify and describe the accessible features of each guest room; (2) hold accessible guest rooms for people with disabilities until all other guest rooms of that type have been rented; and (3) ensure that a reserved accessible guest room is not inadvertently released to someone who did not reserve the accessible room.\(^{299}\) With respect to third-party reservation operators, the regulations limit their obligations when the operators do not themselves own and operate places of lodging.\(^{300}\) The regulations provide that covered entities qualifying as places of lodging must come into compliance with these requirements by March 15, 2010.\(^{301}\)

g. **Timeshares, Condominium Hotels, and Other Places of Lodging (change to regulations)**

The 2010 Regulations provide that timeshares and condominiums that operate like hotels are subject to Title III obligations.\(^{302}\) In determining whether a timeshare or condominium operates like a hotel, the regulations provide factors to consider when determining whether such
a facility qualifies as a public accommodation under the “place of lodging” category. The regulations provide that one may consider whether the facility “provides guest rooms under conditions and with amenities similar to a hotel, motel or inn” including (1) on- or off-site management and reservations service; (2) rooms available on a walk-up or call-in basis; (3) housekeeping or linen services; and (4) acceptance of reservations for guest rooms without guaranteeing a specific room until check-in, and without a lease or security deposit. Timeshare or condominium units that are not “owned or substantially controlled” by a public accommodation that operates a place of lodging will not be required to comply with Title III obligations. These units are also not subject to the reservation requirements discussed above.

IV. THE ADA IN THE FRANCHISE INDUSTRY

A. Title III Liability and Compliance Issues in the Franchise Context

Many of the franchised systems in existence today operate facilities that fall under the definition of a “public accommodation” as described above in Section II. The requirements of Title III of the ADA therefore apply to these facilities, and to those who own, lease, lease to, or operate the facility. If these businesses were operated as independent businesses, liability for compliance with Title III would clearly rest with the owner and operator of such a business. In a franchised system, however, there remain questions of liability for compliance with Title III. Who is the “operator” of the franchised business? If the franchisor requires certain system standards to ensure system-wide brand compliance, does the imposition of these requirements create Title III liability for the franchisor? Does the liability analysis change if the franchisor leases the location directly to the franchisee? Can the franchisor and franchisee contractually agree to allocate ADA liability to one or the other party? These questions have been addressed since the inception of the ADA, but there remains a lack of direction on several of these important issues.

1. Is a Franchisor an “Operator” of a Franchised Unit Under Title III?

In franchised systems that operate out of facilities that qualify as public accommodations, the franchisor typically requires some or all of the following to ensure that its franchised locations comply with the franchisor's system standards and brand attributes: (a) prototype architectural plans for franchisees’ use; (b) the franchisor’s approval of initial plans or changes to plans for new locations; (c) the franchisor’s approval of any modifications made to existing locations; and (d) compliance with the franchisor’s operating standards and ongoing franchisor inspections to ensure compliance. Are these standard franchise terms sufficient to create Title III liability for the franchisor?

Title III compliance is required of an entity that operates a place of public accommodation. However, the ADA does not define the word “operator” as it is used within Section 302(a). Consequently, plaintiffs in ADA enforcement actions brought against franchised locations sometimes have attempted to hold the franchisor liable for compliance with Title III, on the theory that the franchisor rises to the level of an “operator” under Title III by virtue of the standard franchise terms described above.

303 Id.
304 Id.
305 Id.
306 Id.
a. **Title III Franchise Cases**

Despite over 15 years of cases dealing with this question, there remains a split among the various circuits and state courts on this issue. Most courts that have addressed this issue have found that franchisors were not “operators” responsible for Title III non-compliance with respect to franchised units.

In *Neff v. Dairy Queen Corp.*, the Eighth Circuit held that the franchisor’s right under the franchise agreement to set standards for building and equipment maintenance, and to veto proposed structural changes, did not make it an “operator” of the restaurant for purposes of ADA liability. The plaintiffs failed to show any additional facts to prove that the franchisor had an ability to affect the removal of existing barriers at the franchisee’s location or had actually prohibited the franchisee from undertaking any barrier removal.

The Eighth Circuit reached a similar conclusion in *Pona v. Cecil Whittakers, Inc.* Other courts have also found that the standard franchise terms described above do not create ADA liability for the franchisor by elevating the franchisor to the role of “operator.” In each of these cases, the courts granted or upheld the franchisors’ motions to dismiss or for summary judgment.

b. **Days Inns Cases**

In the late 1990’s, Days Inns of America, the franchisor of Days Inn hotels, defended four lawsuits brought by the Department of Justice, which alleged that Days Inns was liable for ADA compliance at certain of its franchised hotel locations. The courts that considered these cases reached inconsistent conclusions as to Days Inns’ liability.

(i) **Eastern District of California**

In *United States v. Days Inns of Am., Inc.*, the District Court for the Eastern District of California considered Days Inns’ Planning and Standards Manual, which was provided to each new franchisee as a guideline for the minimum acceptable requirements for a Days Inn facility. The Days Inns franchise agreement required its facilities to comply with Days Inns’ requirements and applicable federal and state laws, including the ADA. The court followed the reasoning of the *Neff* court and other ADA cases in holding that an “operator” for ADA purposes must have authority over the discriminatory action. The court granted Days Inns’ motion for summary judgment, holding that Days Inns did not have sufficient control to subject the franchisor to ADA liability for ADA violations at a franchised location.

(ii) **Eastern District of Kentucky**

The District Court for the Eastern District of Kentucky also granted Days Inns’ motion for summary judgment in *United States v. Days Inns of Am., Inc.*, holding that “Congress did not

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307 *Neff v. Dairy Queen Corp.*, 58 F.3d 1063, 4 A.D. Cas. 1170 (5th Cir. 1995).
308 *Pona v. Cecil Whittakers, Inc.*, 155 F.3d 1034, 8 A.D. Cas. 968 (8th Cir. 1998).
intend to find franchisors, such as the defendants, liable under § 303, and said statute is limited to owners, operators, lessors, and lessees of public accommodations and commercial facilities. The court also concluded that Days Inns did not have sufficient control over the franchisee’s operations in order to subject it to being classified as the “operator” under the ADA.

(iii) Eighth Circuit

In the remaining two cases, however, the courts reached a different conclusion. The Eighth Circuit, in *United States v. Days Inns of Am., Inc.*, reversed the district court’s grant of summary judgment in favor of Days Inns and remanded the case for a determination of Days Inns’ actual knowledge about the design and construction of the franchised location. Although the court agreed with the lower court’s assessment that Days Inns was not an “operator” of the facility, the court rejected Days Inns’ argument that § 303’s anti-discrimination language is limited to owners, operators, lessors, and lessees of newly-constructed facilities, and instead looked to the language of § 303(a)(1), which assesses liability for the “failure to design and construct facilities for first occupancy after [January 26, 1993].” The court stated that “a franchisor with no knowledge that a franchisee has constructed a facility in violation of the ADA should not suffer liability under section 303, regardless of the franchisor’s available authority to ensure ADA compliance.” Additionally, the court indicated that the typical requirement that a franchisee’s facility comply with all laws, including the ADA, was not sufficient control over the design and construction of a facility. The Eighth Circuit did conclude that “to bear responsibility for an inaccessible facility under section 303, a party must possess a significant degree of control over the final design and construction of a facility,” and remanded the case for further consideration of Days Inns’ actual knowledge of the franchisee’s final plans.

(iv) Central District of Illinois

Finally, in *United States v. Days Inns of Am., Inc.*, the district court found Days Inns liable for ADA violations at its franchisee’s facility by virtue of its involvement in the design and construction of the hotel. The court was not persuaded by the earlier cases that limited ADA liability to owners, operators, lessors, and lessees of public accommodations, and instead rejected applying this limitation to the design and construction of new facilities, citing legislative history to support its position. In a troubling statement for franchisors, the court stated that section 303’s “design and construct” liability is broad and “includes architects, builders, planners, and most definitely national hotel licensing corporations which exist for the sole purpose of ensuring that new hotels are designed and constructed in accordance with acceptable standards.”

(v) Consent Decree

In an effort to resolve these conflicting decisions and, presumably, to avoid further costs of litigation, Days Inns and its parent, Cendant Corporation, entered into a Consent Decree with
the United States in 1999.\textsuperscript{322} Pursuant to the terms of this Consent Decree, Days Inns and Cendant agreed to the following provisions:

- Establishment of a certification program to ensure Days Inns receives a Certificate of ADA Compliance for all new hotels before it authorizes the use of its marks on these locations.
  - Days Inns must verify each Certificate is properly completed and signed by the architect or contractor, or the franchisee if the architect or contractor will not sign the Certificate.
  - Receipt and confirmation of the Certificate does not require Days Inns to verify the accuracy of the Certificate.

