The Americans with Disabilities Act Title III—The "New" Building Code

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Scott S. Moore*

The Americans with Disabilities Act
Title III—The "New" Building Code

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I. INTRODUCTION

Whether intentionally or not, historically our society has tended to

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isolate and segregate individuals with disabilities, making it difficult for them to integrate fully into an "able" person's world. In the United States alone, some forty-three million people have a physical or mental disability.¹ As a greater percentage of the U.S. population grows older, the number will continue to rise. Despite that fact, discrimination against the disabled continues and is considered by many to be a serious and pervasive social problem.²

Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion to facilities and employment, the discriminatory effect of architectural, transportation and communication barriers and exclusion through improper qualification standards. Census data and national polls document that people with disabilities are severely disadvantaged to function in our society socially, vocationally, economically, and educationally.³ As such, people with disabilities occupy an inferior status in our society and cost this country billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.⁴

Disability discrimination appears to persist in several critical areas including: employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services.⁵ But, unlike individuals who have faced discrimination on the basis of such things as race, color, sex, national origin, religion, or age, individuals who have been discriminated on the basis of their disability have had no legal recourse—until now.⁶ The Americans with Disabilities Act (ADA)—

². Id., § 2(a)(2), 42 U.S.C. § 12101(a)(2); The United States Census Bureau reports that 13.4 million working age Americans felt they had a disability that blocked or interfered with work. Of those, blacks were far more likely than whites to report being disabled. The bureau found that 14 percent of blacks aged 6 to 64 indicated they had a work disability, compared with only eight percent of whites and Hispanics. Likewise, disability rates were reported much higher among older workers, uneducated and those with low incomes. As of the 1988 figures, only one-third of the men and one-fourth of the women who reported having a disability were in the work force, i.e. about double the unemployment rate of non-disabled workers. Spencer Rich, 13.4 Million Report Employment Disability: Rate Appears to be Highest Among Blacks, WASH. POST, Aug. 16, 1989, at A12.
⁴. Id., § 2(a)(9), 42 U.S.C. § 12101(a)(9). According to the organizations who have hired disabled individuals, these people are generally motivated, capable and dependable. In 1987, a Harris poll found that close to 90% of disabled workers receive good or excellent ratings from their employers. Likewise, managers felt that their employees with disabilities performed their jobs as well as or better than other employees.
⁶. Id., § 2(a)(4), 42 U.S.C. § 12101(a)(4). The ADA has been heralded as the Emancipation Proclamation for people with disabilities. BLANK, ROME, COMISKEY & MCCaULEY, ADVOCACY GROUP AND BUSINESS SURVEY ON THE AMERICANS WITH
signed into law by President Bush on July 26, 1990 and which took effect throughout 1992—hopes to respond to this persistent problem through the five different Titles of the Act.

Title I of the ADA is the "employment" section of the Act. It prohibits employers from discriminating against qualified disabled individuals in any aspect of employment, including hiring, compensation, discharge, job assignment and in all other "terms, conditions, and privileges" of employment.

Title II attempts to insure disabled individuals access to the services, programs and activities of public entities. Public entities are virtually every state or local government instrumentality whether it be transportation systems, access to buildings or equal access to public employment.

Title III attempts to provide access to businesses and other establishments offering goods or services to customers and/or the public at large (referred to as "public accommodations" and "commercial facilities") to all persons. Title III became effective on January 26, 1992.
Since that date, persons who own a "public accommodation" and some "commercial facilities" are required to meet "new" building code standards designed to make all facilities "readily accessible" to the disabled. 11

Title IV provides a mishmash of provisions addressing how the ADA should be interpreted and coordinated with other state and federal laws. Under this section, several items are excluded from the Act, such as the ability of insurance companies to underwrite and classify risks. If another state or federal law in existence provides equal or greater protection than does the ADA, that protection is not limited or invalidated by the Title II. 12

This Article addresses the scope of requirements established in Title III. First, this Article will discuss accessibility for the disabled prior to the Act. Next, this Article will define the confines of "disability" under the Act. And finally, the Article discusses the new requirements under Title III of the Act.

II. PUBLIC ACCESSIBILITY PRIOR TO THE ADA

Prior to 1973, legislation directed at aiding and preventing discrimination of the disabled did not exist. At that time, any changes were largely changes in social conscience and not forced by federal, state or local governments. The passage of the Vocational Rehabilitation Act in 1973 altered this structure by bringing government into the picture. It was the first time disability legislation created categories of impermissible discrimination. 13

The Rehabilitation Act forbade discrimination against the disabled by employers who received federal financial assistance and created the foundation upon which the ADA was built. In addition, the Rehabilitation Act required contractors and subcontractors with federal contracts of over $2500 to take affirmative steps to hire and promote disabled persons. If the contractors had fifty or more employees and a federal contract of $50,000 or more, they were required to maintain a written affirmative action program. 14

Although passed in 1973, it wasn't until 1977 that the regulations were first issued stating the standards of illegal discrimination. The Act had a very limited application to private-sector employers and entities which left the majority of reform yet to be implemented.

