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Prepared by:

Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Staff Attorney, with Equip for Equality

The ADA in the Hospitality Setting[1]

The Americans with Disabilities Act ("ADA") has done much to open the doors to the hospitality industry to people with disabilities. When Congress passed the ADA, it intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] This broad mandate applies to various types of businesses, including those that provide hospitality services.

Since that time, businesses in the hospitality industry such as hotels, restaurants and cruise lines, have seen significant litigation under the ADA, and this litigation often raises issues unique to the hospitality industry. This Legal Brief explores cases brought by customers with disabilities seeking access to hospitality venues under Title III of the ADA as well as employees with disabilities under Title I of the ADA. This Legal Brief also discusses regulations and guidance materials issued by the federal agencies charged with enforcing the ADA—namely the U.S. Department of Justice ("DOJ") and the U.S. Equal Employment Opportunity Commission ("EEOC"). It also reviews DOJ settlement agreements and consent decrees that impact the hospitality industry.

ADA Title III: Public Accommodation Considerations for the Hospitality Industry[3]

In Title III of the ADA, Congress prohibits places of public accommodation, defined as "private entit[ies]" that "affect commerce" that fall within one of twelve enumerated categories,[4] from discriminating against people with disabilities.[5] It is well-settled that this definition includes businesses in the hospitality industry, such as hotels, motels, inns, restaurants, and bars. In fact, the definition of public accommodation includes private entities that operate "an inn, hotel, motel, or other place of lodging" with limited exception for "an establishment located within a building that contains not more than

five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor."[6] The definition of public accommodation also includes private entities that operate "a restaurant, bar, or other establishment serving food or drink."[7]

As a general matter, Title III prohibits discrimination in any aspect of the provision of goods and services. A case illustrating this general principle was recently filed by DOJ. In *United States of America v. Corral of Westland, LLC*, DOJ alleged that a Michigan restaurant violated Title III when it excluded restaurant patrons and denied them equal access to the goods and services of the restaurant on the basis of a genetic skin disorder.[8] In DOJ's complaint, it pled that three children with a genetic disease that causes their skin to be so fragile that the slightest friction can cause severe blistering, entered a restaurant with their other sister and mother. The restaurant manager questioned the mother about her children's condition, and the mother said that the disease was not contagious. Nonetheless, the restaurant manager denied service to the family and told them to "go find somewhere else to eat" because their presence made other customers "uncomfortable."[9] According to the court's docket, the parties settled the case on April 15, 2013, and it is expected that the settlement agreement or consent decree will appear on DOJ's website soon.[10]

I. Title III: Legal "Standing" in the Hospitality Industry

Article III of the U.S. Constitution limits federal court jurisdiction to live cases or controversies; courts have interpreted this constitutional requirement to mean that a plaintiff must have "standing" to assert a claim.[11] To have standing, a plaintiff must demonstrate three components: (1) the plaintiff must suffer a personalized and concrete injury-in-fact of a legally cognizable interest; (2) the plaintiff's injury must be fairly traceable to the defendant's conduct; and (3) it must be likely, as opposed to speculative, that a favorable court decision will redress the plaintiff's injury.[12]

Many Title III cases – including cases regarding the hospitality industry – rise or fall on the question of "standing." Because Title III authorizes only injunctive relief, when determining whether a plaintiff suffered a concrete injury-in-fact, courts consider whether the plaintiff is threatened with harm in the future "because of existing or imminently threatened non-compliance with the ADA."[13] In the standing analysis, courts also determine which accessibility violations a plaintiff can challenge. While some plaintiffs seek recovery for all accessibility violations, as explained below, most courts apply the standing doctrine and find that a plaintiff can challenge accessibility violations related only to their disability or, in some cases, only accessibility violations experienced personally by the plaintiff. Moreover, some courts have employed the standing analysis to prevent plaintiffs from filing frivolous or vexatious lawsuits. Each of these considerations, as applied to cases in the hospitality industry, is assessed below.

A. Standing: Requirement to Establish Future Harm

When determining whether a plaintiff will likely experience future harm, courts generally focus on four factors: (1) the proximity of the business to the plaintiff's home; (2) the plaintiff's past patronage of defendant's business; (3) the definiteness of the plaintiff's plans to return; and (4) the plaintiff's frequency of travel near the business.[14] By the very nature of hotels, motels, and other places of transient lodging, plaintiffs almost always lack proximity between their home and the location of the business. Recognizing this, courts have stated that when plaintiffs bring cases against hotels, the "proximity factor is less important."[15]

Although all four factors are important, many cases turn on whether a plaintiff establishes a definite desire to return to the business in question. In *Campbell v. Moon Palace, Inc*., a customer who used a wheelchair sued a restaurant after discovering a number of alleged ADA violations.[16] The court initially found that the customer lacked standing to sue because he admitted in his deposition that he did not intend to visit the restaurant in the future and that he preferred other similar restaurants. Although the customer testified that he "would probably most likely end up going back," the court reasoned that such "some day" intentions did not support a finding of future injury.[17] However, following the court's decision, the customer filed a motion for reconsideration and submitted an affidavit stating that he intended to go to the restaurant to celebrate his anniversary with his girlfriend.[18] In this affidavit, he swore: "I will 100% absolutely visit the facility again" and "I always return after my attorney lets me know that the facility is ADA compliance."[19] In response to this affidavit, the court found the threat of future discrimination to be real and immediate and held that the customer had standing to bring his claim.

Conversely, in *Deck v. American Hawaii Cruises, Inc.*, the court found that a traveler lacked standing to bring her ADA claim because she failed to establish a "real and immediate threat" of future injury because her desire to return to the cruise was conditional and speculative.[20] The court explained that the traveler's interest was conditional because she could not commit to a particular date to return because of her mother's health situation. It also found the traveler's interest to be speculative because she indicated that in the future, she would "look into taking" another trip, meaning that she may even choose to take a cruise on another ship.[21] Similarly, the court in *National Alliance for Accessibility v. Triad Hospitality Corporation* held that a hotel guest lacked standing because she lived far from the hotel in question, alleged no familial or business ties to the vicinity, and identified no definite plans to return to the area.[22]

In *Access for the Disabled v. First Resort, Inc*., following a non-jury trial, the court concluded as a matter of law that the hotel guest lacked standing to bring a lawsuit, discrediting her claim that she desired to stay at and return to the hotel.[23] Emphasizing that the hotel guest stayed on the hotel's premises for only thirty-minutes and used that

time to take photographs of the barriers, the court concluded that the guest did not have a real intent to stay at the hotel. In addition, the court explained that the guest's desire to return to the hotel was "speculative" because she had no family or friends located in the area, the hotel was not particularly close to shopping or the beach, and that she had not visited the area for several years for any reason other than "ADA-related purposes."[24] Note that in an earlier decision in this same case, the court held that the hotel guest did have standing to bring her claim even though she visited the hotel as a "tester," because at the time, the record reflected the hotel guest's desire to shop and be close to the beach and that she visited the area about every two or three months.[25]

It is important to note, however, that not all courts require plaintiffs to establish an intent to return to a place of hospitality on a specific date to establish standing, so long as they expresses a desire to return generally. In *Segal v. Rickey's Restaurant and Lounge, Inc*., a customer with cerebral palsy sued a restaurant for accessibility issues in its parking lot, bathrooms, tables, and bar area.[26] The restaurant argued that the customer lacked standing to bring these claims because he only visited the restaurant six times a year and could not say exactly when he planned to return. Finding the customer to have standing, the court explained that the customer did not have to state the exact date on which he planned to return, only that he did, in fact, plan to return to the restaurant. The court also emphasized that the customer lived one mile from the restaurant, which raised a factual question about his stated desire to return and the frequency of his travel near the restaurant, and thus, precluded summary judgment for the restaurant.

Similarly, in *Spector v. Norwegian Cruise Line Ltd*., the court found the passengers to have standing even though they did not have definite plans to take another cruise.[27] The court explained that it was not unreasonable to believe or unlikely that the passengers would take another cruise in the near future, especially in light of the evidence that the passengers had taken other cruises, expressed a desire to return, and were avid travelers. Interestingly, the court commented that "Plaintiffs' standing to seek injunctive relief is further bolstered by the fact that injunctive relief is the only available remedy for a private plaintiff under Title III of the ADA" because otherwise they have "no other adequate remedy at law to remedy the alleged discrimination."[28]

Of course, litigants are more successful when they can explain why they prefer to stay at a specific hotel or dine at a specific restaurant. For instance, in *D'Lil v. Best W. Encina Lodge & Suites*, the U.S. Court of Appeals for the Ninth Circuit overturned a lower court's decision dismissing a case after finding the plaintiff lacked standing to sue.[29] In this case, the court found that the hotel guest established her intent to return the geographic area, evidenced by the regularity in which she visited the city before, during, and after her stay at the Best Western. The court emphasized the hotel guest's explanation that she preferred this facility because it met her needs with regards to "taste, style, price and location."[30]

There have been a handful of cases where courts found plaintiffs to have standing to assert claims against specific facilities, but not all of the facilities named in a lawsuit. In *Scherr v. Marriott International, Inc*., for example, a guest of the Overland Park Courtyard Marriott was injured by a spring hinge on the door, and brought suit under Title III of the ADA.[31] In addition to seeking relief against the Overland Park Courtyard Marriott, the guest also asserted claims against all Marriott locations that used the same spring hinge. The U.S. Court of Appeals for the Seventh Circuit found that the guest had standing to sue the Overland Park Courtyard, taking several factors into account including that she had stayed at that hotel various times in the past, the hotel was in close proximity to 29 of her relatives, and she had expressed a desire to stay at the hotel in the future during a family wedding. However, unlike her desire to stay at the specific Marriott in Overland Park, the guest failed to show an intent to visit any of the other hotels, and accordingly, the appellate court found that the guest lacked standing to sue the other 56 hotels named in her lawsuit.