- Delivery of notice to all franchisees of existing locations inviting each franchisee to participate in a survey program. Franchisees were provided with 60 days in which to elect to participate in the survey program, and the U.S. agreed not to bring any legal action against franchisees for 75 days.
  - Using a survey form developed by the Department of Justice, which identified violations and provided specific remediations, Days Inn and the DOJ agreed upon surveyors to conduct surveys at each franchisee location electing to participate in the program. All surveys were required to be completed within a one-year period.
  - Days Inns bore the cost of the survey program. The Consent Decree provided that the franchisees would not bear this cost.

- Creation of a loan program to finance all remediations required at franchised locations for participating franchisees. Days Inns agreed to fund $4.75 million for interest-free and no costs or fees financing for its franchisees on the following terms:
  - No cap on loan amounts but loans covered only actual costs of remediation including drawing costs.
  - Franchisees were not required to show any financial need or provide any collateral.
  - Three year payback for each loan. As each loan was repaid, the funds were placed back into the loan program to continue to fund additional franchisees through a specified timeframe.

- Payment of $50,000 to the United States.

- Establishment of a specific record-keeping protocol to track all certificates and compliance actions required under the Consent Decree.

In exchange for these terms, the government agreed that Days Inns and Cendant had no liability for ADA violations at existing or new locations provided they complied with the terms of the Consent Decree. This exclusion from liability did not extend to Days Inns’ franchisees, except for those franchisees that performed the remediations required under the Consent

Decree terms. As discussed further below, the terms of this Consent Decree are typical of others entered into by franchisors and/or their franchisees to avoid prolonged investigations and litigation by the Department of Justice.

2. What if the Franchisor also Operates as a Lessor to its Franchisees?

Some franchisors are not only franchisors to their franchisees; they also act as the franchisees’ landlord. As discussed above, ADA liability applies to both the lessor and the lessee of a place of public accommodation or commercial facility. In these systems, how can ADA liability be allocated between the franchisor and its franchisees?

The regulations promulgated to implement the ADA address this issue. Specifically, the regulations state: “Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract.” Additionally, the manual issued by the DOJ to clarify various issues raised by the terms of the ADA addresses this specific issue:

“Do both a landlord who leases space in a building to a tenant and the tenant who operates a place of public accommodation have responsibilities under the ADA? Both the landlord and the tenant are public accommodations and have full responsibility for complying with all ADA title III requirements applicable to that place of public accommodation. The title III regulation permits the landlord and the tenant to allocate responsibility, in the lease, for complying with particular provisions of the regulation. However, any allocation made in a lease or other contract is only effective as between the parties, and both landlord and tenant remain fully liable for compliance with all provisions of the ADA relating to the place of public accommodation.”

Commercial leases generally require that the tenant comply with all laws. Franchisors who also act as the landlord to their franchisees may specifically include language in their leases that require the franchisee/tenant to comply with all requirements under the ADA. These leases should also contain an indemnification of the franchisor/landlord by the franchisee/tenant for any costs or other liabilities arising as a result of the franchisee/tenant’s failure to comply with the ADA. Although such provisions will not relieve the franchisor/landlord from any direct liability under the ADA, the franchisor can look to its franchisee for indemnification of any claims made against the franchisor in its role as the lessor of the location. Note, however, that this allocation of liability within the lease will not necessarily impact any liability the franchisor may be found to have as either the “operator” of a location or as a result of any actions taken by the franchisor to design and construct the franchisee’s location; the applicability of such indemnification language to those more complicated situations would be determined on a case-by-case basis.

Additionally, both franchisors and franchisees that enter into leases with third party landlords should carefully review their lease terms to clarify which party – the landlord or the tenant – is responsible in the first instance for ensuring ADA compliance. At free standing

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323 28 C.F.R. § 36.201(b) (2010).
324 ADA Title III DOJ Technical Assistance Manual § III-1.20000.
locations, the ADA requirements may typically fall to the tenant. But at other offices, shopping centers and shared commercial locations, the landlord may control all or a portion of the access routes at the location, the parking area, internal design and other areas subject to the ADA’s requirements. In these instances, a prudent tenant will carefully draft provisions in the lease to ensure that it can either make changes to these areas as needed to be in compliance with the ADA, or have the right to require that the landlord make the necessary changes.

Pursuant to the terms of a Settlement Agreement between the United States of America and Doctor’s Associates Inc. and Subway Real Estate Corp. (“SREC”), the government required, and SREC agreed, that when SREC negotiates a lease for a new location or a lease renewal, SREC or any affiliated entity will make a good faith effort to include lease terms that require the facility to be modified by the landlord, at the landlord’s expense, to achieve compliance with the ADA standards. This requirement specifically included all of the areas over which the landlord has exclusive authority and control at the location. Additionally, the Settlement Agreement required that if SREC or affiliates control any entrance, parking, exterior or interior routes, or restrooms, they will use good faith efforts to include lease terms allowing SREC or its subtenants to make any necessary changes required to comply with the ADA standards. Furthermore, SREC was required to assess any proposed site presented to it by a franchisee to determine the site’s compliance with ADA standards and the feasibility of the franchisee or its landlord making any physical changes required to bring the site into full ADA compliance. SREC agreed to make a good faith effort to lease locations that are accessible and usable by disabled individuals or are capable of being modified to make such site accessible.

3. What if Either the Franchisor or Franchisee Contractually Assumes Responsibility for Certain ADA-Related Components of the Franchise?

As discussed above, landlords and tenants can allocate responsibility for ADA compliance by the terms of the lease. Franchisors and franchisees can also allocate ADA compliance pursuant to the terms of the franchise agreement or other agreement. Like the allocation of liability in a lease, any other contractual allocation of ADA liability provides clarity and protection between the parties but will not impact the parties’ legal liability to the government or private plaintiffs for ADA compliance.

Most of the cases discussed above dealt primarily with the franchisor’s “control” over a franchisee relative to the initial construction or subsequent modifications of the physical structure of the franchised location. In many franchise systems, however, there are often many ongoing operational requirements that the franchisor imposes on the franchisee. Some of these operational matters impact the business’s ongoing compliance with the ADA. Can the franchisor contractually hold the franchisee responsible for compliance with the ADA pursuant to the franchise agreement at the same time the franchisor imposes specific operating requirements on the franchisee that may cause an unintentional violation of the ADA?

Depending on the type of business franchised, it is not uncommon for franchisors to establish operational procedures that have an ADA impact. Some systems prohibit pets in their locations but fail to address service animals. Many hotel and car rental systems require their franchisees to use the franchisor’s reservation system, which may not fully meet the current ADA requirements. The service models of some systems may on their face prevent franchisees

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325 DJ 204-32-44 (July 31, 2007).
from properly serving disabled customers. For each of these types of requirements, the franchisor should carefully consider the ADA impact of its policies. If the policies are crafted to ensure ADA compliance, the franchisor should require the franchisee to comply with the franchisor’s operating standards and to operate the franchised location in compliance with the ADA.

In *Dahlberg v. Avis Rent A Car System, Inc.*, the plaintiff alleged ADA liability against Avis for its franchisee’s actions arising, in part, out of the franchisee’s use of the Avis reservation system. 326 The court commented that if the Avis reservation system itself resulted in an ADA violation, Avis may be liable for such violation. However, the issues in the case did not result from the reservation system but rather from the actual operations of the franchisee’s location. In this instance, the court commented that the operation of the reservation system by Avis was insufficient to make Avis liable for the day-to-day operations of the franchised location. The court found that Avis did not have control over the operations of its franchisee’s business and therefore was not liable for its ADA violations.

Pursuant to a Settlement Agreement with the United States, H&R Block agreed to modify its operating procedures for both its company operated and franchised locations to require each location to provide effective communication tools for all deaf or hard of hearing customers. 327 The DOJ required H&R Block and its franchisees to: (a) provide auxiliary aids and services upon request to hearing impaired customers; (b) implement and enforce a policy about effective communications to deaf or hearing impaired customers; (c) establish and maintain a list of qualified sign language interpreters in each area served by one or more H&R Block offices; (d) post and maintain a notice in each office informing customers of the right under the ADA to request effective communication tools; and (e) provide training to all employees regarding their responsibilities to ensure that people with disabilities are treated in a nondiscriminatory manner. The DOJ also required H&R Block to monitor compliance with these requirements by its franchisees as it would monitor compliance with all franchise agreement terms and take appropriate disciplinary actions for any non-compliance. If H&R Block was unable to gain compliance with these requirements by any franchisee during the term of the Settlement Agreement, H&R Block was required to report this non-compliance promptly to the DOJ.