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14. Id.
A. History of the "Old" Code

Building codes are specifications and procedures designed to cover all aspects of construction. The builder who designs homes or commercial space must present her plans to the local building department for approval. Then, as the building is erected, it is inspected to ensure that construction adheres to the code. In the most general sense, building codes refer to specifications of plumbing, electrical, elevator, structure, heating and cooling.\textsuperscript{15}

In United States history, building codes have been used sporadically since the colonial days. World wide, New Amsterdam had the first local codes regulating the construction of chimneys and roofs to minimize the spread of fires. At a time when modern fire equipment was not available, fire posed a serious threat to the entire community. Within our own history, it was also the threat of fire that brought the first comprehensive codes into being.\textsuperscript{16}

In 1906, San Francisco was struck by a massive earthquake. With the quake came several localized fires fueled by flammable construction materials that caused extensive damage to the community. Soon after, the age of the building code began and today almost every community has some type of building regulation system in force.\textsuperscript{17}

B. The "Old" Code and Accessibility

Building code regulation is the product of local legislation; either state, county, city or any combination of the three. As a result, no two areas or cities will have the same building code. However, most local codes will be based upon one of three regional models developed by one of three professional organizations: Building Officials & Code Congress International (BOCA), the International Conference of Building Officials (ICBO), and the Southern Building Code Congress International (SBCCI).\textsuperscript{18}

The one organization most influential in helping the ICBO, BOCA and SBCCI set standards is the American National Standards Institute (ANSI). In 1980, the ANSI published ANSI 117, which contained technical specifications for making facilities accessible to persons with disabilities. All three model Codes have adopted a few of the accessibility standards, but none have adopted them all. Similarly, the local codes have only adopted portions of their own model codes.\textsuperscript{19} This leaves

\textsuperscript{15} CHARLES G. FIELD & STEVEN R. RIVKIN, THE BUILDING CODE BURDEN 2 (1975).
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} Id.
only a few of the accessibility standards implemented in any given area.

C. Federal Building Codes

Two federal laws, the Architecture Barriers Act of 1968, and the Rehabilitation Act of 1973, established the Architectural and Transportation Barrier Compliance Board (ATBCB) in order to evaluate barriers the disabled have in accessing federal buildings. The ATBCB responded with a set of regulations developing a set of minimum guidelines to ensure accessibility to disabled persons. These regulations only applied to the "common areas" of federal buildings such as entrances, telephones, drinking fountains, and toilet rooms. None of the requirements were extended to meet the accessibility concerns of the disabled into private businesses.

IV. DISABILITY DEFINED

The ADA eases access for disabled individuals into public accommodations by providing:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.21

The first question that arises is, what constitutes a "disability" in order to acquire protection under the Act? The Act itself has provided a very broad, general definition so that disability includes "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."22 In addition, the Act includes individuals who either have a "record of such an impairment; or [are] being regarded as having such an impairment."23

The definition is comparable to the definition of "individual with a handicap" in section 7(8)(B) of the Rehabilitation Act.24 Unlike the Rehabilitation Act, Congress chose to use the word "disability" instead of "handicap" as an effort to use up-to-date, currently accepted terminology. Like the choice of terms to describe ethnic and racial groups, the terminology to describe the disabled is a sensitive issue. Many disabled feel that the word "handicapped" is overlaid with patronizing attitudes and stereotypes. As such, Congress concluded that it was important for the Act to respond to the sensibilities of those the Act was designed to serve.25

20. Id. at 4.
The word change does not represent any change in either definition or substance from the Rehabilitation Act. The change was made for several reasons. The definition has worked well since it was adopted, and judicial decisions already exist on interpretation which may cut down on litigation. Additionally, to create a specific list would require an extensive list with no guarantee of being comprehensive.

### A. Physical or Mental Impairment

The first test of "disability" is the one that probably comes to mind when people think of a disability. The Act requires that for a disorder to amount to a disability, the individual must have: 1) a physical or mental impairment, that 2) substantially limits one or more of the major life activities of the individual.

The phrase physical or mental impairment means: Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss which affects one or more of several body systems; any mental or psychological disorder such as mental retardation, emotional illness, mental illness and specific learning disabilities; and includes such