The court in *Access 4 All, Inc. v. Starbucks Corporation* applied a similar analysis.[32] In that case, the plaintiffs filed an action alleging ADA violations in 18 locations in Florida and listed approximately 300 additional locations within Florida that contained similar violations. The court found that the plaintiffs only had standing to sue the Starbucks that at least one of the plaintiffs had actually visited and had concrete plans to return to, noting the proximity from the store to plaintiff's residence or planned travel as a factor in the determination.

At least one court allowed a plaintiff to pursue claims against restaurants that he did not visit personally because he pled his lawsuit as a class action, and sufficiently alleged a common design pattern and similar discriminatory practice.[33]

B. Standing: Impact on Specific Disabilities

Courts generally only allow plaintiffs to challenge accessibility violations related to their own disability, and sometimes only allow plaintiffs to seek redress for violations which they personally experienced. In *Campbell v. Moon Palace, Inc*., the court only allowed the patron who uses a wheelchair to pursue the five violations that personally affected him, as opposed to the 37 identified in his complaint that could impact people with mobility impairments more generally.[34] Likewise, in *Access for the Disabled v. First Resort, Inc*., discussed above, the court found that even if the hotel guest had standing generally, she lacked standing to assert claims related to the hotel's failure to provide a roll in shower because she testified that she did not use a roll in shower.[35] Similarly, the hotel guest could not assert claims related to the shower diverter and towel rack because in addition to them not relating to her disability, the hotel guest did not attempt to use these items during her stay.

Other courts, however, have allowed plaintiffs to seek recovery for all barriers related to their disability. In *Strong v. Valdez Fine Foods*, the court allowed a plaintiff to seek

recovery for all barriers related to his mobility disability, even the ones that he did not personally observe.[36] Relying on case law in the Ninth Circuit, the court explained that once an ADA plaintiff has established constitutional standing, the scope of his standing should be broadly interpreted.

C. Standing: "Frivolous" lawsuits

Some courts have used the standing analysis to prevent frivolous litigation to collect attorneys' fees or settlement money for Title III violations. These courts interpret standing strictly, and find a plaintiff to lack standing if the court suspects improper motives.[37]

However, in recent cases involving the hospitality industry, courts have largely rejected defendants' attempts to use these types of arguments. In *Segal v. Rickey's Restaurant and Lounge, Inc.*, a case discussed above, the restaurant argued that the customer lacked standing to bring these claims because he only visited restaurants about six times a year and could not say exactly when he planned to return to Rickey's. Finding that the customer is not "stripped of standing by virtue of the number of lawsuits he has filed," the court noted that for "the ADA to yield its promise of equal access . . . it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA."[38] Further, in *D'Lil v. Best W. Encina Lodge & Suites*, the district court used the plaintiff's past history of ADA litigation to question the sincerity of her intent to return to the hotel.[39] On appeal, the U.S. Court of Appeals for the Ninth Circuit overturned the lower court's opinion and found past litigation history to be an improper consideration.

Although outside of the standing analysis, one court's recent decision received a great deal of media coverage, including a front page story in the New York Times.[40] In *Costello v. Flatman, LLC*, a court denied a plaintiff's petition for attorneys' fees in light of his questionable practices of ADA Title III litigation against a Subway restaurant in Brooklyn, New York. There, a plaintiff sought over $15,000 in attorneys' fees after receiving an award of default judgment under Title III and $14.31 in compensatory damages under state law.[41] Applying the lodestar analysis (the method commonly used to calculate attorneys' fees in ADA cases), the court, in a strongly worded opinion, stated that the attorneys' request for a $425 hourly rate could not be justified, emphasizing that the attorney does little besides drafting boilerplate pleadings. The court then found that the hours the attorney expended were "disingenuous at best" because his pleadings (complaint, amended complaint, motion for entry of default, motion for default judgment, motion for fees) were practically identical to a myriad of other complaints he filed.[42] In an unusual move, the judge also questioned the plaintiff and plaintiff attorneys' motives after the judge personally visited some of the businesses previously sued by the plaintiff and found that the structural deficiencies

continued to exist. The court warned: "If [the attorneys] continue to take on this noble cause, they must do it with the integrity and ethics required of all lawyers, irrespective of practice area."[43]

II. Title III: Statute of Limitations

It is well-settled the plaintiffs cannot bring claims that fall outside the scope of the statute of limitations period. There have been a handful of decisions in the hospitality industry discussing when a plaintiff must file a claim to be within the applicable statute of limitations period.

Some courts have applied the "continuing violation" doctrine to Title III cases. For example, in *Scherr v. Marriott International, Inc.*, a case discussed above, a hotel guest filed a lawsuit for injunctive relief under the ADA more than two years after she stayed at the hotel.[44] Marriott asserted that the customer's claims were barred by the statute of limitations (two years in Illinois).[45] The customer, on the other hand, argued that because she was seeking injunctive relief for ongoing violations, the cause of action continues to accrue each day that the defendant remains in violation of the ADA.[46] The U.S. Court of Appeals for the Seventh Circuit agreed with the hotel guest.[47] It held that because the architectural violations are "continuing," the applicable statute of limitations does not bar her claim for injunctive relief.[48] Citing a similar case out of the Ninth Circuit, *Pickern v. Holiday Quality Foods Inc.*, the Seventh Circuit explained that the ADA allows a plaintiff to pursue a claim when he or she "is being subjected to" and "is about to be subjected to" a violation, and as a result, individuals can suffer a continuing or threatened violation of the ADA.[49]

Other courts have explained that a plaintiff's statute of limitations begins when he or she experiences the barrier to accessibility, which can occur multiple times. In *Hoewischer v. Sailormen, Inc.*, the restaurant argued that the patron's claim should be barred by the statute of limitations (four years in Florida) because he first encountered barriers to the restaurant over four years ago.[50] The restaurant patron, on the other hand, argued that he experienced a new injury each time he visited the restaurant and encountered the barrier, and the court agreed. It held that each "encounter with a barrier is a unique, distinct injury, regardless of whether Plaintiff encountered the same barrier on a previous occasion."[51]

Outside of the hospitality context, courts have held that plaintiffs' cause of action accrues when they knew or should have known about such violation.[52] And outside of the ADA context, some courts have held that a plaintiff's statute of limitations begins to run at the end of the design and construction phase.[53]

III. Title III: Architectural Considerations for the Hospitality Industry

In 2010, the Department of Justice promulgated new regulations with specific implications for the hospitality industry.[54]

A. 2010 Standards for Accessible Guest Rooms at Places of Transient Lodging

Newly constructed places of transient lodging are required to comply with the 2010 Standards,[55] and existing places of transient lodging should use the 2010 Standards as valuable guidance. The 2010 Standards require places of transient lodging to offer a certain number of guest rooms equipped with mobility features as well as a certain number of guest rooms equipped with communication features.[56]

For a comprehensive discussion of the technical specifications required for guest rooms with mobility features, see the 2010 Standards, specifically Section 806.2.[57] As an illustration, these rooms are required to have accessible living and dining areas, accessible exterior spaces including patios, accessible terraces and balconies, at least one sleeping area with clear floor space on both sides of the bed, at least one accessible bathroom, an accessible kitchen or kitchenette, and sufficient turning space within the guest room.[58] The chart below explains the number of total guest rooms required to have such mobility features.

Table 224.2 Guest Rooms with Mobility Features

Total Number of Guest Rooms Provided	Minimum Number of Required Rooms Without Roll-in Showers	Minimum Number of Required Rooms With Roll-in Showers	Total Number of Required Rooms
1 to 25	1	0	1
26 to 50	2	0	2
51 to 75	3	1	4
76 to 100	4	1	5
101 to 150	5	2	7
151 to 200	6	2	8
201 to 300	7	3	10
301 to 400	8	4	12
401 to 500	9	4	13
501 to 1000	2 percent of total	1 percent of total	3 percent of total
1001 and over	20, plus 1 for each 100, or fraction thereof, over 1000	10, plus 1 for each 100, or fraction thereof, over 1000	30, plus 2 for each 100, or fraction thereof, over 1000

For the technical specifications required for guest rooms with communication features, see the 2010 Standards, specifically Section 806.3.[59] As an example, these rooms are required to have accessible alarms, visible notification devices to alert room occupants of incoming telephone calls and a door knock or bell, and telephones with volume controls, telephones that could facilitate the use of a TTY.[60] The chart below explains the number of total guest rooms required to have certain communication features.