With the implementation of the revised ADA Standards, as discussed above, franchisors and franchisees alike should expect to see a heightened focus on operational standards that have an impact on disabled customers.

4. **Loss Shifting – Indemnification and Insurance Considerations**

As discussed, a franchisor can shift financial responsibility for ADA compliance and liability to its franchisees under the terms of a franchise agreement, lease or other contract. A franchisee could also shift ADA liability to its franchisor, although in most systems this is not likely to occur. However, the franchisee in many systems will be the tenant under a lease with a third party for the franchised location and may negotiate that certain aspects of ADA compliance remain the obligation of the landlord. As mentioned above, any loss shifting for ADA liability is effective as between the parties to the agreement shifting the loss, but will not impact the liability of potentially both the franchisor and franchisee, or franchisee and landlord as to claims made

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327 *Settlement Agreement Among The United States of America and HRB Tax Group, Inc.*, H&R Block Tax Services, LLC and HRB Advance, LLC., DOJ Complaint Number 202-76-97 (Dec. 22, 2010).
by disabled individuals or the government. As a result of this, any party who contractually shifts this loss to another party should take additional steps to ensure it is adequately protected in the event of a loss.

The allocation of this liability must include a properly worded indemnification from the party assuming the liability. This indemnification must cover not only damages resulting from any ADA violation, but importantly all attorneys' fees and costs associated with defending any action. Counsel for both franchisors and franchisees should carefully review the indemnification language contained in standard agreements used in the system, as well as any third party leases used by either the franchisor or franchisee.

Any indemnification is only as good as the party standing behind it. Therefore, the party obtaining the indemnification must also carefully examine the financial strength of the party providing the indemnification. If there is not sufficient financial strength to support any potential claims and associated defense costs, it would be prudent to consider some form of security to support this indemnification. In many franchise systems, the franchisee’s indemnification will be included in the overall indemnification provided by the franchisee, which may include personal guarantees of the individuals operating the franchise or personal assets being pledged as security.

Both franchisors and franchisees should also discuss with their respective insurance carriers the possibility of obtaining insurance to cover any potential ADA claims made against either or both of the franchisor and franchisee. The availability of this coverage, and its affordability, will vary by insurance company and type of business operated by the franchisee.

5. “Readily Achievable” Determination Within Franchised Systems

As discussed, whether barrier removal is “readily achievable” will be determined in light of the nature and cost of the removal and the financial resources available to the covered entity and any legally responsible parent corporation or entity. Such a standard, unfortunately, leaves many questions unanswered within the franchising context. What is the proper scope of the financial resources that should be considered? More specifically, will the DOJ or a court look at the financial resources of a franchisee, or of a franchisor’s own operating units, on a unit-by-unit basis or should the assessment be made corporate-wide? As case law has yet to resolve these issues, it is difficult to say how broad the scope of financial resources considered will be. However, the DOJ Technical Assistance Manual suggests that whether the franchisor or franchisee owns or “operates” multiple units of the franchise, within the meaning of the ADA, will be the key inquiry in this assessment.

The DOJ Technical Assistance Manual explains that where a public accommodation is a facility that is “owned or operated” by a parent entity that conducts operations at many different sites, “the public accommodation must consider the resources of both the local facility and the parent entity to determine if barrier removal is ‘readily achievable.’” As a result, a franchisee or franchisor engaging in the “readily achievable” assessment may not only have to take the financial resources of the unit in question into account, but may also have to consider the financial resources of other units it owns or operates, or even financial resources of the parent company as a whole, perhaps even those unrelated to the franchise operation. Conceivably a franchisor owning or operating numerous units would have to consider the financial strength of

the franchising system as a whole. The consequences of such a broad-based assessment as to the financial resources of a franchisee or franchisor will likely result in a greater financial burden being imposed on franchising systems containing multiple units and/or producing large profits. Notably, however, there is no legal precedent embracing this particularly onerous interpretation, and one can make a reasonable case that “readily achievable” was intended to be viewed in the context of a business-by-business analysis.

6. DOJ Investigations with Respect to Franchised Systems

The DOJ recently renewed its commitment to the aggressive enforcement of the ADA. It has also worked to improve public awareness regarding the requirements of and rights protected by the ADA. As the ADA is the only civil rights law to require technical support by the government to the public to ensure non-discrimination against disabled individuals, the DOJ has published its ADA Update: A Primer for Small Business, a copy of which is attached as Appendix 1. This Primer provides direction for all types of businesses in ensuring a business location that is accessible and usable by all disabled individuals.

Since the ADA’s inception over twenty years ago, the DOJ has brought various claims not only against individual business owners, but also against franchisors and franchisees. The DOJ often resolves issues without filing a lawsuit by means of a formal written settlement agreement. Alternatively, the DOJ may file a lawsuit concurrent with the filing of a consent decree incorporating terms agreed upon by the defendant(s) in the lawsuit. All settlement agreements and consent decrees are public records and are posted on the DOJ’s website. Additionally, the DOJ Office of Public Affairs often provides press releases detailing recent settlement agreements, investigations, consent decrees, and other matters.

In matters investigated by the DOJ against franchised systems, some of which have been discussed above, the DOJ and franchisors have settled the DOJ’s claims through agreement requiring the franchisor to take certain actions in not only its company operated locations but also to enforce such actions with its franchisees. There have also been settlement agreements reached between the DOJ and individual franchisees that may have greater implications for the entire franchised system.

In 2006, the DOJ entered into a settlement agreement with NPC International, Inc., the largest Pizza Hut franchisee.\(^{329}\) The franchisor was not named in this agreement. This settlement agreement required the franchisee to: (a) design and construct all new restaurants in compliance with the ADA; (b) make modifications to restaurants constructed after January 26, 1993 to bring those restaurants into compliance; and (c) take action to remove barriers in its restaurants constructed prior to January 26, 1993.

As discussed above, in 2007 the DOJ entered into a Settlement Agreement with Doctor’s Associates, Inc. and Subway Real Estate Corp.\(^{330}\) In addition to the lease terms discussed in Section IV A.2. above, Subway agreed to the following terms: (a) verification that all plans submitted to Subway for review comply with ADA Standards; (b) establishment of a certification program that requires Subway to receive certifications of ADA compliance for all future locations and existing locations which undergo modifications; (c) Subway must offer free of charge to its franchisees access to an ADA consultant during the design, construction or


\(^{330}\) DJ 204-32-44 (July 31, 2007).
alteration phase of any new location; (d) a Subway development agent shall visit each site
during construction to ensure ADA compliance and complete a final inspection with respect to
ADA compliance; (e) the remodeling program developed by Subway was required to include
specific ADA compliance elements; (f) Subway had to create an Evaluation and Remediation
Program and require franchisees to evaluate accessibility of entranceways and rest rooms in all
locations and require franchisees to make remediations if those areas were not ADA compliant;
(g) in conjunction with this remediation program, Subway was required to make available to its
franchisees contact persons knowledgeable about the ADA; (h) Subway had to modify its
operations manual to make ADA compliance an area of compliance and provide that failure to
participate in any required remediation would make the franchisee subject to penalties for non-
compliance, including termination of their franchise agreement; (i) creation of a remediation loan
fund that permitted franchisees to borrow up to $3,000 from such fund under an interest free
loan; (j) creation of training materials on ADA compliance; (k) amendment of its offering circular
to reflect the terms of the settlement agreement; and (l) creation of extensive reporting
requirements to provide ongoing reports to the DOJ regarding compliance with the settlement
terms.

Also in 2007, the DOJ resolved issues with Sylvan Learning Centers through a
settlement agreement.331 This agreement arose from claims made against Sylvan alleging its
failure to provide effective communication tools for its hearing impaired customers. The
settlement agreement applies to Sylvan and its affiliates but does not address Sylvan's
franchisees. As with the H&R Block agreement discussed above, this agreement requires
Sylvan to provide auxiliary aids and services, including qualified sign language interpreters, to
customers with hearing disabilities. It required Sylvan to post notices, provide appropriate
training to its employees, and amend its operating policies. If Sylvan sells any location covered
by the agreement, the terms of the agreement apply to the new owner. This requirement has an
impact on any refranchising Sylvan might choose to do of its company operated locations during
the term of the agreement.

In many of these settlement agreements or consent decrees, if franchisees do not
comply with the terms of such agreements, the franchisor has the obligation to report such non-
compliance to the DOJ, thereby risking a separate action against its franchisees by the DOJ. In
many of these agreements, if the franchisee does comply, the DOJ agrees not to pursue any
action against the franchisees for current ADA violations. These agreements result in forced
compliance by franchisees to avoid individual investigations and/or lawsuits being brought by
the DOJ against a franchisee.