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27. Id.
28. ADA, § 3(2)(A), 42 U.S.C. § 12102(2)(A)(Supp. II 1990). The ADA like the Rehabilitation Act expressly includes physical impairments as a disability. Various cases interpreting the Rehabilitation Act have supported this concept. In Thornhill v. Marsh, 866 F.2d 1182 (9th Cir. 1989), the court reversed a former determination by a district court which held that a back injury could not be considered a handicap since it was the very condition that prevented the person from performing the requirements of the job. Likewise, in Carter v. Casa Cent., 849 F.2d 1048 (7th Cir. 1988), it was not even contested that a nurse with multiple sclerosis had a handicap under the Act. Alternately, Tudyman v. United Airlines, 608 F.Supp 739 (C.D. Cal. 1984), rejected the argument that an applicant who did not meet the airline's weight requirement had a physical impairment which substantially limited him in a major life activity. Rather, the applicant, who was a bodybuilder, was not limited in a major life activity, but was only prevented from obtaining a single job. The definition of disability also expressly includes mental impairments, as does the Rehabilitation Act. In Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986), the Fourth Circuit court held that an employee with a fear of heights, and found medically unable to perform his job which involved heights, was not handicapped within the meaning of the Act. In contrast, Franklin v. United States Postal Serv., 687 F.Supp. 1214 (S.D. Ohio 1988), found that schizophrenia was a handicap.
29. Body systems such as neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine. 28 C.F.R. § 36.104 (1)(i)(1992).
30. The current use of illegal drugs and smoking are not disabilities under the Act. As such, the Act does not prohibit discrimination against individuals based on an individuals current use of illegal drugs or cigarettes. ADA, § 510, 42 U.S.C. § 12210 (Supp. II 1990) 28 C.F.R. § 36.210 (1992); However, public accommodations cannot discriminate on the basis of illegal drug use if: 1) the individual has suc-
diseases and conditions as cerebral palsy, epilepsy, muscular dystrophy, cancer, diabetes and tuberculosis. Under this definition, it is not a disability to have simple physical characteristics such as blue eyes or blonde hair. Nor is it a disability to be subject to environmental, cultural, economic or other disadvantages such as having a prison record, being poor or being a certain age. Similarly, the definition does not cover common personality traits such as poor judgment, shyness or quick temper when they are not associated with a mental or physiological disorder.

It is not enough that an individual have the disability, but the disability must "substantially limit one or more of the individuals major life activities." According to the Justice Department, major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. For example, a person who is blind is substantially limited in the major life activity of seeing, or a person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning and working because of the inability to reason appropriately.

To determine whether the disability is substantially limiting, the disability must be assessed without regard to the availability of mitigating measures. For example, a person with hearing loss may find improved hearing with hearing aids, but under the Act, the person's disability is measured without the aids. Likewise, a person with epilepsy is judged based on the individual's abilities without seizure con-
trolling medication.  

B. Record of Impairment

The second test to determine whether an individual is "disabled" under the Act is to ask if the individual has a record of an impairment. This test is designed to bring in those individuals who may have a history of an impairment that substantially limited a major life activity, but has recovered. It also includes persons who have been misclassified as having an impairment.

C. Being Regarded as Having an Impairment

This category of disability is based on the fact that public authorities may have a perception that an individual is disabled, and as a result of that perception treat the individual in a manner that violates the Act. The rationale for this classification was derived in School Board of Nassau County v. Arline, while interpreting the Rehabilitation Act of 1973. The Court noted that although an individual does not actually have a disability under the Act, society's accumulated myths and fears about disability can be as handicapping as an actual impairment. For example, persons with severe burns may encounter discrimination by a community, resulting in a substantial limitation of the person's major life activities. As such, these persons would be considered disabled under the Act although they may not view themselves as disabled.

38. 480 U.S. 273 (1987); In Arline, the Supreme Court held that evidence that a school teacher had been hospitalized for tuberculosis was enough to establish that she had a "record of impairment" and was therefore handicapped under the Rehabilitation Act.
39. The ADA mirrors the Rehabilitation Act regulations for the purposes of the "regarded as" test. See, e.g., 28 C.F.R. § 42.540(k)(2)(iv)(1992), which provides:

(iv) Is regarded as having an impairment means: (A) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) Has none of the impairments defined in paragraph (k)(2)(i) of this section but is treated by a recipient as having such impairment.
40. The Justice Department regulations and the comments to them state that the perception of the private entity is the key element to the test. The person who perceives himself as having an impairment which should be considered a disability is irrelevant. But, if the entity views the person as being disabled and limits the persons enjoyment of goods or services as a result of the perception, the person becomes protected under the Act. 28 C.F.R. § 36.104 (1992).
Title III of the Americans with Disabilities Act hopes to respond to the gap left in disability accessibility by local building codes and other federal acts. Title III requires entities that provide accommodations to the public meet certain standards of accessibility for the disabled. The general thrust of Title III is to allow the disabled a free opportunity to participate in those activities in which the general public participates. To balance the goal of accessibility and the expense of accessibility to private business, the Act does not force businesses and individuals to engage in new construction and/or completely renovate existing buildings in order to allow the disabled access. Instead, the Act creates three separate types of space: 1) existing; 2) altered; and 3) new. Within each of these categories a separate standard of accessibility applies. In addition, the Act limits its coverage only to space that is either a "public accommodation" or a "commercial facility" as defined by the Act.

A. Types of Facilities

1. Altered Space

Under the Justice Department regulations, an alteration is a "change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility." This definition not only includes major projects such as remodeling, historic restoration and renovation of a building, but also encompasses smaller projects such as rearranging an element of the

41. ADA, § 302, 42 U.S.C. § 12182 (Supp. II 1990). Religious organizations or entities controlled by religious organizations are not bound by Title III. This exemption is very broad, encompassing a wide variety of situations, including when a religious organization carries out activities that would make it a public accommodation or commercial facilities were it not for the exemption. For example, if a church operates a day care, a nursing home or a private school, none of the facilities would be subject to ADA's requirements. The church or other religious organization does not lose the exemption just because the services are open to the general public. ADA § 307, 42 U.S.C. § 12187.