Table 224.4 Guest Rooms with Communication Features	
Total Number of Guest Rooms Provided	**Minimum Number of Required Guest Rooms With Communication Features**
2 to 25	2
26 to 50	4
51 to 75	7
76 to 100	9
101 to 150	12
151 to 200	14
201 to 300	17
301 to 400	20
401 to 500	22
501 to 1000	5 percent of total
1001 and over	50, plus 3 for each 100 over 1000

To ensure equal access for guests with disabilities, in addition to the number of accessible guest rooms, the 2010 Standards require that guest rooms with mobility and communication features be dispersed among the various classes of guest rooms.[61] Places of transient lodging must also provide choices of types of guest rooms, number of beds, and other amenities comparable to the choices provided to other guests.[62]

There may be situations where the minimum number of required guest rooms cannot sufficiently allow for complete dispersion. Under those circumstances, the 2010 Standards set forth the following dispersion priorities: guest room type, number of beds, and amenities. Places of transient lodging are encouraged to consider factors such as room size, bed size, cost, view, bathroom fixtures (hot tubs and spas), and then smoking and nonsmoking rooms.

B. 2010 Standards for Accessible Pools[63]

DOJ's 2010 regulations included, for the first time, technical specifications for accessible swimming pools, wading pools, and spas.[64] Specifically, the regulations require public accommodations that are built or altered after March 15, 2012 to comply

with the 2010 Standards.[65] The regulations initially required public accommodations to bring existing pools and spas into compliance with the 2010 Standards by March 15, 2012, to the extent that it was readily achievable to do so; however, after resistance from the hospitality industry, DOJ ultimately extended the compliance date for existing pools to January 31, 2013.[66] This Legal Brief focuses on requirements for pools, as these issues appear to raise the majority of questions from the hospitality industry.[67]

Under the 2010 ADA Standards, large pools, which are defined as pools with at least 300 linear feet of pool wall, subject to the new construction requirements are required to have two accessible means of entry.[68] One of the accessible entries must be either a fixed pool lift or a sloped entry, while the other can be a fixed pool lift, a sloped entry, a transfer wall, a transfer system, or pool stairs.[69] DOJ recommends that public accommodations install different means of entry to better serve the varying needs of people with disabilities.[70] Further, it recommends that access is provided in different locations to provide increased options for entry and exit.[71]

Small pools, on the other hand, are pools with less than 300 linear feet of pool wall.[72] Small pools subject to the new construction requirements are required to have at least one accessible means of entry, which must be either a fixed pool lift or a sloped entry.[73] There are certain exceptions to these requirements: wave action pools, leisure rivers, sand bottom pools, and other pools where user access is limited to one area are required to provide only one accessible means of entry, but it must be a lift, a sloped entry, or a transfer system.[74] The 2010 Standards include technical requirements for all means of access.[75] For instance, the technical requirements for pool lifts mandate certain specifications with respect to location of the pool lift, seat location, clear deck space, seat height, seat width, footrests/armrests; submerged depth, and lifting capacity.[76] The lift shall be capable of unassisted operation from both the deck and water levels.[77] It is important for a person swimming alone to be able to call the pool lift when it is in the up position so he or she will not be stranded in the water for an extended period of time awaiting assistance.[78]

Hotels and other places of public accommodation with existing pools are obligated to remove barriers to the extent such barrier removal is readily achievable.[79] DOJ has explained that hotels may remove barriers by either installing a fixed pool lift that is independently operable by the user or through other accessible means of entry that comply with the 2010 standards.[80] If, however, installation of a fixed pool lift is not readily achievable, the public accommodation may then consider alternatives such as the use of a portable pool lift that complies with the 2010 standards.[81]

DOJ has provided additional guidance about the requirements for pool lifts. For instance, DOJ has explained that unless it would result in an undue burden not to, sharing accessible equipment between pools is not permitted.[82] Sharing non-fixed lifts can pose safety risks to swimmers with disabilities because if a lift has been moved to

another pool, a person with a disability might be unable to get out of the pool in which they are swimming.[83] Sharing pool lifts also requires swimmers with disabilities to rely on staff assistance to find, move, and set up the lift each time.[84] Likewise, facilities cannot store a pool lift and bring it out only upon request, as this creates an additional burden for people with disabilities.[85] Instead, pool lifts must remain in place and be operational during all times that the pool is open to guests.[86]

Hotels and other places of public accommodation are also required to maintain the accessible features of their lifts in operable working condition so that persons with disabilities have access to the pool whenever the pool is open to others.[87] DOJ has indicated that hotel staff should be trained on instruction regarding availability, operation, and maintenance of accessible equipment.[88] Finally, hotels and other places of public accommodation cannot rely on limitations on coverage or insurance rates as a reason not to comply with the ADA.[89] While legitimate safety requirements can be considered, they must be based on actual risks and be necessary for the safe operation of the business.[90]

Although there have been a handful of cases filed challenging the legality of inaccessible pools at various hotels, motels and inns, there have not been any substantive opinions on this issue yet. Given the prevalence of swimming pools in the hospitality industry, it is expected that this will be a frequent issue in litigation in years to come.

C. Barrier Removal in the Hospitality Industry

Title III requires businesses in the hospitality industry to remove "architectural barriers, and communication barriers that are structural in nature, in existing facilities" when it is "readily achievable" to do so.[91] The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[92]

The ADA includes the following list of factors to consider when determining whether barrier removal is readily achievable:

- the nature and cost of the action needed under the (ADA);[93]
- the overall financial resources of the facility or facilities involved in the action;
- the number of persons employed at such facility;
- the effect on expenses and resources or the impact otherwise of such action upon the operation of the facility;
- the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees;
- the number, type, and location of its facilities; and
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.[94]

Though there is no clear mathematical formula for assessing the achievability of barrier removal, courts will consider both the level of need and the level of resources available. Where a Title III entity has a parent entity that can allocate resources to the local facility, courts also might consider the parent entity's resources, size, and operations. However, courts will consider the parent entity's resources only to the extent appropriate in light of the geographic separateness and the fiscal or administrative relationship of the site or sites in question to any parent entity.

To determine whether barrier removal is readily achievable, courts can look at factors beyond cost.[95] For example, in *Spector v. Norwegian Cruise Line, Ltd*., passengers with disabilities filed a class action lawsuit under Title III of the ADA alleging that the cruise line had physical barriers that prevented them from accessing various areas of the ships.[96] This case ended up before the U.S. Supreme Court on the question of whether a cruise line operating foreign-flag ships in U.S. ports was subject to the ADA. The Supreme Court held that the ADA applies to cruise lines, but the ADA cannot regulate matters involving the internal order and discipline of a foreign-flag ship. Thus, the ADA requires that physical barriers be removed from structures only if it would be "readily achievable" to do so, but explained that barrier removal that interfered with international legal obligations or posed a safety threat to the ship's crew were outside the scope of the ADA.

Businesses, including restaurants, have tried to use the ADA's "readily achievable" language to defend ADA lawsuits when they lack legal authority to make changes to the physical structure per the terms of a lease agreement. For instance, in *Grove v. De La Cruz*, a restaurant patron filed suit against a restaurant after experiencing numerous barriers due to inaccessibility in the restroom. The restaurant argued that it was not "readily achievable" to remove the barriers because it had no legal right to do so per the terms of its lease agreement with the building owners. The court disagreed, and explained that although a landlord and tenant were free to contract for allocation of compliance duties, this agreement was merely between the landlord and tenant, and does not preclude a customer from seeking removal of a barrier.[97]

However, the majority of barrier removal cases focus on financial considerations. In many cases, hospitality providers try to dispose of barrier removal cases at the summary judgment stage. The case law demonstrates that businesses must do more than aver that they cannot afford to make the architectural modifications. For example, in *Segal v. Rickey's Restaurant and Lounge, Inc*., a restaurant moved for summary judgment on an ADA claim, asserting that the changes requested "would involve more than [it] could afford."[98] The restaurant guest raised concerns about the accessibility of the accessible parking spaces, pavement from the parking lot to restaurant, door to the restaurant, and restaurant bathroom. The court found the evidence on financial hardship was insufficient to grant summary judgment to the restaurant.

Other courts, however, have adjudicated claims related to barrier removal as a matter of law. In *Harty v. Mal-Motels, Inc*., the plaintiff alleged that the motel failed to engage in readily achievable barrier removal. Both the plaintiff and the motel filed motions for summary judgment.[99] Specifically, plaintiff supported his claims with an expert report detailing the various aspects of the Econo Lodge that were not in compliance with the ADA and estimated costs to bring them to compliance. Plaintiff then produced portions of the Econo Lodge's tax documents that demonstrated its business expenses. The court found that when compared to the amount the Econo Lodge spent on similar expenses such as "painting, stucco, and building renovations," certain remediations were "readily achievable."[100] Specifically, the court found that it was readily achievable for the Econo Lodge to install proper signage in the restroom, adjust writing tales, bevel thresholds, raise electrical outlets in guest rooms, widen the door leading to the adjacent restaurant, lower the registration counter, restripe the parking lot, install handrails for the built-up curb ramps near the accessible parking spaces, and convert the men's restroom to a single-user unisex accessible restroom. The court noted that the total cost of all such renovations was $11,675.00. However, the court found that plaintiff failed to demonstrate that certain other modifications were readily achievable—such renovations included creating seven fully accessible guestrooms at $15,000 each, equipping two of the rooms with roll-in showers at $4,000 each, and installing handrails to all stairs at $7,500 each.