7. Recent Title III Cases and DOJ Settlement Agreements and Consent
Decrees

While there are numerous cases and DOJ actions pending or recently resolved under
the ADA against individual business owners and operators, there are several involving
franchised systems of interest. In addition to the H&R Block Settlement Agreement discussed
above, which was filed in early 2011, the DOJ entered into an extensive Consent Decree with
Hilton Worldwide, Inc. in November 2010.332 This consent decree was filed contemporaneously
with the filing of a lawsuit by the DOJ against Hilton alleging that Hilton failed to design and
construct its facilities built after January 26, 1993 in compliance with the ADA, and that Hilton

331 Settlement Agreement Between The United States of America and Sylvan Learning Centers, LLC, DJ #202-35-
195 (Sept. 27, 2007).
failed to provide individuals with disabilities the same opportunity to reserve rooms using its website and telephone reservation systems. The terms of this consent decree are lengthy and involve many operational elements of the Hilton system. Essentially, to resolve these issues, Hilton agreed to:

- Conduct surveys of owned and joint venture hotels built after January 1993 to assess ADA compliance.
- Ensure all owned and joint venture hotels built after January 1993 have the required number of designated accessible guestrooms within 4 years.
- For all owned and joint venture hotels that build additions, ensure additions and paths of travel to and through the additions comply with the ADA.
- Require all franchised or managed hotels that enter into new agreements, change ownership, or renew or extend their franchise agreement to conduct an ADA survey and certify compliance with the ADA.
- Hire an ADA consultant to review all surveys performed, conduct on-site inspections to verify ADA compliance, and report annually to the court.
- Require all franchised and managed hotels that are not in compliance to develop and submit a plan to the ADA consultant describing how and when it will comply. Each such hotel has 7 years to complete all remediation.
- Ensure its reservation systems provide information about the availability of accessible rooms, as well as details about the configuration, amenities and views available in such rooms, and ensure disabled individuals are able to reserve these rooms.
- Improve the accessibility of the Hilton websites by bringing them into compliance with the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0, Level A (guidelines developed by an international committee that develops standards for growth of the Web).
- Institute a reservation policy for accessible rooms that holds open two non-premium accessible rooms as the last rooms sold at each hotel.
- Amend its brand standards to require ADA compliance in new construction and alterations, to require training for employees, to designate an ADA contact person at each hotel, and amend its quality assurance reviews to incorporate ADA compliance.
- Ensure its prototype design and plans are ADA compliant.
- Expand its employee training to train personnel how to interact properly with disabled guests.

The Consent Decree is effective for a 4 year term. It also contains extensive reporting requirements. While the list above is lengthy, it does not adequately portray the level of detailed involvement the DOJ will have in Hilton’s business over the term of this decree, including such things as when disabled guests must be upgraded to premium rooms. As most readers should have already determined, Hilton’s cost of compliance will be significant. And the cost of the continued involvement of the DOJ in the day-to-day operations of Hilton over the term of the consent decree is as yet undetermined.
In May 2011, in a follow-on case brought in the Northern District of California, the court in *Vallabhapurapu v. Burger King Corporation*\(^{333}\) essentially reiterated its decision in *Castaneda v. Burger King Corporation*\(^{334}\) by denying Burger King’s motion to dismiss. Burger King brought this motion as a result of the plaintiffs’ failure to include Burger King’s franchisees as necessary parties to the lawsuit. Both class action cases alleged violations of the ADA, California’s Unruh Civil Rights Act\(^{335}\), and California’s Disabled Persons Act\(^{336}\) arising at franchised Burger King locations that are leased to its franchisees by Burger King. The plaintiffs in both actions named only Burger King, not the individual franchisees operating the locations in question. The *Castaneda* case was settled for a smaller class than originally claimed and the *Vallabhapurapu* case was brought by plaintiffs not included in the *Castaneda* settlement. Both cases have only addressed Burger King’s attempts to have its franchisees named as additional defendants. The courts also addressed Burger King’s motions to dismiss for plaintiffs’ lack of standing as a result of a lack of actual visits to each location by the named plaintiffs. Neither court addressed whether Burger King is an “operator” or lessor of these locations, or has ADA liability as a result of a failure to design and construct the facilities in an accessible fashion. Unless Burger King reaches a settlement with the proposed class in *Vallabhapurapu*, further decisions in this case may reach those issues.

8. **Obligations of Franchisors and Franchisees Under Title III**

While the lack of clarity in the courts about liability for ADA violations in franchised systems, combined with the DOJ’s aggressive actions against both franchisors and franchisees, may have many readers concerned, there are simple and cost-effective actions that can be taken immediately to minimize ADA exposure. The first step for both franchisors and franchisees is to understand the requirements of the ADA and how these requirements apply to each business. As many states have codified the ADA requirements into their building codes, initial compliance with the ADA at a newly constructed facility should be easier to obtain. But it is also essential for both franchisors and franchisees to have a strong working knowledge of ongoing compliance requirements as discussed in this paper.

Accommodating disabled customers is not only prudent from a legal risk standpoint, it is also good business. There are millions of disabled individuals in the United States and both franchisors and franchisees should view these individuals as potential customers. As has been discussed in this paper, however, an inadvertent (or intentional) disregard for the ADA requirements may ultimately negatively impact any sales to be gained by ensuring each location is fully accessible by all disabled customers. The economic risk to the franchisor or franchisee is real, as is the negative impact to the overall franchise system from any resulting publicity of the ADA violations.

a. **Franchisors**

Franchisors develop and oversee each of their businesses. It is therefore essential for franchisors to have a strong knowledge of the ADA in general, and its applicability in particular to each franchised system. This knowledge should then be incorporated into the franchisor’s prototype plans, training, and operational standards. Franchisors should make sure their operational standards reflect the business model they want for the franchised system, but also

\(^{334}\) *Castaneda v. Burger King Corp.*, 2010 U.S. Dist. LEXIS 78299 (N.D. Cal. July 12, 2010).
\(^{335}\) CAL. CIV. CODE § 51 et seq.
\(^{336}\) CAL. CIV. CODE § 54 et seq.
comply with ADA standards that might impact ongoing operations, such as allowing service animals in the facility, explaining modifications to operating standards to accommodate disabled individuals, and ensuring reservation systems provided by the franchisor comply fully with the ADA. However, once the overall standards are adopted by the franchisor, a prudent franchisor will not involve itself in the day to day operations of a franchisee except for periodic system standards reviews.

Training for existing and new franchisees, as well as the franchisor’s employees, is essential so that all individuals understand the ADA requirements and their applicability to the franchised business. Providing this training to franchisees, and then requiring franchisees to train their employees on the appropriate ways to accommodate disabled customers, is critical.

For all new and remodeled locations, specifically requiring franchisees to comply with the ADA and provide the franchisor with a certification of such initial compliance before allowing the franchised location to open is a prudent practice for a franchisor. If a franchisor is concerned that existing locations are not compliant, the franchisor may require the franchisee to complete an ADA survey as part of any remodeling program. Although a franchisor should continue to provide ADA-compliant prototype plans to ensure uniformity throughout its system, the franchisor’s involvement should not rise to the level of designing and constructing the specific location.

Franchise agreements, leases, and other contracts should be drafted to shift financial responsibility for any ADA liability from the franchisor to its franchisees, with the accompanying indemnifications and guarantees to ensure the franchisor can reasonably rely on this assumption of responsibility.

Even franchisors who have been diligent in the past in developing compliant plans and operating standards should take time now to understand the recent changes made to the ADA Standards. A careful review of existing plans and operating standards is critical in light of the changes made to the ADA Standards.

(b) Franchisees

If possible, franchisees should attempt to allocate some or all responsibility for ADA liability to the franchisor. If the franchisee leases its location from a third-party landlord, the franchisee should pay careful attention to the lease language allocating responsibility for ADA liability between the tenant and the landlord, and ensure the lease allows the franchisee to require the landlord to make necessary alterations to portions of the premises controlled by the landlord.

Franchisees should pay careful attention to any training provided by the franchisor about ADA requirements. If the franchisor does not provide such training, franchisees should urge their franchisor to revise its training to incorporate such training. Franchisees should also make full use of the DOJ’s website and all materials made available by the DOJ on ADA compliance. As the operators of each franchised location, franchisees must be ready to meet the needs of disabled customers as they arise.

As franchisees develop new locations or remodel existing locations, they should also make themselves aware of all accessibility requirements. Using a qualified architect and contractor can help with this process. Reliance solely on local or state building codes or the franchisor’s prototype plans is not sufficient. The franchisee must be involved with its architect.
and contractor to ensure ADA compliance. If the franchisor requires a certification from the franchisee for any construction, franchisees should make this requirement clear to its architect and contractor early in the construction process to make sure the architect or contractor will provide all required certifications.