42. The ADA recognizes that the provision of goods and services in an integrated manner is a fundamental tenet of nondiscrimination on the basis of disability. Providing segregated accommodations and services relegates persons with disabilities to the status of second-class citizens. Section 36.203(a) of the Justice Department regulations states that a public accommodation shall afford goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual. "[T]hese provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities." 28 C.F.R. pt. 36, app. B § 36.203 (1992).

existing space and changing the configuration of walls or full-height partitions.\textsuperscript{44} The regulations make it clear however, that the following are not alterations unless they affect the usability of the building:

- normal maintenance projects
- reroofing
- painting
- wallpapering
- asbestos removal
- electrical systems change

Businesses have expressed concerns that by making minor actions alterations, they could be triggering the requirements for altered areas. Since the standards for altered areas are much more stringent than those of existing area, businesses have become worried that the slightest change to an area may cost substantially more than the planned repair or change. The regulations have made it clear, however, that minor changes were never intended to trigger the full regulatory blow of the Act.\textsuperscript{45}

2. New Space

In general, "new" space is that which is designed and constructed for first occupancy after January 26, 1993.\textsuperscript{46} The Justice Department has interpreted this section and developed more specific standards by which to determine whether a space is new. Under the regulations, a facility is subject to the heightened standards of the Act only if a completed application for a building permit or a permit extension for the building is filed after January 26, 1992, and the facility is occupied after the January 26, 1993 deadline.\textsuperscript{47}

The Department's choice of a specific permit date, rather than the date of first occupancy, occurred for very rational reasons. If the Department would have chosen to use occupancy only, as the Act would suggest, whether a space would end up qualifying as new would be unpredictable at best. Many different factors can come into play during the construction phase which could change the date of occupancy by months or years, and force the facility to comply with a whole array of different building standards. To redesign or reconstruct a building when it becomes apparent the building would only be ready for first occupancy after the deadline would be quite costly.\textsuperscript{48} The date a permit is acquired, on the other hand, is predictable and usually early enough so that any redesign necessary to meet the Act can be accomplished without breaking the project financially.

\textsuperscript{44} 28 C.F.R. § 36.402(b)(1)(1992).
B. Places of Public Accommodation and Commercial Facilities

The Act does not require changes to be made to each and every facility or building that exists. To the contrary, as noted earlier, the Act only requires specific changes be made to "places of public accommodation" or "commercial facilities."\textsuperscript{49} Places of public accommodation and commercial facilities are defined so that only specific public entities are responsible for adapting their building structures to be disability accessible. Essentially, only private businesses and buildings designed to provide goods and services to the public must comply.

1. Places of Public Accommodation

The term "public accommodation" has provided some confusion to those who have attempted to read the Act—the problem being that the Act uses the words "public accommodation" in section 301(7) to describe those entities subject to change under the Act. However, the regulations set up by the Justice Department chose to use the terminology differently.

Section 302 of the Act generally proscribes discrimination against the disabled in the access of any place of public accommodation. The regulations have used the words "public accommodation" to describe those who are potentially liable under the Act. The persons liable, should a violation occur, are any person who "owns, leases (or leases to), or operates a place of public accommodation."\textsuperscript{50} Thus, the term "public accommodation" has come to mean the private entity that owns, leases (or leases to), or operates a place of public accommodation.\textsuperscript{51}

The buildings or facilities themselves have been given the slightly different term of "place of public accommodation." The regulations adopted this term from an adaptation of the statutory definition in section 301(7) of public accommodation.\textsuperscript{52} The definition of place of public accommodation mirrors the twelve categories of facilities represented in the statutory definition.\textsuperscript{53} Those twelve categories include: places of lodging, eateries, places of public gathering, sales or rental establishments, service, exhibition or entertainment hall, establishments, stations used for specified public transportation, places of public display or collection, places of recreation, places of education, social

\textsuperscript{50} ADA, § 302(a), 42 U.S.C § 12182(a)(Supp. II 1990).
\textsuperscript{52} 28 C.F.R. § 36.104 (1992)(comments).
\textsuperscript{53} The legislative history states that these twelve categories "should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities." H.R. REP. No. 485, 101st Cong., 2nd Sess., pt. 2, at 100 (1990).
service establishments, and places of exercise or recreation.\footnote{28 C.F.R. pt. 36, app. B § 36.104 (1992).}

In order to be a place of public accommodation, a facility must be operated by a private entity, its operations must affect commerce and it must fall within one of the twelve categories listed above.\footnote{ADA § 301(7), 42 U.S.C. § 12181(7)(Supp. II 1990).} The list of twelve is exhaustive and no other categories may be added. However, there may be an unlimited amount of examples for each category. Some of the examples the Act provides are:\footnote{ADA § 301(7), 42 U.S.C. § 1218(7)(Supp. HE 1990).}

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Since the examples are not exhaustive, a category such as social serv-

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\footnote{28 C.F.R. § 36.207 (1992), provides that when a portion of a residence is exclusively a residence, that portion is not covered under the Act.}
ices would also include establishments like substance abuse centers, rape crisis centers, and halfway houses.57

In addition to the facility falling into one of these twelve categories, the facility must also affect commerce. Commerce means travel, trade, traffic, commerce, transportation, or communication (1) among the several states; (2) between any foreign country or any territory or possession and state; or (3) between points in the same state but through another state or foreign country.58

The addition of "affecting commerce" appears to be a low—if not nonexistent—hurdle to clear. With such a broad definition of commerce, essentially any business activity will affect commerce. If there is any question of whether a place of public accommodation affects commerce, it appears that all the facility would need to do is have one phone call placed from the building, and the building would be entered into a communication between points within a state and thus affecting commerce.