However, some courts find issues related to barrier removal to be so fact-dependent that they cannot be decided without a trial. For example, in *Hoewischer v. Sailormen, Inc*., a customer who used a wheelchair sued a restaurant for several accessibility barriers.[101] On a summary judgment motion by the restaurant, the court found that plaintiff established a genuine issue of material fact regarding his claims related to the route to the public sidewalk, the walkway to the restaurant, the entrance doors, and the bathroom door because the restaurant made $250,000 to $300,000 in profit in the previous year and the total cost of bringing the facility into compliance would be $20,000. Thus, the court found the determination to be a "fact-intensive inquiry" that is "rarely decided on summary judgment."[102]

In *Access for the Disabled v. First Resort, Inc*., the Siesta Inn made a number of renovations in response to the hotel guest's Title III action. It did not, however, install a roll in shower in its guest rooms. Following a trial, the court found that the hotel guest failed to demonstrate that certain renovations were readily achievable. The Siesta Inn produced evidence that it has been unable to pay its full mortgage payments during the past several years. It further demonstrated that to install a roll in shower, it would have to close down a room on each side during the construction due to construction noise, which would take approximately one year in gross rentals from one room to recoup the costs associated with the construction. The motel further showed that it had a negative net income for seven of the last eight years.

DOJ has successfully negotiated various settlement agreements and consent decrees

with businesses in the hospitality industry on the issue of barrier removal. As an example, in *U.S.A. v. Rosa Mexicano Company et al*, the parties' consent decree, which resolved DOJ's lawsuit against the popular restaurant chain, required the restaurant to remove numerous barriers present in its restaurants.[103] Similarly, in its settlement agreement with another restaurant, Mrs. K's Toll House Restaurant agreed to obtain the permits and licenses necessary to install a fully accessible toilet room in accordance with the 2010 Standards.[104] The restaurant agreed to make other changes, including installation of directional signage, widening doors, replacing entry door hardware, installing accessible parking spaces, and installing an accessible lower portion of the counter.

IV. Modifications to Policies, Practices and Procedures in the Hospitality Industry

Title III entities must provide "reasonable modifications in policies, practices, or procedures, … unless … such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advocates, or accommodations."[105]

A. Service Animals and the Hospitality Industry[106]

Access for service animals in the hospitality industry has been an ongoing issue for individuals with disabilities and hospitality providers. As a general manner, service animals should be given the "broadest feasible access" to avoid separation from the individual with a disability.[107]

1. Service Animals: DOJ Regulations

Covered entities in the hospitality industry such as hotels and restaurants must modify their policies, practices and procedures to permit the use of a service animal by an individual with a disability.[108] In 2010, DOJ issued revised regulations redefining a "service animal" as "[a]ny dog that is *individually trained* to *do work or perform tasks* for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability . . . The work or tasks performed by a service animal must be directly related to the individual's disability."[109]

DOJ recognizes that service animals benefit individuals with various types of disabilities and are regularly trained to perform the following tasks:

- Pulling a wheelchair;
- Assisting an individual during a seizure;
- Alerting individuals to the presence of allergens;
- Retreiving items such as medicine or the telephone;
- Providing physical support and assistance with balance and stability to individuals with mobility disabilities; and

- Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.[110]

Hospitality providers cannot require an individual to submit proof of a service animal's certification, training or licensing.[111] In fact, there are only two questions that hospitality providers are permitted to ask prior to admitting a service animal into a hotel or restaurant.[112] Providers may ask: (1) whether the animal is required because of a disability; and (2) what work or task the animal has been trained to perform.[113] Restaurants, hotels, and other places of public accommodation should not ask these questions if it is readily apparent that an animal has been trained to do work or perform tasks for an individual with a disability.[114] For example, if a restaurant manager observes a dog guiding someone who is blind or opening doors for someone who uses a wheelchair, he should not make any inquiries about the nature of the animal.[115]

Hospitality providers may exclude service animals if the animal is out of control and the animal's handler does not take effective action to control it or if the animal is not housebroken.[116] However, if an animal is properly excluded, the hospitality provider must still provide the customer the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.[117]

2. Service Animals: Cases Finding for the Customer

Hospitality providers that have blanket policies or practices excluding animals may be subjected to court orders or settlement agreements requiring modification of the relevant policy or practice. The unique nature of hotels and restaurants do not alter the ADA's requirement that businesses must modify a no-pets policy to permit service animals. For example, in *Davis v. Patel*, a woman with a disability with a service animal sued the owners and operators of a Super 8 Motel for prohibiting her from staying in a motel room with her service animal.[118] The lower court dismissed her case, finding that the plaintiff failed to show that the motel's denial of accommodation was based solely on her disability. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed and allowed the plaintiff's case to proceed. The court explained that the plaintiff could bring an ADA claim by showing "simply that the hotel failed to make reasonable modifications to its policy."[119]

Restaurants are also required to modify their policies to permit service animals. In *Johnson v. Gambrinus Company / Spoetzl Brewery*, a brewery refused to modify its no-pets policy to permit an individual with a disability from taking a public brewery tour with his service animal.[120] The brewery asserted that the Food, Drug, and Cosmetics Act prevented the brewery from modifying its blanket "no animals" policy because a dog would cause contamination. The district court and appellate court both disagreed, finding that the Food, Drug, and Cosmetics Act did not prevent the brewery from allowing service animals on many areas of the tour. The court also noted that the risk of contamination posed by the few foreseeable service animal visits was minimal, if not

altogether unlikely or impossible in certain locations within the brewery. Accordingly, the court ordered the brewery to submit a plan that provides "the broadest feasible access consistent with the safe operation" of the brewery."[121]

3. Service Animals: Cases Finding for the Provider

As noted above, a "service animal" must be trained to perform a task for an individual with a disability.[122] Thus, hotels, restaurants, and other providers of hospitality are under no obligation to admit animals that have not been trained, a conclusion with which the courts have agreed. In *Davis v. Ma*, a customer with a degenerative back disability brought his 13 week old puppy into a restaurant.[123] After being asked to leave in light of the restaurant's no-pets policy, the customer advised that the puppy was a service animal in training. The manager asked the customer for his puppy's "ID" and when the plaintiff said he did not have one, the manager advised that the puppy had to leave the restaurant. The court found for the restaurant in this case, explaining that the plaintiff failed to establish that the puppy was a service animal. The record established that the puppy had not received any training to assist in performing tasks. Indeed, the puppy had only had basic obedience training, and the plaintiff admitted that the puppy did not assist him in walking or balancing. Although the plaintiff had obtained a service animal tag from the city, this tag was not determinative because the evidence demonstrated that the city provided such service animal tags on the honor system. The restaurant asserted that the puppy posed a direct threat because he had not yet received vaccinations and that the restaurant was located in an officially declared rabies area. The court, however, did not consider the restaurant's direct threat argument because it already had found that plaintiff's ADA claim failed as a matter of law.

The ADA does not, however, impose a "civility code" to regulate the conduct of businesses. In *Krist v. Kolombos Restaurant Inc*., a customer regularly visited a restaurant and described it as a place "like Cheers" where "people knew you and were friendly."[124] According to her lawsuit, after the customer started using a service animal, her interactions with employees at the restaurant significantly changed. She filed a lawsuit under Title III of the ADA alleging that she was constructively excluded from the restaurant, that the restaurant filed to adhere to the ADA's code of civility, and had engaged in intentional discrimination. The district court and the U.S. Court of Appeals for the Second Circuit disagreed. The appellate court held that the customer was not constructively excluded, evidenced by the fact that she frequented the restaurant approximately three or four times per week, that she continued to sit in her preferred booth when it was available, and that she stayed at the restaurant for several hours on each visit. Moreover, the evidence showed that the restaurant management and employees "yelled" at her on two occasions when the service animal sat in the aisle, as it potentially impeded customer traffic and waiter movements. Finally, the court rejected the customer's argument that the ADA imposed a civility code.

4. Service Animals: DOJ Settlement Agreements

Many restaurants have entered into settlement agreements, consent agreements and consent decrees with DOJ over the past few years in response to customer complaints. In *United States v. Shanghai Cottage at Fairhope, Inc.*, DOJ investigated a complaint after a restaurant employee refused to serve a patron with a service animal wrongfully relying on a local health code.[125] Further, the DOJ entered into a settlement agreement with Dragon City.[126] In this case, the complainant visited the restaurant and was told that she had to leave the premises. Outside the restaurant with her growing concern, being upset, and having experienced embarrassment and humiliation, she contacted her local police department, who explained to the restaurant representative that she had the right to be accompanied by her service dog. Although the restaurant eventually allowed the complainant to enter the restaurant, she was required to sit well away from all other customers, near a service area in the restaurant.