B. **Title I Liability Issues in the Franchise Context**

As discussed in Section I above, Title I of the ADA also prohibits employers with 15 or more employees from discriminating against disabled employees. As most franchise lawyers are aware today, employees of franchisees often attempt to include the franchisor in any claims made against the franchisee resulting from an alleged employment law violation. The question of who the “employer” is under an ADA claim is the same as with other employment law violations alleged against a franchisee and its franchisor. Is the franchisee an agent of the franchisor, making the franchisor vicariously liable for ADA Title I violations alleged by the franchisee’s employees? Is the franchisor the joint employer of the franchisee's employees? A full exploration of these issues is beyond the scope of this paper.337 However, we raise this issue for consideration by both franchisor and franchisee counsel.

V. **CONCLUSION**

The ADA was enacted over 20 years ago to prevent discrimination against disabled individuals as employees and as users of places of public accommodations. Both franchisors and franchisees of most franchised systems operating today are subject to the terms of the ADA and must be aware of how the ADA impacts the development, original construction, renovation, and daily operations of each individual unit. Compliance with the ADA is not only essential from a brand and financial risk standpoint, it is also good business practice to ensure each business is maximizing its customer base by being fully accessible to all disabled customers.

Appendix 1

U.S. Department of Justice
Civil Rights Division
Disability Rights Section

ADA UPDATE:
A PRIMER FOR SMALL BUSINESS
Table of Contents to Appendix 1

NEW CUSTOMERS .....................................................................................................................1

WHO IS COVERED BY THE ADA? .............................................................................................1

COMPLIANCE DATES ................................................................................................................2

GENERAL NONDISCRIMINATION REQUIREMENTS ...............................................................3
  Policies and Procedures ........................................................................................................3
  Service Animals .....................................................................................................................4
  Wheelchairs and Other Power-Driven Mobility Devices .......................................................5
  Communicating with Customers .........................................................................................7

MAKING THE BUILT ENVIRONMENT ACCESSIBLE ...............................................................10
  Existing Facilities ................................................................................................................10
    Element-by-Element Safe Harbor .....................................................................................10
    Readily Achievable Barrier Removal .............................................................................12
    Barrier Removal Before March 15, 2012 ......................................................................12
    Priorities for Barrier Removal .......................................................................................13
  Parking ...............................................................................................................................15
  Accessible Entrances .........................................................................................................16
  Accessible Route to Goods and Services .........................................................................17
  Shelves, Sales and Service Counters, and Check-Out Aisles .......................................18
  Food and Restaurant Services .........................................................................................20
  New Construction and Alterations .....................................................................................20
  Alterations ........................................................................................................................21

STEPS FOR SUCCESS .............................................................................................................22
  Assessing Your Facility .......................................................................................................22
  Staff Training ......................................................................................................................22
  Tax Credit and Deduction .................................................................................................22
The Department of Justice has revised its regulations implementing the Americans with Disabilities Act (ADA). This rule takes effect on March 15, 2011, clarifies issues that have arisen over the past 20 years, and contains new requirements, including the 2010 Standards for Accessible Design (2010 Standards). This document provides guidance to assist small business owners in understanding how this new regulation applies to them.

New Customers

More than 50 million Americans – 18% of our population – have disabilities, and each is a potential customer. People with disabilities are living more independently and participating more actively in their communities. They and their families want to patronize businesses that welcome customers with disabilities. In addition, approximately 71.5 million baby boomers will be over age 65 by the year 2030 and will be demanding products, services, and environments that meet their age-related physical needs. Studies show that once people with disabilities find a business where they can shop or get services in an accessible manner, they become repeat customers.

People with disabilities have too often been excluded from everyday activities: shopping at a corner store, going to a neighborhood restaurant or movie with family and friends, or using the swimming pool at a hotel on the family vacation. The ADA is a Federal civil rights law that prohibits discrimination against people with disabilities and opens doors for full participation in all aspects of everyday life. This publication provides general guidance to help business owners understand how to comply with the Department's revised ADA regulations and the 2010 Standards, its design standards for accessible buildings. The ADA applies to both the built environment and to policies and procedures that affect how a business provides goods and services to its customers. Using this guidance, a small business owner or manager can ensure that it will not unintentionally exclude people with disabilities and will know when it needs to remove barriers in its existing facilities. If you are planning to build a new facility or alter an existing one, please see New Construction and Alterations for specific guidance on these types of projects. Businesses should consult the revised ADA regulations (www.ada.gov/regs2010/ADAregs2010.htm) and the 2010 Standards (www.ada.gov/2010ADAsstandards_index.htm) for more comprehensive information about specific requirements.

Who is Covered by the ADA?

Businesses that provide goods or services to the public are called "public accommodations" in the ADA. The ADA establishes requirements for 12 categories of public accommodations, which include stores, restaurants, bars, service establishments, theaters, hotels, recreational facilities, private museums and schools, doctors' and dentists' offices, shopping malls, and other businesses. Nearly all types of businesses that serve the public are included in the 12 categories, regardless of the size of the business or the age of their buildings. Businesses covered by the ADA are required to modify their business policies and procedures when necessary to serve customers with disabilities and take steps to communicate effectively with customers with disabilities. The ADA also requires businesses to remove architectural barriers in existing buildings and make sure that newly built or altered facilities are constructed to be accessible to individuals with disabilities. "Grandfather provisions" often found in local building codes do not exempt businesses from their obligations under the ADA.

Commercial facilities, such as office buildings, factories, warehouses, or other facilities that do not provide goods or services directly to the public are only subject to the ADA's requirements for new construction and alterations.
Compliance Dates

Businesses need to know two important deadlines for compliance. Starting March 15, 2011, businesses must comply with the ADA's general nondiscrimination requirements, including provisions related to policies and procedures and effective communication. The deadline for complying with the 2010 Standards, which detail the technical rules for building accessibility, is March 15, 2012. This delay in implementation was provided to allow businesses sufficient time to plan for implementing the new requirements for facilities. In addition, hotels, motels, and inns have until March 15, 2012, to update their reservation policies and systems to make them fully accessible to people with disabilities.

<table>
<thead>
<tr>
<th>Compliance Dates</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>March 15, 2011</td>
<td>General Non-Discrimination Requirements</td>
</tr>
<tr>
<td>March 15, 2012</td>
<td>Hotel Reservation Policies</td>
</tr>
<tr>
<td>March 15, 2012</td>
<td>2010 Standards</td>
</tr>
</tbody>
</table>

For additional details, see, ADA 2010 Revised Requirements: Effective Date/ Compliance Date at [www.ada.gov/ revised_effective_dates-2010.htm](http://www.ada.gov/ revised_effective_dates-2010.htm).
Policies and Procedures

Your business, like all others, has formal and informal policies, practices, and procedures that keep it running smoothly. However, sometimes your policies or procedures can inadvertently make it difficult or impossible for a customer with a disability to access your goods and services. That is why the ADA requires businesses to make "reasonable modifications" to their usual ways of doing things when serving people with disabilities. Most modifications involve only minor adjustments in policies. For example, a day care center that has two scheduled snack times must modify this policy to allow a child with diabetes to bring food for an extra snack if necessary. A clothing store must modify a policy of permitting only one person at a time in a dressing room for a person with a disability who is shopping with a companion and needs the companion's assistance to try on clothes. Anything that would result in a fundamental alteration – a change in the essential nature of your business – is not required. For example, a clothing store is not required to provide dressing assistance for a customer with a disability if this is not a service provided to other customers.

Customers with disabilities may need different types of assistance to access your goods and services. For example, a grocery store clerk is expected to assist a customer using a mobility device by retrieving merchandise from high shelves. A person who is blind may need assistance maneuvering through a store's aisles. A customer with an intellectual disability may need assistance in reading product labels and instructions. Usually the customer will tell you up front if he or she needs assistance, although some customers may wait to be asked "may I help you?" When only one staff person is on duty, it may or may not be possible for him or her to assist a customer with a disability. The business owner or manager should advise the staff
person to assess whether he or she can provide the assistance that is needed without jeopardizing the safe operation of the business.

Retrieving out of reach items and describing items for sale are ways to provide assistance to customers with disabilities.