Finally, the facility must be private and not public. Facilities that are operated by government agencies or any public entity do not qualify as a place of public accommodation under the Act. To be excluded from Title III, the entity must actually be operated by the government entity. The fact that a private entity receives or is dependent upon government assistance does not by itself preclude a facility from being a place of public accommodation.59 This does not mean that government operated facilities are exempt from the Act, only that they are not subject to Title III. The actions of government facilities are regulated by Title II and subject to a separate set of Department of Justice regulations.60

2. Commercial Facilities

Even if a facility does not fall within one of the public accommodations twelve categories, it still may be a "commercial facility" and subject to portions of the accessibility requirements.61 Commercial facilities are defined as facilities intended for nonresidential use whose operations will affect commerce.62 Essentially the term is designed to be interpreted broadly and encompass all commercial es-

60. Id.
61. Privately operated airports are considered to be commercial facilities. Places of public accommodation include terminals used for "specified public transportation," but transportation by aircraft is specifically excluded from that category. Thus, they are not places of public accommodation and are not subject to the existing facilities provisions. They are however subject to the new and altered area standards as a commercial facility. Id.
 establishments not included within the specific definition of a place of public accommodation and/or any building in which employment may occur, including:63

- corporate offices
- sales offices
- factories
- warehouses
- distribution centers
- production facilities

Like the "place of public accommodations" definition, to be a commercial facility requires the operation of the facility to "affect commerce." Again, this requirement is hardly a requirement at all, and is read to be any activity which would reach the level necessary for meeting the commerce clause of the constitution.64

C. Compliance with Title III65

1. Barrier Removal within Existing Space

   i. Barrier removal

   In already existing places of public accommodation, barriers can exist for the disabled preventing them access to services or goods in their community. For example, a department store may have display shelves placed at a certain distance from each other which prevent a wheel chair from being easily maneuvered through the store, or a bank may have an elevator without braille controls which prevents a person who is visually disabled from accessing the banks services. The ADA does not require these existing facilities to make major structural changes. However, Section 302(a)(2)(A)(iv) of the ADA does require these facilities to remove any architectural barriers where such removal is "readily achievable" (i.e., easily accomplishable and able to be carried out without much difficulty or expense).66

   Section 302(a)(2)(A)(iv) does not insure the disabled full access to all places of public accommodation, and provides no standard for ex-

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63. The legislative history states that the term commercial facility is to be interpreted broadly to cover commercial establishments that are not included within the specific definition of "public accommodation" such as office buildings, factories, and other places in which employment will occur. H.R. REP. 485, 101st Cong., 2nd Sess., pt. 2, at 116-17 (1990).
65. Under section 504 of the ADA, the Architectural and Transportation Barriers Compliance Board is required to issue guidelines to assist the Department of Justice to establish accessibility standards for new construction and alterations in places of public accommodation and commercial facilities. The Board consists of twelve members who are appointed by the President at least six of whom are required to be persons with disabilities. The Department of Justice is then responsible for issuing the final regulations to implement Title III. ADA, § 504, 42 U.S.C. § 12204 (Supp. II 1990); 56 Fed. Reg. 35,408 (1991)(statutory background concerning 36 C.F.R. pt. 1191).
isting commercial facilities. What section 302 does do is strike a balance between guaranteeing access to individuals with disabilities and the legitimate cost concerns of business to implement any major structural changes. As such, a much less rigorous degree of accessibility is required for existing facilities than new facilities where accessibility is more easily incorporated into building plans and expenses.67

For example, the Justice Department compares two separate bank facilities, one existing and the other planned for future construction. The existing bank has an automatic teller machine (ATM). As part of its responsibility under the Act, the bank would have to remove any barriers which would prevent the use of the ATM if it were readily achievable to do so. Thus, it may depend on how easily the bank could lower the machine or ramp a few steps leading up to the ATM on whether it would be required to make any changes. On the other hand, the new bank with plans to put in an ATM would be subject to much stricter standards and would be required to put into place an ATM which is freely accessible.68

Whether barrier removal is readily achievable is determined on a case-by-case basis. Even though it may not require extensive restructuring, existing places of public accommodation are required to remove physical barriers of any kind.69 This includes all temporary or movable structures such as furniture, equipment, and display racks. In addition, removing a barrier may require a structural addition such as ramping a few stairs or building a teller window for wheelchair use in a bank lobby.70

