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Benesch Bulletin

AMERICANS WITH DISABILITIES ACT PUBLIC ACCOMMODATIONS ALERT

On October 7, 2009, the United States Department of Justice ("DOJ") published a Settlement Agreement with Parco, Ltd. ("Parco") a franchisee of Wendy's Old Fashioned Hamburgers Restaurants, whereby Parco was required, among other things, to remedy numerous violations of Title III of the Americans With Disabilities Act ("ADA") relating to public accommodations.

The settlement agreement arises out of a complaint filed with the DOJ by Peer Action Disability Support, a local group involved in supporting disabled persons, alleging that one of the Wendy's restaurants operated by Parco did not comply with the ADA. The DOJ investigated the allegations at the particular restaurant identified in the complaint and then expanded its investigation to include additional restaurants operated by Parco.

The DOJ classified the restaurants into two categories – restaurants constructed prior to January 26, 1992 (and not altered under the ADA) and restaurants having first occupancy after January 26, 1993. These dates are important because under Title III of the ADA,

commercial facilities designed for first occupancy on or after January 26, 1993 must be fully accessible to individuals with disabilities. Commercial facility must assure that any part of its facility altered after January 26, 1992 (the date the ADA went into effect) is made accessible to individuals with disabilities, unless doing so is virtually impossible.

The site visits conducted by the DOJ focused on designated accessible parking spaces, exterior routes, entrances, customer service queues, counters, dining areas and public rest rooms. Among the many violations found were:

- Improper slope of handicap parking spaces and access aisles;
- Insufficient clearance at entrances;
- Insufficient handicap parking spaces;
- Improper signage for handicap spaces;
- Customer queues that were too narrow;
- Interior routes within the restaurant being too narrow;
- Counters too high;
- Rest room doors that required too much force to open;
- Toilet room signs too high;
- Toilets being too close to side walls or partitions;
- Grab bars that were too short;
- Insufficient knee clearance underneath lavatory counters;
- Improper "twist" privacy locks in toilets;
- Paper towel dispensers too high and too wide without a detectable cane barrier;
- Newspaper and magazine holders in rest rooms that were too high; and
- Urinals and toilets that were too high

The settlement agreement was specifically binding on Parco, its successors and assigns and any future operator in the buildings; and Parco was specifically required to agree to notify all successors in interest of the settlement agreement and its requirements.

In addition to monetary penalties (which were rather modest - a contribution of $7,000 to the citizens group that filed the complaint and a $4,000 fine to the United States), Parco agreed to remedy all deficiencies within approximately thirty days and to provide a report and supporting evidence of compliance to the DOJ. In addition, the settlement agreement will remain in effect for three years, during which time, the DOJ, and presumably the complainant and others, can check for compliance and perhaps other violations. While the fines were relatively nominal in this case, the cost of remedying the violations and the time within which to do so were not. Changing the slope of parking areas, access areas and the like can be time consuming, weather sensitive, and costly. Changing the height of counters, urinals, toilets and other items also can be time consuming and costly, if for no other reason than walls and floors may have to be resurfaced.

In recent years there has been an ever increasing number of claims made alleging violations of the public accommodations requirements of the ADA. The DOJ has pursued claims against hospitals and hotels; and now

against a restaurant franchisee.

Building owners and their tenants are also subject to private lawsuits – in many instances initiated by private "testers" (handicapped individuals who go from property to property looking to identify ADA access type violations, and then bringing suit when violations are found, without ever having complained to the property owner or business about the violation or requesting that the violation be corrected). This is often the case because if violations are proven (which is almost always the case), potential damages include not only the correction of noncompliant facility's violations, but also the payment by the defendant of the plaintiff's attorneys' fees and costs.

Although a defendant in a recent Ohio ADA federal lawsuit was successful in having the plaintiff's case dismissed (after proving that the plaintiff "tester" had not visited several of the stores that the plaintiff alleged she had been in) and in having the defendant's counterclaim for fraud and abuse of process being permitted to continue against the plaintiff tester and her attorneys, these victories are few and far between – and, even in victory, the defendant will still have to remedy the ADA violations or risk another lawsuit or a DOJ action.

Additional Information

To learn more about the ADA and commercial facilities and public accommodations, and defense of litigation for ADA violations, please contact: **Norm Gutmacher** at 216.363.4591 or email: ngutmacher@beneschlaw.com; **Ann Knuth** at 216.363.4168 or email: aknuth@beneschlaw.com; or **Roger Schantz** at 614.223.9375 or email: rschantz@beneschlaw.com. Biographical information for these attorneys and other members of our Real Estate and Labor & Employment Practices Groups is available at www.beneschlaw.com.