Service Animals

Often businesses such as stores, restaurants, hotels, or theaters have policies that can exclude people with disabilities. For example, a "no pets" policy may result in staff excluding people with disabilities who use dogs as service animals. A clear policy permitting service animals can help ensure that staff are aware of their obligation to allow access to customers using service animals. Under the ADA's revised regulations, the definition of "service animal" is limited to a dog that is individually trained to do work or perform tasks for an individual with a disability. The task(s) performed by the dog must be directly related to the person's disability. For example, many people who are blind or have low vision use dogs to guide and assist them with orientation. Many individuals who are deaf use dogs to alert them to sounds. People with mobility disabilities often use dogs to pull their wheelchairs or retrieve items. People with epilepsy may use a dog to warn them of an imminent seizure, and individuals with psychiatric disabilities may use a dog to remind them to take medication. Service members returning from war with new disabilities are increasingly using service animals to assist them with activities of daily living as they reenter civilian life. Under the ADA, "comfort," "therapy," or "emotional support animals" do not meet the definition of a service animal.
Service animals provide many types of assistance for people with disabilities.

Under the ADA, service animals must be harnessed, leashed, or tethered, unless these devices interfere with the service animal's work or the individual's disability prevents him from using these devices. Individuals who cannot use such devices must maintain control of the animal through voice, signal, or other effective controls. Businesses may exclude service animals only if 1) the dog is out of control and the handler cannot or does not regain control; or 2) the dog is not housebroken. If a service animal is excluded, the individual must be allowed to enter the business without the service animal.

In situations where it is not apparent that the dog is a service animal, a business may ask only two questions: 1) is the animal required because of a disability; and 2) what work or task has the animal been trained to perform? No other inquiries about an individual's disability or the dog are permitted. Businesses cannot require proof of certification or medical documentation as a condition for entry.

**Wheelchairs and Other Power-Driven Mobility Devices**

People with mobility, circulatory, or respiratory disabilities use a variety of devices for mobility. Some use walkers, canes, crutches, or braces while others use manually-operated or power wheelchairs, all of which are primarily designed for use by people with disabilities. Businesses must allow people with disabilities to use these devices in all areas where customers are allowed to go.
Devices categorized as wheelchairs must be permitted.

Advances in technology have given rise to new power-driven devices that are not necessarily designed for people with disabilities, but are being used by some people with disabilities for mobility. The term "other power-driven mobility devices" is used in the revised ADA regulations to refer to any mobility device powered by batteries, fuel, or other engines, whether or not they are designed primarily for use by individuals with mobility disabilities for the purpose of locomotion. Such devices include Segways®, golf cars, and other devices designed to operate in non-pedestrian areas. Public accommodations must allow individuals who use these devices to enter their premises unless the business can demonstrate that the particular type of device cannot be accommodated because of legitimate safety requirements. Such safety requirements must be based on actual risks, not on speculation or stereotypes about a particular class of devices or how they will be operated by individuals using them.

Businesses must consider these factors in determining whether reasonable modifications can be made to admit other power-driven mobility devices to their premises:

- The type, size, weight, dimensions, and speed of the device;
- The business's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);
- The business's design and operational characteristics, such as its square footage, whether it is indoors or outdoors, its placement of stationery equipment or devices or furniture, and whether it has storage space for the device if requested by the customer;
- Whether legitimate safety standards can be established to permit the safe operation of the device; and
- Whether the use of the device creates a substantial risk of serious harm to the environment or natural or cultural resources or poses a conflict with Federal land management laws and regulations.

Using these assessment factors, a business may decide that it can allow devices like Segways® in its facilities, but cannot allow the use of golf cars in the same facility. It is likely that many businesses will allow the use of Segways® generally, although some may decide to exclude them during their busiest hours or on particular shopping days when pedestrian traffic is
particularly dense. Businesses are encouraged to develop written policies specifying when other power-driven mobility devices will be permitted on their premises and to communicate those policies to the public.

Businesses may ask individuals using an other power-driven mobility device for a credible assurance that the device is required because of a disability. An assurance may include, but does not require, a valid State disability parking placard or other Federal or State-issued proof of disability. A verbal assurance from the individual with a disability that is not contradicted by your observation is also considered a credible assurance. It is not permissible to ask individuals about their disabilities.

**Communicating with Customers**

Communicating successfully with customers is an essential part of doing business. When dealing with customers who are blind or have low vision, those who are deaf or hard of hearing, or those who have speech disabilities, many business owners and employees are not sure what to do. The ADA requires businesses to take steps necessary to communicate effectively with customers with vision, hearing, and speech disabilities.

Because the nature of communications differs from business to business, the rules allow for flexibility in determining effective communication solutions. What is required to communicate effectively when discussing a mortgage application at a bank or buying an automobile at a car dealership will likely be very different from what is required to communicate effectively in a convenience store. The goal is to find practical solutions for communicating effectively with your customers. For example, if a person who is deaf is looking for a particular book at a bookstore, exchanging written notes with a sales clerk may be effective. Similarly, if that person is going to his or her doctor's office for a flu shot, exchanging written notes would most likely be effective. However, if the visit's purpose is to discuss cancer treatment options, effective communication would likely require a sign language or oral interpreter because of the nature, length, and complexity of the conversation. Providing an interpreter guarantees that both parties will understand what is being said. The revised regulations permit the use of new technologies including video remote interpreting (VRI), a service that allows businesses that have video conference equipment to access an interpreter at another location.
Exchange of written notes may be appropriate for casual interactions.

It is a business's responsibility to provide a sign language, oral interpreter, or VRI service unless doing so in a particular situation would result in an undue burden, which means significant difficulty or expense. A business's overall resources determine (rather than a comparison to the fees paid by the customer needing the interpreter) what constitutes an undue burden. If a specific communications method would be an undue burden, a business must provide an effective alternative if there is one.

Complex transactions will likely require more formal means of communication, such as a sign language interpreter.
Many individuals who are deaf or have other hearing or speech disabilities use either a text telephone (TTY) or text messaging instead of a standard telephone. The ADA established a free telephone relay network to enable these individuals to communicate with businesses and vice versa. When a person who uses such a device calls the relay service by dialing 7-1-1, a communications assistant calls the business and voices the caller's typed message and then types the business's response to the caller. Staff who answer the telephone must accept and treat relay calls just like other calls. The communications assistant will explain how the system works if necessary.

Businesses must answer calls placed through the telephone relay service.

The rules are also flexible for communicating effectively with customers who are blind or have low vision. For example, a restaurant can put its menu on an audio cassette or a waiter can read it to a patron. A sales clerk can find items and read their labels. In more complex transactions where a significant amount of printed information is involved, providing alternate formats will be necessary, unless doing so is an undue burden. For example, when a client who is blind visits his real estate agent to negotiate the sale of a house, all relevant documents should be provided in a format he can use, such as on a computer disk or audio cassette. It may be effective to e-mail an electronic version of the documents so the client can use his or her screen-reading technology to read them before making a decision or signing a contract. In this situation, since complex financial information is involved, simply reading the documents to the client will most likely not be effective. Usually a customer will tell you which format he or she needs. If not, it is appropriate to ask.
People with disabilities continue to face architectural barriers that limit or make it impossible to access the goods or services offered by businesses. Examples include a parking space with no access aisle to allow deployment of a van's wheelchair lift, steps at a facility's entrance or within its serving or selling space, aisles too narrow to accommodate mobility devices, counters that are too high, or restrooms that are simply too small to use with a mobility device.

The ADA strikes a careful balance between increasing access for people with disabilities and recognizing the financial constraints many small businesses face. Its flexible requirements allow businesses confronted with limited financial resources to improve accessibility without excessive expense.

The ADA's regulations and the ADA Standards for Accessible Design, originally published in 1991, set the standard for what makes a facility accessible. While the updated 2010 Standards retain many of the original provisions in the 1991 Standards, they do contain some significant differences. These standards are the key for determining if a small business's facilities are accessible under the ADA. However, they are used differently depending on whether a small business is altering an existing building, building a brand new facility, or removing architectural barriers that have existed for years.

Existing Facilities

Element-by-Element Safe Harbor

If your business facility was built or altered in the past 20 years in compliance with the 1991 Standards, or you removed barriers to specific elements in compliance with those Standards, you do not have to make further modifications to those elements – even if the new standards have different requirements for them – to comply with the 2010 Standards. This provision is
applied on an element-by-element basis and is referred to as the "safe harbor." The following examples illustrate how the safe harbor applies:

The 2010 Standards lower the mounting height for light switches and thermostats from 54 inches to 48 inches. If your light switches are already installed at 54 inches in compliance with the 1991 Standards, you are not required to lower them to 48 inches.

The 1991 Standards require one van accessible space for every eight accessible spaces. The 2010 Standards require one van accessible space for every six accessible spaces. If you have complied with the 1991 Standards, you are not required to add additional van accessible spaces to meet the 2010 Standards.

The 2010 Standards contain new requirements for the input, numeric, and function keys (e.g. "enter," "clear," and "correct") on automatic teller machine (ATM) keypads. If an existing ATM complies with the 1991 Standards, no further modifications are required to the keypad.