The problem lies in the fact that with each disability come separate needs in order to access an existing facility. An individual with a visual impairment may find it more difficult to sense ramps whereas a person in a wheelchair has much greater access when faced with a ramp rather than stairs. For the most part however, the efforts existing facilities take will be amicable to individuals with an array of disabilities. As a person in charge of a place of public accommodation, one should be aware of the barriers that exist to individuals of various disability backgrounds and what can be done to remove them.71

68. Id.
71. According to a recent survey, 91% of businesses are familiar with the ADA and 75% indicate that they have taken steps to prepare for it. In preparing for the ADA, 30% of companies were increasing awareness, 28% were reviewing their facilities, 11% had established a task force, and 9% had reviewed policies and procedures. 60% of the companies had used some form of outside organization to advise them on how to comply with the ADA. Most of the companies used law firms (45%), while others used consultants (13%), advocacy groups (11%), architects (5%) and professional affiliations(4%). BLANK, ROME, COMISKEY & Mc-
As an aid to determining the proper steps to removing barriers, the Justice Department has urged public accommodations to comply with barrier removal based on the following order of priorities.\(^2\)

First, the Department suggests that owners of the public accommodations take measures to enable individuals with disabilities to physically enter the accommodation. This recognizes that the first step to providing access to the disabled is to get them through the front door. These measures may include installing an entrance ramp, widening entrances and providing more accessible parking.

Secondly, measures must be taken to provide access to those areas of a place of public accommodation where the goods and services are provided. In a retail store, this would be in the areas where the goods are displayed, whether it be on shelves or racks.

Third, a public accommodation should have barriers removed so as to provide access to restroom facilities. This includes such efforts as widening stalls, installing handle bars or removing objects which could interfere with access to the area where the restrooms are located.

Despite the priorities granted by the Department, all parts of an existing facility must have had the barriers removed by the January 26, 1992 deadline. Examples of ways to remove barriers at any of these stages of priority include, but are not limited to: installing ramps, cutting out the curb on sidewalks, repositioning shelves, rearranging tables, repositioning telephones, installing flashing fire alarms, installing raised toilet seats, repositioning the walls between bathroom stalls and removing high pile carpet.

\textit{ii. Readily achievable}

Once it is recognized that a place of public accommodation has barriers preventing disabled individuals access to the goods or services provided, the facility still may not be required to remove the barrier if it is not "readily achievable." For example, even though it may be readily achievable to ramp a step or a few stairs leading to a restroom or display area, a public accommodation generally would not be required to provide a ramp or elevator for an entire flight of stairs. This is because the readily achievable standard does not require removing a

\textit{CAULEY, ADVOCACY GROUP AND BUSINESS SURVEY ON THE AMERICANS WITH DISABILITIES ACT 20} (Alexander \& Alexander Consulting Group)(1992). Advocacy groups for the disabled have not felt that this effort is enough. Twenty-one out of twenty-five advocacy groups in the same survey said that businesses were not doing all they could to prepare for the ADA. There was a consensus among the groups that places of public accommodation would soon be under more pressure from the disabled community and would be more likely to take action. \textit{Id.} at 16.

barrier when it demands extensive restructuring or burdensome expense.\textsuperscript{73}

Since each situation is different based on the type of barrier, the type of facility, and the finances available for changes, the ADA created a fact-based test.\textsuperscript{74} The factors to consider when determining whether removal of a barrier is readily achievable are: (1) the nature and cost of the action needed to remove the barrier; (2) the overall financial resources of the facility, the number of people employed by the facility and the impact of the action upon the operation of the facility; (3) the overall size of the business of a covered entity, the number, type and location of its facilities; and (4) the type of operation of the covered entity, including the composition and function of the workforce.\textsuperscript{75}

This list of factors reflects Congress' intention that a wide variety of factors come into play when determining whether the removal of a specific barrier is readily achievable. It also takes into account the fact that many facilities are owned and operated by large entities and requires that the resources beyond the single local facility be taken into account.\textsuperscript{76} Obviously, the financial ability of any given public accommodation and the cost of the removal are two of the major factors to be considered. Thus, actions are not readily achievable to the extent that they would result in a significant loss of selling or serving space.\textsuperscript{77}

However, the obligation that an owner of a public accommodation remove barriers is a continuing one. It is completely possible that the removal of a barrier may not presently be readily achievable as a result of the expense or lack of resources available to the facility, yet in

\textsuperscript{73} ADA, § 301(9) 42 U.S.C. § 12181(9)(Supp. II 1990).
\textsuperscript{74} In determining whether an action is readily achievable the regulations state these factors:

1. The nature and cost of the action needed under this part;
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; the overall size of the parent corporation or entity with respect to the number of its employees; 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.

\textsuperscript{75} ADA, § 301(9), 42 U.S.C. § 12181(9)(Supp. II 1990).


the future the barrier is required to be removed because of a change in circumstances.78

iii. Alternatives to barrier removal

If the owners of a public accommodation can demonstrate that removing a particular barrier is not readily achievable, there are still obligations. The owners of a place of public accommodation must make the goods, services, facilities, or accommodations it provides available through an alternative method, providing that the method is readily achievable.79 For example, if it is not readily achievable for a retail store to alter its shelves or rearrange display racks to provide accessible aisles, the store must provide a clerk, if readily achievable, who could retrieve inaccessible merchandise for the shopper.80 Likewise, if it is not readily achievable for a dry cleaner to ramp a flight of stairs leading into the store, an alternative for the cleaner is to provide a curb side service or home delivery for its wheelchair-bound customers.