Hotels, motels, and resorts have also entered into settlement agreements with DOJ in response to incidents regarding service animals. In the settlement agreement between United States and Micro-Hospitality Partnership, which owns the Microtel Inn, DOJ investigated an incident where a guest who uses a service animal because he is blind was turned away after being told that pets were not allowed on the premises.[127] The Microtel employee also called 911 and asked that police be sent to remove the complainant and his family from the premises. In the settlement agreement between the United States and Budget Saver Corporation, the complainant alleged that she checked into the motel and presented her service animal's registration card.[128] Despite informing the motel that the animal was a service animal, the employee demanded medical verification of her need for a service animal and charged her $50.00 because she would not produce medical information.

In DOJ settlement agreements, consent agreements and consent decrees, hospitality providers generally agree to the following terms:

- Not to discriminate by excluding or providing unequal treatment to persons with disabilities who use service animals;
- Adopt a service animal policy (which includes the definition of a service animal, explains that service animals play an importance role in ensuring independence of people with disabilities, acknowledges that service animals are trained to do work or perform tasks for a broad range of people with disabilities; explains that service animals do not always have a harness, sign or symbol indicating that they are service animals; makes clear which inquiries are permissible; and designates one employee to respond to customer inquiries or complaints);
- Post the service animal policy for all employees, including in other languages if necessary to ensure that all employees understand the policy;
- Train their employees about the service animal policy;
- Procure and post a sign welcoming people with service animals;

- Pay monetary damages to complainants; and
- Pay civil penalties (with fines ranging from $2,500[129] to $20,000[130]).

B. Ticketing Policies and the Hospitality Industry

Although places of transient lodging always had obligations under the ADA to make their reservation systems accessible to guests and prospective guests with disabilities, DOJ's revised regulations clarify the responsibilities for places of lodging with requirements that went into effect on March 15, 2012.[131] Specifically, a public accommodation that owns, leases (or leases to), or operates a place of lodging must modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not needs accessible rooms.[132] Reservation systems must identify and describe accessible features in the hotels and guest rooms in sufficient detail for an individual with a disability to be able to assess independently whether a specific hotel or room meets his or her accessibility needs.[133] In addition, places of lodging must hold accessible guest rooms open until all guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type.[134] Places of lodging must also guarantee that the specific accessible guest room reserved through its reservation system is held for the reserving customer, regardless of whether specific rooms are typically held in response to reservations made by others.[135] There is an exception in the regulations to certain requirements for reservations for individual guest rooms or other units not owned or substantially controlled by the entity that owns, leases, or operates the overall facility.[136]

Since the revised regulations became effective, DOJ has entered into at least one settlement agreement to ensure that hotels, motels and resorts are complying with these regulatory requirements. DOJ's settlement agreement with Westgate Resorts, Ltd. and CFI Resorts Management, Inc. generally tracked the regulatory requirements for lodging providers, requiring the hospitality provider to:

- Allow persons with disabilities to reserve accessible guestrooms/suites in the same way and on the same terms that others can reserve guestrooms/ suites;
- Ensure that all reservation staff (both onsite or off-site at a reservations center) have ready access to information about the lodging facility's accessible guestrooms/suites;
- Ensure that accessible guestrooms/suites are held for possible use by persons with disabilities until all other rooms in the same price category have been reserved; and
- Require the rates for accessible guestrooms/suites to be the same as the rates for guestrooms/suites with comparable features and amenities that are not designated accessible.[137]

Even before the DOJ's revised regulations became effective, DOJ had entered into settlement agreements related to inaccessible hotel reservation policies. When DOJ

entered into a consent decree with *Hilton Worldwide, Inc*. in November of 2010,[138] it marked the first time that DOJ had entered into an agreement that specifically detailed how a hotel reservations system should be made accessible, requiring a hotel chain to make its online systems accessible, and requiring a hotel chain to provide information about accessible features in guest rooms throughout the chain on its website.[139] Even as far back as 2004, DOJ entered into a settlement agreement with Motel 6 requiring it to ensure that its telephone and internet reservation systems provide service to individuals who request accessible rooms in a manner equivalent to that provided to individuals who seek to reserve standard rooms, although this agreement lacked the detail provided in *Hilton Worldwide*.[140] Under the *Motel 6* agreement, Motel 6 agreed to retain an independent consultant to conduct testing of the ability to reserve accessible rooms through various reservation systems including the Motel 6 Website, calling individual properties directly, and calling Motel 6's central call center.

In fact, as far back as 1996, DOJ has entered into agreements with lodging facilities requiring comprehensive changes to their reservation policy, including a settlement agreement with Marriott International, Inc., and Courtyard Management Corporation.[141]

V. Communication Access in the Hospitality Industry

The ADA requires Title III entities, including hotels, restaurants, and other places in the hospitality industry, to ensure "effective communication" with people with disabilities and furnish "appropriate auxiliary aids and services" when it is necessary to do so.[142] As discussed below, there is case law about communicating with individuals who are deaf at drive-thru windows and providing materials in alternate formats.

Nearly a decade ago, in *Bunjer v. Edwards*, a district court issued a strong opinion condemning a McDonald's franchise for failing, in violation of Title III, to communicate effectively with a deaf customer who attempted to order at its drive-thru window.[143] In this case, the customer attempted to write down his order and drive it to the drive-thru window; however, the employees were uncooperative and demanded that he come inside. When the customer refused, the employees filled his order at the window but gave him the wrong change and wrong drink while "snickering."[144] The court held that the defendant's drive-thru facility discriminated against patrons who are deaf or hard of hearing and that the staff was inadequately equipped to accommodate such customers. As a result, the court ordered the McDonald's franchise to implement policies and provide training about accommodating people who are deaf or hard of hearing. Although the court limited this injunctive relief to the particular McDonald's franchise in question, it noted that it hoped such relief would "serve as a wake-up call for the national McDonald's Corporation to put in place training and other appropriate procedures."[145]

Since that time, there has been at least one settlement agreement between a restaurant and DOJ. A deaf individual filed a complaint with DOJ asserting that a fast food chain restaurant in Pennsylvania refused to take his written food order at the drive-thru window. In response to DOJ's investigation, the restaurant placed picture menus at the drive-thru window and at interior cash registers to be given to customers upon request, placed pen and paper at drive-thru windows, trained staff on serving customers with disabilities, agreed to take corrective or disciplinary action against any employee who does not comply with its accessibility policy, and paid the complainant $1,000.[146]

In 28 C.F.R. Part 36, Appendix B, DOJ stated that a public accommodation can choose among various alternatives as long as the result is effective communication.[147] As an example, it provided that a restaurant would not be required to provide menus in Braille for patrons who are blind if the waiters in the restaurant are made available to read the menu. If restaurants choose not to provide menus in alternate formats, however, they must ensure that employees are trained to read menus upon request. In *Camarillo v. Carrols Corporation*, the U.S. Court of Appeals for the Second Circuit reversed the lower court's decision that had dismissed a patron's claim against various fast food restaurants.[148] The patron alleged that the restaurants provided neither a large print menu that she could read, nor any other means to ensure "effective communication."[149] When she asked the restaurant employees to read the menus, the employees would often respond with annoyance, impatience, or read only part of the menu to her. The district court dismissed the patron's ADA claim, finding that her allegations amounted to a complaint about poor or impolite service. The Second Court disagreed, stating that the patron alleged more than "rudeness or insensitivity" but rather raised a reasonable inference that the restaurants "failed to adopt policies or procedures to effectively train their employees how to deal with disabled individuals" which can "constitute a violation of the ADA."[150] Once the case returned to the district court, the restaurant tried to have it dismissed on a motion for summary judgment, which was denied except on the plaintiff's claim for monetary damages.[151] Acknowledging that having a server read the menu is likely sufficient to comply with the ADA, the court found that the guest could proceed with her claim because she had presented facts regarding the ineffectiveness of the communication, as the guest was not informed about item prices, was not able to select from the entirety of the menu, and generally received impatient and reluctant service.

DOJ has also become involved in cases where complainants who are blind or have low vision require accommodations to be able to read a restaurant's menu. In DOJ's consent decree with Friendly Ice Cream Corporation, Friendly agreed to institute policies to provide menus in an alternate format or to read menus to customers with visual impairments.[152]

Although most of the case law in this area has involved restaurants, hotels, motels, and inns, cruise ships also have obligations to provide effective communication. DOJ has entered into settlement agreements on this issue.[153] For instance, in DOJ's settlement agreement with Westgate Resorts, Ltd. and CFI Resorts Management, Inc.,

the hotel agreed to provide all written information, including information about fire-safety, maximum room rate, telephone/television information cards, room service menus, and guest service guides in alternate formats.[154] Similarly, in *United States of America v. NCL (Bahamas) Ltd., and NCL America, LLC*, NCL agreed to provide auxiliary aids and services in compliance with the ADA on all cruises originating from or returning to the United States, including all shore excursions in the United States that were purchased through NCL.[155] NCL also agreed to provide cruise information relating to shore excursions and other services provided on NCL's internal television channel in a written format including daily information provided to all guests concerning shore excursions, safety, and shipboard activities.