If a business chooses to alter elements that were in compliance with the 1991 Standards, the safe harbor no longer applies to those elements. For example, if you restripe your parking lot, which is considered an alteration, you will now have to meet the ratio of van accessible spaces in the 2010 Standards. Similarly, if you relocate a fixed ATM, which is considered an alteration, you will now have to meet the keypad requirements in the 2010 Standards. The ADA’s definition of an alteration is discussed later in this publication.

The revised ADA rules and the 2010 Standards contain new requirements for elements in existing facilities that were not addressed in the original 1991 Standards. These include recreation facilities such as swimming pools, play areas, exercise machines, miniature golf facilities, and bowling alleys. Because these elements were not included in the 1991 Standards, they are not subject to the safe harbor. Therefore, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so. For example, a hotel must determine whether it is readily achievable to make its swimming pool accessible to people with mobility disabilities by installing a lift or a ramp as specified in the 2010 Standards.

### New Requirements in the 2010 Standards Not Subject to the Safe Harbor

| Amusement rides                          | Saunas and steam rooms                       |
| Recreational boating facilities         | Swimming pools, wading pools, and spas       |
| Exercise machines and equipment         | Shooting facilities with firing positions    |
| Fishing piers and platforms             | Residential facilities and dwelling units    |
| Golf facilities                         | Miscellaneous                               |
| Miniature golf facilities               | – Team or player seating                    |
| Play areas                              | – Accessible route to bowling lanes          |
|                                         | – Accessible route in court sports facilities |
Readily Achievable Barrier Removal

The ADA requires that small businesses remove architectural barriers in existing facilities when it is "readily achievable" to do so. Readily achievable means "easily accomplishable without much difficulty or expense." This requirement is based on the size and resources of a business. So, businesses with more resources are expected to remove more barriers than businesses with fewer resources.

Readily achievable barrier removal may include providing an accessible route from a parking lot to the business's entrance, installing an entrance ramp, widening a doorway, installing accessible door hardware, repositioning shelves, or moving tables, chairs, display racks, vending machines, or other furniture. When removing barriers, businesses are required to comply with the Standards to the extent possible. For example, where there is not enough space to install a ramp with a slope that complies with the Standards, a business may install a ramp with a slightly steeper slope. However, any deviation from the Standards must not pose a significant safety risk.

Removing barriers, such as a step to an entrance, is required when readily achievable.

Determining what is readily achievable will vary from business to business and sometimes from one year to the next. Changing economic conditions can be taken into consideration in determining what is readily achievable. Economic downturns may force many public accommodations to postpone removing some barriers. The barrier removal obligation is a continuing one and it is expected that a business will move forward with its barrier removal efforts when it rebounds from such downturns. For example, if a restaurant identified barriers under the 1991 Standards but did not remove them because it could not afford the cost, the restaurant has a continuing obligation to remove these barriers when it has the financial resources to do so.

Barrier Removal Before March 15, 2012

Businesses removing barriers before March 15, 2012, have the choice of using either the 1991 Standards or the 2010 Standards. You must use only one standard for removing barriers in an entire facility. For example, you cannot choose the 1991 Standards for accessible routes and the 2010 Standards for restrooms. (See, ADA 2010 Revised Requirements: Effective Date / Compliance Date at www.ada.gov/ revisedeffectivedates-2010.htm). Remember that if an
element complies with the 1991 Standards, a business is not required to make any changes to that element until such time as the business decides to alter that element.

### Compliance Dates and Applicable Standards for Readily Achievable Barrier Removal, New Construction, and Alterations

<table>
<thead>
<tr>
<th>Compliance Date</th>
<th>Applicable Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Until March 15, 2012</td>
<td>1991 Standards or 2010 Standards</td>
</tr>
<tr>
<td>On or after March 15, 2012</td>
<td>2010 Standards</td>
</tr>
</tbody>
</table>

### Priorities for Barrier Removal

Understanding how customers arrive at and move through your business will go a long way in identifying existing barriers and setting priorities for their removal. Do people arrive on foot, by car, or by public transportation? Do you provide parking? How do customers enter and move about your business? The ADA regulations recommend the following priorities for barrier removal:

- Providing access to your business from public sidewalks, parking areas, and public transportation;
- Providing access to the goods and services your business offers;
- Providing access to public restrooms; and
- Removing barriers to other amenities offered to the public, such as drinking fountains.

Businesses should not wait until March 15, 2012 to identify existing barriers, but should begin now to evaluate their facilities and develop priorities for removing barriers. Businesses are also encouraged to consult with people with disabilities in their communities to identify barriers and establish priorities for removing them. A thorough evaluation and barrier removal plan, developed in consultation with the disability community, can save time and resources.

In some instances, especially in older buildings, it may not be readily achievable to remove some architectural barriers. For example, a restaurant with several steps leading to its entrance may determine that it cannot afford to install a ramp or a lift. In this situation, the restaurant must provide its services in another way if that is readily achievable, such as providing takeout service. Businesses should train staff on these alternatives and publicize them so customers with disabilities will know of their availability and how to access them.
When barrier removal is not possible, alternatives such as curbside service should be provided.
Parking

If your business provides parking for the public, but there are no accessible spaces, you will lose potential customers. You must provide accessible parking spaces for cars and vans if it is readily achievable to do so. The chart below indicates the number of accessible spaces required by the 2010 Standards. One of every six spaces must be van accessible.

<table>
<thead>
<tr>
<th>Total Number of Parking Spaces Provided in Parking Facility</th>
<th>Minimum Number of Required Accessible Parking Spaces</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 to 25</td>
<td>1</td>
</tr>
<tr>
<td>26 to 50</td>
<td>2</td>
</tr>
<tr>
<td>51 to 75</td>
<td>3</td>
</tr>
<tr>
<td>76 to 100</td>
<td>4</td>
</tr>
<tr>
<td>101 to 150</td>
<td>5</td>
</tr>
<tr>
<td>151 to 200</td>
<td>6</td>
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<tr>
<td>201 to 300</td>
<td>7</td>
</tr>
<tr>
<td>301 to 400</td>
<td>8</td>
</tr>
<tr>
<td>401 to 500</td>
<td>9</td>
</tr>
<tr>
<td>501 to 1000</td>
<td>2 percent of total</td>
</tr>
<tr>
<td>1001 and over</td>
<td>20, plus 1 for each 100, or fraction thereof, over 1000</td>
</tr>
</tbody>
</table>

Small businesses with very limited parking (four or fewer spaces) must have one accessible parking space. However, no signage is required.

An accessible parking space must have an access aisle, which allows a person using a wheelchair or other mobility device to get in and out of the car or van.
An overview of accessible parking requirements

Accessible Entrances

One small step at an entrance can make it impossible for individuals using wheelchairs, walkers, canes, or other mobility devices to do business with you. Removing this barrier may be accomplished in a number of ways, such as installing a ramp or a lift or regrading the walkway to provide an accessible route. If the main entrance cannot be made accessible, an alternate accessible entrance can be used. If you have several entrances and only one is accessible, a sign should be posted at the inaccessible entrances directing individuals to the accessible entrance. This entrance must be open whenever other public entrances are open.

Ensuring that items do not block the accessible route allows independent access.
Accessible Route to Goods and Services

The path a person with a disability takes to enter and move through your business is called an "accessible route." This route, which must be at least three feet wide, must remain accessible and not be blocked by items such as vending or ice machines, newspaper dispensers, furniture, filing cabinets, display racks, or potted plants. Similarly, accessible toilet stalls, dressing rooms, or counters at a cash register must not be cluttered with merchandise or supplies.

Temporary access interruptions for maintenance, repair, or operational activities are permitted, but must be remedied as soon as possible and may not extend beyond a reasonable period of time. Businesses must be prepared to retrieve merchandise for customers during these interruptions. For example, if an aisle is temporarily blocked because shelves are being restocked, staff must be available to assist a customer with a disability who is unable to maneuver through that aisle. In addition, if an accessible feature such as an elevator breaks down, businesses must ensure that repairs are made promptly and that improper or inadequate maintenance does not cause repeated failures. Businesses must also ensure that no new barriers are created that impede access by customers with disabilities. For example, routinely storing a garbage bin or piling snow in accessible parking spaces makes them unusable and inaccessible to customers with mobility disabilities.
Snow or other debris in accessible parking spaces and access aisles must be removed as soon as possible.