In many situations, an alternative method can be created with little additional attention and service on behalf of the employees of the public accommodation. This does not mean, however, that the public accommodation can charge the customer for the additional costs of providing the service.81 Moreover, the facility is not required to abandon security concerns by requiring a single cashier to abandon his post at the cash register to retrieve merchandise.82

2. Readily Accessible—New and Altered Facilities

Whereas presently existing facilities need only to remove the physical barriers preventing the disabled from accessing places of public accommodation, new and altered facilities that are either a place of public accommodation or a commercial facility must subscribe to a full array of new building regulations and/or a whole new federal building code. This "code" virtually requires accessibility to any new space, whether it be an entire building or merely a wing.

Congress left the job of defining accessibility to a small federal agency called the Architectural and Transportation Barrier Compliance Board (ATBCB).83 On July 26, 1991, the ATBCB introduced an entire scheme to regulate accessibility standards for new construction,

83. ADA, § 504, 42 U.S.C. § 12204 (Supp. II 1990). The Justice Department is responsible for accepting the standards created by the ATBCB and developing the regulations for compliance.
known as the ADA Accessibility Guidelines (ADAAG). As may be recalled, ANSI 117 was the model standard for creating an accessible building code. The ADAAG attempted to incorporate many of the standards that already exist under the ANSI 117 standards. Unfortunately, the ATBCB was under a congressional deadline to issue regulations and could not wait to join with the ANSI to produce a single set of standards for accessibility.

The differences between ANSI 117 and the new ADAAG standards will, at least for the time being, make compliance difficult. Eventually the ADAAG standards will have to be incorporated into every state and local code. Until that time, the ADAAG standards are different than almost all of the existing local and model standards. Business and building planners must be prepared to follow not only their local codes, but the ADAAG standards as well.

i. Standards for newly constructed space

Section 303(a)(1) of the ADA requires that all new places of public accommodation and commercial facilities construct facilities readily accessible to, and usable by, individuals with disabilities. The phrase “readily accessible to, and usable by, individuals with disabilities” is a term that, in varied forms, has been used in the Architectural Barriers Act of 1968 and the Rehabilitation Act of 1973. It means that the facility can be approached, entered and used by individuals with disabilities easily and conveniently. For the most part, a facility that is constructed to meet the requirements of the rule’s accessibility standards will be considered readily accessible and usable by the disabled. To the extent that type or element of a facility is not specifically addressed by the standards, the language of this section is the safest guide.

Full compliance with the regulations is required unless the entity can demonstrate that it is “structurally impracticable” to meet the requirements. However, the structurally impracticable exception is

85. The ANSI recently held a committee meeting to consider revising the ANSI accessibility standards. The ATBCB recommended that the committee adopt the final version of the ADAAG as the ANSI standard. The ATBCB hoped that by urging a uniform accessibility standard that met the ADAAG final rules, the Federal government, model rules, state and local building codes could begin to incorporate the ADA compliance guidelines quickly and efficiently. Instead, the ANSI committee has postponed their final revision. If ANSI does not conform its standard, this would continue the problem of separate and diverse requirements throughout the area. IMRA ADA Compliance Manual: A Practical Guide for Mass Retailers, § 4.1, p. 6 (Tent. Draft 1991).
rarely available. This is because full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. A situation in which a building must be built on stilts due to its location over marshlands is an example where the exception may apply. But outside of rare instances, all newly constructed facilities must comply with the ADAAG standards.

ii. Standards for altered space

With respect to a facility or part thereof that is altered, the facility must, to the maximum extent feasible, make the altered area readily accessible to and usable by individuals with disabilities. In addition, where the entity is undertaking an alteration that affects or could affect the usability or access to an area of the facility containing a "primary function," the entity must also make the path of travel to the altered area, bathrooms, telephones and drinking fountains, readily accessible to the maximum extent feasible. However, this is only if the cost of altering the path of travel to the altered area, bathrooms, telephones or drinking fountains is not disproportionate to the overall cost and scope of the alterations.

Generally, altered spaces must meet the requirements of the new construction provisions in the ADAAG. The Department of Justice has interpreted compliance to the "maximum extent feasible" to mean that exceptions will only be allowed in the "occasional case where the nature of the existing facility makes it virtually impossible to comply fully with applicable accessibility standards through a planned alteration." Essentially this standard requires compliance unless it is technically infeasible to do so; i.e. a situation in which alterations will not be made because existing structural conditions require removing or altering an essential part of the building's frame or a building's physical characteristics prohibit alterations in strict compliance with the ADAAG provisions.