VI. Website Access in the Hospitality Industry

Like all places of public accommodation, businesses in the hospitality industry should consider whether their websites must be accessible under Title III of the ADA. As background, because the ADA was enacted in 1990, well before the Internet was commonly used, Title III is silent on the subject of whether websites must be accessible. While the case law on this issue is still developing, and there are not many cases specific to the hospitality industry, there are cases finding that a website with a nexus to a physical place of public accommodation must be made accessible because the website is a "service" of the place of public accommodation. The plain language of the ADA applies to the goods and services "of" a place of public accommodation or the services, programs, and activities "of" a public entity, rather than only the goods and services provided "at" or "in" a place of public accommodation or facility of a public entity.[156] This case law suggests that hotels and restaurants must make their websites accessible so that individuals with disabilities can have equal access to information hosted on websites such as hotel reservations, restaurant menus, directions, and more.

Other cases, however, have held that whether a website is a "place of public accommodation" depends on if it forms a "nexus" with a brick-and-mortar business.[157] In *Access Now, Inc. v. Southwest Airlines, Co.*, an individual who is blind and an organization representing people with disabilities sought injunctive and declaratory relief against Southwest Airlines, alleging that Southwest's website was inaccessible in violation of Title III.[158] The court held that Southwest's website was not subject to Title III of the ADA because it did not form a nexus with a place of public accommodation, emphasizing that Southwest's online ticket counters did not exist in any particular geographical location.

More recently, a court held that Title III of the ADA applied to Netflix, a business housed entirely online.[159] This case could impact the hospitality industry, as many hospitality providers have travel websites with an online-only presence. It is expected that hospitality providers such as travel websites with only an online presence may start to see litigation on this issue to the extent their websites are not accessible.

Places of public accommodation will likely receive more guidance on this issue, as DOJ is expected to issue a Notice of Proposed Rulemaking ("NPRM") later this year (2013). DOJ has stated that the NPRM will "propose the scope of the obligation to provide accessibility when persons with disabilities access public websites, as well as propose the technical standards necessary to comply with the ADA."[160]

ADA Title I: Employment Considerations for the Hospitality Industry

Title I of the ADA prohibits covered entities from discriminating against "a qualified individual on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; and employee compensation, job training, and other terms, conditions, and privileges of employment."[161] Hotels, motels, restaurants, bars, and other businesses in the hospitality industry that have 15 or more employees are covered under Title I.[162] Case law and administrative guidance applicable to employers in the hospitality industry raise some issues that are relevant to all employers, and others that are specific to the hospitality setting.

As a general matter, employers cannot terminate an employee's employment because of a disability. In *Holmes v. Cutchall Management Kansas LLC*, the plaintiff worked as server at defendant's restaurant.[163] It was undisputed that the plaintiff missed her shift in violation of defendant's notice policy. According to the defendant, the manager chose to terminate plaintiff the next time plaintiff was at the restaurant and claimed that the manager instructed other managers at defendant to terminate plaintiff in person. However, the other managers did not terminate plaintiff's employment. Shortly thereafter, the plaintiff had a seizure at work. When the plaintiff's manager returned from vacation, she terminated plaintiff. The restaurant argued that there was no discrimination because the plaintiff's manager made the decision to terminate plaintiff's employment well before she learned of plaintiff's epilepsy. The court found that there was a genuine issue of fact on this issue, and denied the restaurant's motion for summary judgment.

1. Medical Examinations and Inquiries[164]

The ADA regulates the types of medical examinations and inquiries an employer can make of an employee or an applicant. What an employer can ask, and when, is a question particularly important in the hospitality industry as food service providers also have obligations to comply with state, county, or local food handling laws that frequently incorporate the federal FDA Food Code.[165] The EEOC published a guidance document, *How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers*, to advise food service employers about how to handle these sorts of issues, including concerns related to FDA Food Code and transmitting diseases through food.[166]

Under the ADA, before extending a conditional job offer to an applicant, businesses in the hospitality industry, including restaurants and bars, cannot ask disability-related

questions.[167] Many food service employers may want to ask applicants whether they have any diseases transmissible through food, or use the FDA Food Code's Model Form 1-A before extending a conditional job offer, but the ADA prohibits such inquiries at this stage. Instead, during the interview stage, employers should ask questions only about whether the person is qualified to do the job. The EEOC advises that this requirement is in line with the guidance of Model Form 1-A, which says food service employers should ask questions about symptoms and diseases only after a conditional job offer. [168]

After extending a conditional job offer, food service employers may ask questions about diseases transmissible through food, so long as the employers treat all applicants in the same job category in the same manner.[169] However, if the job offer is rescinded after an applicant discloses disability-related information, the employer must demonstrate that the decision was job-related and consistent with business necessity.[170]

Businesses in the hospitality industry, including food service providers, may ask current employees about medical information so long as it is job-related and consistent with business necessity.[171] The EEOC clarifies that food service employers can ask current employees whether they have a disease transmissible through food or to fill out Model Form 1-A.[172] Likewise, if an employer has an objective factual basis for linking an employee's medical condition to workplace safety or job performance, the employer can ask a particular employee who handles food medical questions.[173]

2. Otherwise Qualified

Title I of the ADA protects qualified individuals with a disability. A qualified individual is a person who meets legitimate skill, experience, education, or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation.[174]

When determining whether a particular function is essential, courts consider the following factors:[175]

- the job description;
- the employer's judgment;
- the amount of time spent on the job performing the function;
- the consequences of not performing the function;
- the terms of a collective bargaining agreement;
- the work experience of past incumbents in the job; and
- the current work experience of incumbents in similar jobs.

There have been multiple cases that assessed whether a restaurant manager's essential job functions include performing the tasks of the wait staff that they manage. In one case, *Equal Employment Opportunity Commission v. Denny's, Inc.*, the court held that it did not. There, a restaurant manager was terminated after she underwent an above-knee amputation.[176] The manager returned from medical leave and asked to work a light duty part-time schedule. Although Denny's initially agreed, it terminated

the manager's employment after five days on this modified schedule after finding that she was a "safety hazard."[177] In its motion for summary judgment, Denny's asserted that the manager was not otherwise qualified, as she could not perform the essential functions of the restaurant manager position which entailed moving quickly between tasks and moving around the entire restaurant. Denny's argued that managers were expected to step in and perform the tasks of other positions, such as cleaning, cooking, stocking, and lifting. Disagreeing with Denny's, the court relied on the manager job description which listed only supervisory and administrative tasks. The court also considered the manager's description of her own job, in which she testified was not physically demanding as she spent most of her time interacting with customers, handling paperwork, and instructing other employees. The court was further persuaded by a vocational counselor that observed the restaurant operations for two days and never observed a manager performing a non-managerial task that could not have been performed by another available employee as a matter of managerial discretion.

Another court, however, came to the opposite conclusion. In *Burnett v. Pizza Hut of America, Inc.*, the plaintiff, a restaurant manager, started to experience sleeplessness, muscle and joint pain, depression, and generalized fatigue and was ultimately diagnosed with fibromyalgia, musculoskeletal pain, and inflammatory arthritis.[178] Her doctor issued various restrictions on her including inability to lift more than 20 pounds and inability to do repetitive motions of her upper extremities. After a medical leave, the restaurant manager sought to return to her managerial position with restrictions, but Pizza Hut denied her this opportunity.[179] On Pizza Hut's motion for summary judgment, the court considered whether the manager was qualified to perform the essential job functions of a restaurant manager and concluded that she was not. While the manager argued that a managerial position was only to manage and did not include the physical tasks otherwise performed by supervised employees, the court found that Pizza Hut provided ample evidence that it had legitimate business reasons for expecting and requiring managers to assist in performing physical labor tasks when necessary, such as training employees, filling in for late or absent employees, and covering positions during scheduled low volume periods. Pizza Hut also provided evidence that all restaurant managers were responsible for ensuring that all jobs were performed, including those of a physical and repetitive nature.

A hotel's concern about how a guest might react to an employee with a disability is not a valid reason for terminating an employee. In *Kerr v. Emerald Hospitality, Inc.*, a hotel employee with cerebral palsy who walked with a noticeable limp brought a lawsuit under the ADA asserting that her supervisor terminated her due to her negative perception of her disability.[180] She submitted sworn statements that her supervisor commented about her ability to walk and expressed concern that hotel guests would have a negative perception about her walking. Another employee submitted an affidavit saying that the supervisor had made comments that the plaintiff's walking "looked bad" to guests.[181] Because a genuine issue of material fact existed, the court allowed the case to proceed past the summary judgment stage.