**Shelves, Sales and Service Counters, and Check-Out Aisles**

The obligation to remove barriers also applies to merchandise shelves, sales and service counters, and check-out aisles. Shelves and counters must be on an accessible route with enough space to allow customers using mobility devices to access merchandise. However, shelves may be of any height since they are not subject to the ADA’s reach range requirements. Where barriers prevent access to these areas, they must be removed if readily achievable. However, businesses are not required to take any steps that would result in a significant loss of selling space. At least one check-out aisle must be usable by people with mobility disabilities, though more are required in larger stores. When it is not readily achievable to make a sales or service counter accessible, businesses should provide a folding shelf or a nearby accessible counter. If these changes are not readily achievable, businesses may provide a clip board or lap board until more permanent changes can be made.
A lowered counter and clear floor space are critical components of an accessible service counter.
Food and Restaurant Services

People with disabilities need to access tables, food service lines, and condiment and beverage bars in restaurants, bars, or other establishments where food or drinks are sold. There must be an accessible route to all dining areas, including raised or sunken dining areas and outdoor dining areas, as well as to food service lines, service counters, and public restrooms. In a dining area, remember to arrange tables far enough apart so a person using a wheelchair can maneuver between the tables when patrons are sitting at them. Some accessible tables must be provided and must be dispersed throughout the dining area rather than clustered in a single location.

Restaurants must provide access to self-service items.

Where barriers prevent access to a raised, sunken, or outdoor dining area, they must be removed if readily achievable. If it is not readily achievable to construct an accessible route to these areas and distinct services (e.g., special menu items or different prices) are available in these areas, the restaurant must make these services available at the same price in the dining areas that are on an accessible route. In restaurants or bars with only standing tables, some accessible dining tables must be provided.

New Construction and Alterations

The ADA requires that all new facilities built by public accommodations, including small businesses, must be accessible to and usable by people with disabilities. The 2010 Standards lay out accessibility design requirements for newly constructed and altered public accommodations and commercial facilities. Certain dates in the construction process determine which ADA standards – the 1991 Standards or the 2010 Standards – must be used.

If the last or final building permit application for a new construction or alterations project is certified before March 15, 2012, businesses may comply with either the 1991 or the 2010 Standards. In jurisdictions where certification of permit applications is not required, businesses can also choose between the 1991 or 2010 Standards if their jurisdiction receives their permit.
application by March 15, 2012. Businesses should refer to their local permitting process. Where no permits are required, businesses may comply with either the 1991 or 2010 Standards if physical construction starts before March 15, 2012. Start of physical construction or alterations does not mean the date of ceremonial ground breaking or the day demolition of an existing structure commences. In this situation, if physical construction starts after March 15, 2012, the business must use the 2010 Standards.

**Alterations**

When a small business undertakes an alteration to any of its facilities, it must, to the maximum extent feasible, make the alteration accessible. An alteration is defined as remodeling, renovating, rehabilitating, reconstructing, changing or rearranging structural parts or elements, changing or rearranging plan configuration of walls and full-height partitions, or making other changes that affect (or could affect) the usability of the facility.

Examples include restriping a parking lot, moving walls, moving a fixed ATM to another location, installing a new sales counter or display shelves, changing a doorway entrance, replacing fixtures, flooring or carpeting. Normal maintenance, such as reroofing, painting, or wallpapering, is not an alteration.

<table>
<thead>
<tr>
<th>2010 ADA Standards Basics</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Chapter 1: Application and Administration</strong></td>
</tr>
<tr>
<td>Contains important introductory and interpretive information, including definitions for key terms used in the 2010 Standards.</td>
</tr>
<tr>
<td><strong>Chapter 2: Scoping</strong></td>
</tr>
<tr>
<td>Sets forth what elements and how many of them must be accessible. Scoping covers newly constructed facilities and altered portions of existing facilities.</td>
</tr>
<tr>
<td><strong>Chapters 3 – 10: Design and Technical Requirements</strong></td>
</tr>
<tr>
<td>Provides design and technical specifications for elements, spaces, buildings, and facilities.</td>
</tr>
<tr>
<td><strong>Common Provisions for Small Business</strong></td>
</tr>
<tr>
<td><strong>Accessible Route</strong></td>
</tr>
<tr>
<td>Section 206 and Chapter 4</td>
</tr>
<tr>
<td><strong>Parking Spaces</strong></td>
</tr>
<tr>
<td>Sections 208 and 502 specifically address parking spaces. The provisions regarding accessible route (section 206 and chapter 4), signs (section 216), and, where applicable, valet parking (section 209) also apply.</td>
</tr>
<tr>
<td><strong>Passenger Loading Zones</strong></td>
</tr>
<tr>
<td>Sections 209 and 503</td>
</tr>
<tr>
<td><strong>Sales and Service</strong></td>
</tr>
<tr>
<td>-----------------------</td>
</tr>
<tr>
<td>Sections 227 and 904 specifically cover sales and service areas, such as check-out aisles and sales and service counters. Section 226.1, exempts sales and service counters from the technical requirements of 902 (dining surfaces and work surfaces).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Dining Surfaces</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sections 226 and 902 specifically address fixed dining surfaces. The provisions regarding accessible routes in section 206.2.5 (Restaurants and Cafeterias) and 226.2 (Dispersion) also apply to dining surfaces.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Dressing, Fitting, and Locker Rooms</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Sections 222 and 803 cover dressing, fitting, and locker rooms. The provisions on doors in sections 206.5 and 404 usually apply.</td>
</tr>
</tbody>
</table>

**STEPS FOR SUCCESS**

Being proactive is the best way to ensure ADA compliance. Evaluate access at your facility, train your staff on the ADA's requirements, think about the ADA when planning an alteration or construction of a new facility, and, most importantly, use the free information resources available whenever you have a question.

**Assessing Your Facility**

The revised ADA regulations give businesses 18 months (until March 15, 2012) before they must comply with the 2010 Standards. The purpose of this phase-in period is to provide businesses sufficient time to plan and comply. Businesses are strongly encouraged to assess their facilities now to determine what architectural barriers exist. Until March 15, 2012, you have the choice of using the 1991 Standards or the 2010 Standards to remove architectural barriers, alter, or construct a new facility. Businesses that use the 1991 Standards during this phase-in period can take advantage of the safe harbor provision. Beginning March 15, 2012, only the 2010 Standards can be used.

**Staff Training**

A critical and often overlooked component of ensuring success is comprehensive and ongoing staff training. You may have established good policies, but if front line staff are not aware of them or do not know how to implement them, problems can arise. Businesses of all sizes should educate staff about the ADA's requirements. Staff need to understand the requirements on modifying policies and practices, communicating with and assisting customers, and accepting calls placed through the relay system. Many local disability organizations, including Centers for Independent Living, conduct ADA trainings in their communities. The Department of Justice or the ADA National Network can provide local contact information for these organizations.

**Tax Credit and Deduction**

To assist small businesses to comply with the ADA, the Internal Revenue Service (IRS) Code includes a Disabled Access Credit (Section 44) for businesses with 30 or fewer full-time employees or with total revenues of $1 million or less in the previous tax year. Eligible expenses may include the cost of undertaking barrier removal and alterations to improve accessibility,
providing sign-language interpreters, or making material available in accessible formats such as Braille, audiotape, or large print.

Section 190 of the IRS Code provides a tax deduction for businesses of all sizes for costs incurred in removing architectural barriers in existing facilities or alterations. The maximum deduction is $15,000 per year.

ADA INFORMATION RESOURCES

U.S. Department of Justice
For more information about the revised ADA regulations and 2010 ADA Standards, please visit the Department of Justice’s ADA Website or call our toll-free number.

ADA Website
http://www.ADA.gov/

ADA Information Line
800-514-0301 (Voice)
800-514-0383 (TTY)

24 hours a day to order publications by mail.
M-W, F 9:30 a.m. 5:30 p.m., Th 12:30 p.m. 5:30 p.m. (Eastern Time) to speak to an ADA Specialist. All calls are confidential.

"Reaching Out to Customers with Disabilities" explains the ADA's requirements for businesses in a short 10-lesson online course (www.ada.gov/reachingout/intro1.htm).

ADA National Network (DBTAC)
Ten regional centers are funded by the U.S. Department of Education to provide ADA technical assistance to businesses, States and localities, and persons with disabilities. One toll-free number connects you to the center in your region:

800-949-4232 (Voice and TTY)
http://www.adata.org/

Access Board
For technical assistance on the ADA/ABA Accessibility Guidelines:

800-872-2253 (Voice)
800-992-2822 (TTY)
Internal Revenue Service

For information on the Disabled Access Tax Credit (Form 8826) and the Section 190 tax deduction (Publication 535 Business Expenses):

800-829-3676 (Voice) or 800-829-4059 (TTY)
http://www.irs.gov/

This publication is available in alternate formats for persons with disabilities.

This document has been developed for small businesses in accordance with the Small Business Regulatory Enforcement Flexibility Act of 1996.

Duplication of this document is encouraged.

For more information about the ADA, please visit our website or call our toll-free number.

PDF Version of this Document

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