In some situations it may be technically infeasible to provide access to all disabled individuals. However, even if a facility is unable to be altered to accommodate one group of disabled individuals, alterations must still be made to accommodate persons with other types of disabilities. For example, providing access to persons in wheelchairs may be

technically infeasible because it would require removal of the build-
ings structural supports. However, the facility must still conform to
other provisions to the maximum extent feasible, such as those
designed for the vision or hearing impaired.\textsuperscript{95}

Alterations to areas that contain a "primary function" not only
must comply with accessibility standards to the maximum extent fea-
sible, but must make a path of travel to the altered area, to restrooms,
to telephones and to drinking fountains that are, to the maximum ex-
tent feasible, accessible to the disabled.\textsuperscript{96} An area which contains a
"primary function" is an area in which the intended major activity of
the facility occurs.\textsuperscript{97} Examples of primary function areas include:\textsuperscript{98}

- customer service lobby of a bank
- dining areas of a cafeteria
- meeting rooms in a conference center
- employee work areas in places of public accommodation

Alternatively, areas which do not contain primary functions
include: \textsuperscript{99}

- mechanical rooms
- storage spaces
- employee lounges and locker rooms
- entrances and corridors
- boiler rooms
- restrooms

When a primary function area is altered, the entity must provide a
path of travel that is a continuous, unobstructed way of pedestrian
passage by means of which the altered area, restrooms, telephones and
drinking fountains may be entered and exited by the disabled.\textsuperscript{100} The
path of travel is not only an entrance to the primary function area, but
includes sidewalks, interior and exterior ramps, clear floor paths
through lobbies and corridors and elevators.\textsuperscript{101} As can be imagined,
producing a path of travel could very easily equal or exceed the cost
and scope of the original alteration project. As such, section 302(a)(2)
allows an entity to partially escape from the "path of travel" obliga-
tions if the cost of the path of travel is disproportionate to the cost of
the overall alterations. The Department of Justice has interpreted
"disproportionate" to mean when the cost of the path of travel exceeds
twenty percent of the cost of the alteration to the primary function
area. When and if that occurs, the entity still must provide a degree
of accessibility in the following priority:
- an accessible entrance
- an accessible route to the area
- an accessible route to one restroom for each sex
- an accessible telephone
- an accessible drinking fountain

VI. REMEDIES AND ENFORCEMENT OF THE ACT

The last topic of discussion is the remedies that are provided under
the Act. Any person who has been discriminated against under Title
III because of a disability is granted the right to institute a civil action
for injunctive relief under the Act. To obtain standing for an in-
junctive suit, the Act does not require that a disabled person attempt
to obtain accessibility into a facility in what would be a futile gesture if
the person has notice that the facility does not intend to comply with
Title III. In terms of the new and accessible requirements on facilities,
this means that a disabled person, without being directly discrimi-
nated against, but with actual knowledge of an entity refusing to com-
ply, may bring an injunctive action for relief. Potential relief includes:
1) an order to alter facilities to make such facilities readily accessible
to, and usable by, individuals with disabilities; 2) an order requiring
the provision of an auxiliary aid or service; or 3) an ordered modifica-

102. Id. § 36.403(f). The costs that may be counted as expenditures required to provide
an accessible path of travel may include:
(i) Costs associated with providing an accessible entrance and an accessi-
ble route to the altered area, for example, the cost of widening doorways
or installing ramps;
(ii) Costs associated with making restrooms accessible, such as installing
grab bars, enlarging toilet stalls, insulating pipes, or installing accessible
faucet controls;
(iii) Costs associated with providing accessible telephones, such as relo-
cating the telephone to an accessible height, installing amplification de-
vices, or installing a telecommunications device for deaf persons (TDD);
(iv) Costs associated with relocating an inaccessible drinking fountain.

103. Id. § 36.403(g).

are identical to those provided in section 204(a) of the Civil Rights Act of 1964 42
tion of policy.\textsuperscript{105}

When there has been an alleged violation of Title III, such as a filed injunctive suit, the Attorney General is required to investigate the allegation and has the option of initiating a compliance review of the facility.\textsuperscript{106} Following either the investigation or review, the Attorney General then has the authority and discretion to institute a civil action in federal district court if the Attorney General has reasonable cause to believe: 1) any person or group of persons is engaged in a pattern or practice or discrimination under Title III; or 2) any person or group of persons has been discriminated against under Title III, and such discrimination raises an issue of general public importance.\textsuperscript{107} Should the Attorney General succeed in an action, the court has the ability to grant not only injunctive relief as in a private suit, but also has the authority to award monetary damages to persons aggrieved by the violation.\textsuperscript{108} In addition, the court is able to grant a civil penalty against the entity to vindicate the public interest. This amount is limited to $50,000 for a facility's first violation and $100,000 for any subsequent violations.\textsuperscript{109} Because of potential damages, managers of facilities must take special care to insure their facility is in compliance. For noncompliance will not only be expensive financially, but costly to the company's image if the company is found to be in violation.

\begin{footnotesize}
\begin{enumerate}
\item[108.] § 308(b)(2)(B), 42 U.S.C. § 12188(b)(2)(B)(Supp. II 1990). An award for punitive damages is expressly excluded. ADA § 308(b)(4). However, it is within a court's discretion to grant the prevailing party reasonable attorney's fees, including the costs and litigation expenses. 28 C.F.R. § 36.505 (1992).
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