3. Reasonable Accommodations[182]

Under Title I of the ADA, prohibited discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" absent undue hardship,[183] defined as "an action requiring significant difficulty or expense."[184] An employee must show that he or she is able to perform the essential functions of a position with or without a reasonable accommodation. An employer's duty to provide a reasonable accommodation is a "fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities."[185] ADA regulations, promulgated by the EEOC, define reasonable accommodations as:

> Modifications or adjustments to the work environment, or to the manner or circumstances under which the position … is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position … or … enjoy equal benefits and privileges of employment…[186]

The ADA provides a non-exhaustive list of reasonable accommodations that "may include":

> [J]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[187]

Any of these accommodations may be required for an employee in the hospitality setting.[188]

The reasonable accommodation process generally begins with a request for a reasonable accommodation. Any statement by an employee, or someone speaking on behalf of the employee, that lets an employer know that an adjustment or change at work is needed for a reason related to a medical condition is considered a request for a reasonable accommodation under the ADA.[189] The request need not be in writing.[190] The request for a reasonable accommodation triggers the employer's duty to engage in an informal, interactive process with the employee to determine an appropriate reasonable accommodation.[191] Specific accommodations do not need to be identified by the employee although it is usually best if specific accommodations can be recommended. The employer should give "primary consideration" to the employee's preferred accommodation although employers are not obligated to provide the requested accommodation as long as an "effective" reasonable accommodation is provided.[192]

In the EEOC's guidance document *How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers*, the EEOC discusses

the ADA's requirements and applies such requirements to various hypothetical scenarios relevant to employers and employees in the food service industry.[193] The EEOC explains how to respond to an employee's request to use a service animal as a reasonable accommodation.[194] The EEOC explains that a restaurant cannot automatically reject this request from an employee with a disability, and cites FDA Food Code Section 2-403.11. The FDA Food Code prohibits handling of animals, but allows employees to use service animals. According to Section 6-501.115, service animals may be permitted in areas not used for food preparation. Employees may handle their service animals if, after handling a service animal, the employee washes his hands for at least 20 seconds using soap, water, and vigorous friction on the hands, followed by rinsing and drying. The EEOC document also reminds food service employers to consider whether a service animal would cause an undue hardship or pose a direct threat to the business.

Reassignment to a vacant position can be a reasonable accommodation in the hospitality industry. In *Fjellestad v. Pizza Hut of America*, a restaurant manager was seriously injured in an automobile accident.[195] She was released to return to work, but could not work over 35 hours per week or more than three consecutive days at work. The parties all agreed that managers typically worked fifty hours per week. As a result, Pizza Hut terminated the manager. Although the manager conceded that she could not perform the essential functions of a manager position without a reasonable accommodation, she argued that she should have received one of two accommodations—specifically, she wanted either a permanent co-manager position in which she shared unit managerial responsibilities or reassignment to the vacant shift manager position. The court held that the permanent co-manager position was not reasonable, as this would require Pizza Hut to create a new position. However, the court found that Pizza Hut could have reassigned the manager to a vacant shift manager position, a position that only required managers to work 35-40 hours per week.

4. ADA Defenses, Direct Threat & Infectious and Communicable Diseases

Generally, the foundations of the ADA's direct threat provisions can be found in the U.S. Supreme Court's decision in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Arline*, a teacher with tuberculosis was terminated from her elementary-school teaching position.[196] Subsequently, she brought suit, alleging that her termination violated Section 504 of the Rehabilitation Act which prohibits discrimination by federal funding recipients.[197] After finding that an individual with a contagious disease is covered by Section 504, the Court ruled that the school district must make an individualized assessment to determine whether, despite her disability, the teacher was qualified:

> The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have

> their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology—precisely the type of injury Congress sought to prevent.[198]

To determine whether Arline was qualified, the Court stated that the district court would need to conduct an individual inquiry to balance "protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[199] The Court directed the district court to consider four factors: (1) the nature of the risk, (2) the duration of the risk, (3) the severity of the risk, and (4) the probability of the risk and likelihood of the harm.[200] The Supreme Court's analysis in *Arline* has been incorporated into the ADA's direct threat provisions, as can be seen in the ADA's text, the EEOC's regulations, and federal court cases focusing on direct threat.

The "Defenses" section of the ADA provides that, under certain conditions, covered employers may impose qualification standards that establish specific requirements for positions. Specifically, Section 12113(a) provides:

> It may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . . [201]

Section 12113(b) continues that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."[202] The ADA defines direct threat to mean "a significant risk to the health or safety of others that cannot be reduced by reasonable accommodation."[203]

The EEOC regulations state that to prove direct threat not only requires a "significant risk," but also requires that there be "substantial harm."[204] So, if there is a "significant risk" that a person with epilepsy will have a seizure at work, but it cannot be shown that the seizure would cause "substantial harm," under the EEOC's regulation, that person would not be deemed a "direct threat." The EEOC regulations also state that if the threat can be "reduced" by a reasonable accommodation so that the person is no longer a significant risk of substantial harm, then there is no direct threat.[205]

Additionally, the EEOC regulations set forth the standard for whether an individual is a direct threat. Under the regulations, a decision whether an individual presents a direct threat must be based on a particularized inquiry. Such a determination must be based on "an individualized assessment of the individual's present ability to safely perform

the essential functions of the job," which itself must be based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence."[206] The assessment should consider four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.[207] These are essentially the same four factors articulated by the Supreme Court in the *Arline* case discussed above.

The EEOC's Interpretative Guidance to 29 C.F.R. § 1630.2(r) emphasizes the "case by case" determination of whether an employee poses a direct threat.[208] According to the EEOC:

> The employer should identify the specific risk posed by the individual. For individuals with mental or emotional disabilities, the employer must identify the specific behavior on the part of the individual that would pose the direct threat. For individuals with physical disabilities, the employer must identify the aspect of the disability that would pose the direct threat. The employer should then consider the four factors listed in part 1630.[209]

The Interpretative Guidance also states that the "determination must be based on individualized factual data, using the factors discussed above, rather than on stereotypic or patronizing assumptions and must consider potential reasonable accommodations."[210]

Of particular import to the hospitality industry, in Section 12113(e) of the ADA, Congress instructed the Secretary of Health and Human Services to review all infectious and communicable diseases transmissible through the handling of food, publish a list of such diseases including how such diseases are transmitted, and widely disseminate such information.[211] Under this section, businesses, including restaurants, may refuse to assign or continue to assign an individual to a job involving food handling if he or she has an infectious or communicable disease transmitted through the handling of food.[212]

According to EEOC Guidance, if an employee has one of the diseases listed in the FDA Food Code and is disabled as defined by the ADA, then food establishments may only exclude the employee after determining:[213]

1. There is no reasonable accommodation that would eliminate the risk of transmitting the disease while also allowing the employee to work in his food handling position;
2. All reasonable accommodations would pose an undue hardship on the business; and
3. There is no vacant position not involving food handling for which the employee is qualified and to which he can be reassigned.

Although arising outside of the typical hospitality context, the following case raises important issues for all food service providers. In *Henderson v. Thomas*, prisoners

with HIV brought a class action lawsuit on behalf of all current and future inmates of the Alabama Department of Corrections ("ADOC") alleging discrimination on the basis of HIV status.[214] The prisoners alleged that they were wholly excluded from participation in kitchen jobs within ADOC and food-service jobs in work-release programs. Interpreting Title II of the ADA and the Rehabilitation Act, the court held that the defendant's policies were "obviously irrational" in light of the fact that the "science is unanimous: there is no risk of HIV spreading through food."[215] EEOC guidance emphasizes that HIV is not listed on the CDC list or in the FDA Food Code as a disease transmissible through the food supply, and reminds employers that fear about HIV or AIDS, or concern about others' reactions, does not justify rescinding a job offer.[216]

V. Harassment

There have been a few cases discussing disability-based harassment in the hospitality setting. In *Navarre v. White Castle System, Inc.*, the court denied summary judgment to an employer on an ADA harassment claim.[217] The employee, who had ADHD and Tourette's syndrome, alleged that he was subjected to unlawful verbal and physical harassment on the basis of disability. The court found that the plaintiff presented sufficient evidence to overcome White Castle's motion for summary judgment. The employee presented evidence that his coworker pushed him, shoved him, and threatened to punch him. The employee also presented evidence that his colleague called him words such as "retard" "[expletive] stupid," and asked him if he was "dropped on his [expletive] head" even after the plaintiff objected and stated that he was disabled.[218] White Castle argued that these words were not intended to be literal, but rather were words "so commonly used as terms of derision that they carry no natural association with an actual disability,"[219] an argument the court rejected at this stage of the litigation. Because the employee experienced such harassment each day for over three months, the court found the harassment to be severe and pervasive. In *EEOC v. Bob Rich Enterprises,* a jury awarded $165,000 to a Subway manager who is hard of hearing, finding that she had been harassed and forced to resign because of her disability.[220] The jury verdict followed the presentation of evidence by the EEOC that plaintiff was forced to resign her position after both the owner and human resources/training manager repeatedly mocked her privately and in front of other employees, creating a hostile workplace, with taunts such as: "Read My Lips" and "Can you hear me now?" and "You got your ears on?"

Conversely, in *Mitchell v. Fowler Foods/Kentucky Fried Chicken*, the court found that an employee with depression, bipolar disorder, and post-traumatic stress disorder who was called "slow" and "mentally retarded" failed to establish a hostile work environment claim. The court held that this type of "mere utterance" without more was insufficient to establish a hostile work environment claim.

Conclusion

Litigation regarding businesses in the hospitality industry raises numerous issues,

many of which are unique to the nature of the hospitality business. This Legal Brief analyzed a sampling of the recent case law and administrative regulations, guidance and settlement agreements that involve businesses in the hospitality industry. Businesses, employers, employees and customers with disabilities in the hospitality industry are encouraged to use the numerous resources available to keep apprised of the ADA and its obligations.

