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Real Estate & Environmental Bulletin

REVISIONS TO THE PUBLIC ACCOMMODATION REQUIREMENTS OF THE ADA PROPOSED BY THE JUSTICE DEPARTMENT

The Department of Justice, Civil Rights Division (the "Department") has proposed new regulations adopting standards consistent with Parts I and III of the Americans with Disabilities Act and the Architectural Barriers Act Accessibility Guidelines (the "2004 Guidelines"). The Department is accepting public comments on the proposed regulations until August 18, 2008. Currently, the 2004 Guidelines are not binding. However, if the proposed regulations are adopted, the 2004 Guidelines will have legal effect. The Department also concurrently published proposed regulations applying the 2004 Guidelines to state and local governments.

The 2004 Guidelines seek to improve the access of disabled persons to state and local government services and to places of public accommodation, without discrimination, consistent with the American with Disabilities Act (the "ADA"). While the ADA applies to both "public" and "private" facilities, the requirements for public facilities often differ from those of private facilities. Generally speaking, a "public" facility is a facility or portion of a facility constructed by, on behalf of, or for the use of a governmental entity; while a "private" facility is a place of public accommodation or other commercial facility.

The ADA requires a wide range of both private and public establishments to comply with accessibility standards to ensure that disabled individuals are capable of having the same experiences, or the functional equivalent, afforded to

other patrons. With respect to private facilities, the ADA applies to a variety of establishments, such as hotels, theaters, stadiums, restaurants, retail stores, office buildings and shopping centers. Many of the standards apply to the physical characteristics of a facility and require facilities to enhance the accessibility of their premises.

The proposed regulations will apply to public facilities, as well as places of public accommodation located in private commercial facilities. Commercial landlords and tenants, as well as all other businesses open to the public, should be aware of the possible effect these regulations will have on their existing facilities, new projects underway, and projects planned for the future. Existing safe harbor provisions may be changed, while others may be added. For example, under the proposed regulations elements in existing non-public facilities that comply with the current standards for barrier removal would not have to be modified to comply with the standards proposed in the new regulations.

The proposed regulations can be divided into three major aspects: the types of places affected, the types of building features affected and required, and the minimum level of accessibility and maintenance of those features. Movie theaters, stages, auditoriums, sporting venues, golf courses, putt-putt greens, hotels, swimming pools, play and recreation areas, and ATMs are just a few of the many types of venues affected. Additionally, under the proposed

regulations many existing facilities may need to be modified. This includes restrooms, stairs, elevators, ramps, platform lifts, barriers to access, and the addition of auxiliary aids and services (such as video interpreting services and assistive listening systems).

Notable changes in the level of accessibility and maintenance are also proposed. For example, the proposed regulations would change the maximum "high side reach" for unobstructed reaches from 54 inches to 48 inches, and the maximum "low side reach" for unobstructed reaches from 9 inches to 15 inches. Thus the height of light switches, electrical outlets, fire alarms, card readers, thermostats, sinks, counter tops, elevator controls, phones and other common elements of facilities may need to be adjusted for the new side-reach capabilities if the proposed regulations are adopted without change.

Navigating these complex and expansive proposed regulations can be difficult, and a misunderstanding or misapplication can be costly for small businesses and large corporations alike. Building owners and/or their tenants who violate the ADA are subject to private lawsuits under the ADA, as well as suits by the Department. In Ohio, there has been an influx of litigation against property owners and tenants for ADA violations. Potential damages include the correction of non-compliant facilities, as well as payment of the plaintiff's attorneys' fees and costs when violations are found, which is almost always the case.

Additional Information

To learn more about the proposed regulations, their implications on commercial facilities and public accommodations, and defense of litigation for ADA violations, please contact:

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