Notes:

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights and Rachel M. Weisberg, Staff Attorney, with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Franklin Wolf, Equip for Equality Volunteer Attorney, for his assistance with this brief. Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. 42 U.S.C. § 12101(b)(1).
3. For more general information on Title III issues, please see the Great Lakes ADA Center Legal Brief titled, "Hot Topics in ADA Title III Litigation," available at: www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo011_Title3Litigation.pdf.
4. 42 U.S.C. § 12181(7).
5. 42 U.S.C. § 12182.
6. 42 U.S.C. § 12181(7)(A).
7. 42 U.S.C. § 12181(7)(B).
8. *U.S.A. v. Corral of Westland, LLC*, ECF No. 2:13-cv-10717 (E.D. Mich.) filed 2/20/2013. Available at: www.ada.gov/golden_corral_cmplt.htm (last accessed April 28, 2013).
9. *Id*.
10. *See generally* www.ada.gov/settlemt.htm.
11. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).
12. *Id*. at 560-561.
13. *Pickern v. Holiday Quality Foods*, 293 F.3d 1133, 1138 (9th Cir. 2002).
14. *See, e.g., Segal v. Rickey's Rest. and Lounge, Inc*., 2012 WL 2393769 (S.D. Fla. June 25, 2012).
15. *Nat'l Alliance for Accessibility, Inc. v. Triad Hospitality Corp*., 2012 WL 996661, *6 (M.D. N.C. March 23, 2012) (finding plaintiff lacked standing to bring ADA claim against hotel); *see also Access 4 All, Inc. v. Wintergreen Commercial P'ship, Ltd.,*2005 WL 2989307, *3 (N.D. Tex. 2005) (finding that plaintiff's proximity to defendant's hotel neither injured nor advanced his claim, and that this part of the analysis was irrelevant); *see also Access 4 All, Inc. v. Absecon Hospitality Corp*., 2006 WL 3109966 (D.N.J. Oct. 30, 2006).
16. *Campbell v. Moon Palace, Inc*., 2011 WL 4389894 (S.D. Fla. Sep. 21, 2011) ("Campbell I").
17. *Id*. at *5.
18. *Campbell v. Moon Palace, Inc*., 2011 WL 6951846 (S.D. Fla. Dec. 15, 2011) ("Campbell II").

19. *Id*. at *2.
20. *Deck v. Am. Hawaii Cruises, Inc.*, 121 F.Supp.2d 1292, 1297 (D. Hawaii 2000).
21. *Id*. at 1299.
22. *Nat'l Alliance for Accessibility, Inc.*, 2012 WL 996661, at *6.
23. *Access for the Disabled v. First Resort, Inc.*, 2012 WL 4479005 (Sept. 28, 2012 ("First Resort II").
24. *Id*. at *6.
25. *Access for the Disabled, Inc. v. First Resort, Inc.*, 2012 WL 2917915 (M.D. Fla. July 17, 2012) ("First Resort I").
26. *Segal*, 2012 WL 2393769.
27. *Spector v. Norwegian Cruise Line Ltd*., 2007 WL 2900588 (S.D. Tex. Sept. 28, 2007).
28. *Id*. at *7.
29. *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1037-39 (9th Cir. 2008).
30. *Id*. at 1038.
31. *Scherr v. Marriott Int'l, Inc*., 703 F.3d 1069 (7th Cir. 2013).
32. *Access 4 All, Inc. v. Starbucks Corp.*, 2012 WL 602603 (S.D. Fla. Feb. 23, 2012).
33. *Castaneda v. Burger King Corp.*, 597 F. Supp. 2d 1035, 1046 (N.D. Cal. 2009).
34. *Campbell I*, 2011 WL 4389894 at *3-4; *Campbell II*, 2011 WL 6951846 at *2.
35. *Access for the Disabled, Inc. v. First Resort, Inc.*, 2012 WL 4479005 (Sept. 28, 2012)
36. *Strong v. Valdez Fine Foods*, 2011 WL 455285 (S.D. Cal. Feb. 4, 2011).
37. *See, e.g.*, *Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F. Supp. 2d 1208, 1217 (S.D. Cal. 2007).
38. *Segal*, 2012 WL 2393769.
39. *D'Lil*, 538 F.3d at 1037-39.
40. New York Times, Judge Rebukes 2 Lawyers Profiting From U.S. Disability Law, March 29, 2013, available at: www.nytimes.com/2013/03/30/nyregion/judge-rebukes-lawyers-profiting-from-us-disability-law.html?_r=0 (last visited April 28, 2013)
41. *Costello v. Flatman, LLC*, 2013 WL 1296739 (E.D.N.Y. March 28, 2013).
42. *Id*. at *6.
43. *Id*. at *8.
44. *Scherr*, 703 F.3d at 1075.
45. *Id*.
46. *Id*.
47. *Id*.
48. *Id*. at 1076.
49. *Id*. *citing Pickern v. Holiday Quality Foods Inc*., 293 F.3d 1133, 1137 (9th Cir. 2001).
50. *Hoewischer v. Sailormen, Inc*., 2012 WL 2865788 (M.D. Fla. July 10, 2012).
51. *Id*. at *8.
52. *Frame v. City of Arlington*, 657 F.3d 215, 238 (5th Cir. 2011).
53. *See Garcia v. Brockway,* 526 F.3d 456 (9th Cir. 2008) (en banc) (discussing statute of limitations in a "design and construction" case under the Fair Housing Act).

54. 28 C.F.R. § 36.406(a) (applicable dates); 28 C.F.R. § 36.406(c) (places of lodging); 2010 Standards for Accessible Design subpart D of 28. C.F.R. part 36 ("2010 Standards") §§ 224, 806 (transient lodging guest rooms); 2010 Standards §§ 242, 1009 (swimming pools, wading pools and spas).
55. 28 C.F.R. § 36.406 (new construction built between 1/26/1993 and 9/15/2010 must comply with the 1991 Standards; new construction built between 9/15/2010 and 3/15/2012 can comply with either the 1991 or 2010 Standards; new construction built on or after 3/15/2012 must comply with the 2010 Standards).
56. 2010 Standards § 806.2 (mobility features); 2010 Standards § 806.3 (communication features).
57. 2010 Standards § 806.2.
58. *Id*.
59. 2010 Standards § 806.3.
60. *Id*.
61. 2010 Standards § 224.5.
62. *Id*.
63. DOJ has published numerous guidance documents regarding accessible pools. For more information about accessible pools, wading pools and spas, visit: ADA 2010 Revised Requirements – Accessible Pools Means of Entry and Exit. Available at: www.ada.gov/pools_2010.htm (last accessed May 2, 2013); Questions and Answers: Accessibility Requirements for Existing Swimming Pools and Hotels and Other Public Accommodations. Available at: www.ada.gov/qa_existingpools_titleIII.htm (last accessed May 2, 2013); Letter to the American Hotel and Lodging Association regarding accessible entry and exit for swimming pools and spas. Available at: www.ada.gov//ahla_letter_2_21.htm (last accessed May 2, 2013). DOJ has also archived its webinars and webinar presentation material on this topic, which is available at: www.ada.gov/webinar_pools_access/index.htm (last accessed May 2, 2013).
64. 28 C.F.R. § 36.304; 28 C.F.R. § 36.406; 2010 Standards.
65. 28 C.F.R. § 36.406.
66. 28 CFR Pt. 35 and 36. Available at: www.gpo.gov/fdsys/pkg/FR-2012-05-21/html/2012-12365.htm (last accessed April 28, 2013).
67. For more information about wading pools and spas, see: 2010 Standards §§ 242, 1009.
68. 2010 Standards § 242.2; *see also* ADA 2010 Revised Requirements – Accessible Pools Means of Entry and Exit (www.ada.gov/pools_2010.htm).
69. 2010 Standards § 242.2.
70. 2010 Standards § Advisory 242.2.
71. *Id*.
72. 2010 Standards § 242.2-Exception 1; *see also* ADA 2010 Revised Requirements – Accessible Pools Means of Entry and Exit (www.ada.gov/pools_2010.htm).
73. 2010 Standards § 242.2-Exception 1.
74. 2010 Standards § 242.2-Exception 2.
75. 2010 Standards § 1009.
76. *Id*.
77. 2010 Standards § 1009.2.7 (Operation).

78. 2010 Standards § Advisory 1009.2.7 (Operation).
79. 28 C.F.R. § 36.304(d).
80. *See* ADA 2010 Revised Requirements – Accessible Pools Means of Entry and Exit. Available at: www.ada.gov/pools_2010.htm (last accessed May 2, 2013).
81. *Id*.
82. Questions and Answers: Accessibility Requirements for Existing Swimming Pools and Hotels and Other Public Accommodations. Available at: www.ada.gov/qa_existingpools_titleIII.htm (last accessed May 2, 2013).
83. *Id*.
84. *Id*.
85. *Id*.
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.
91. 42 U.S.C. § 12182(b)(2)(A)(iv).
92. 42 U.S.C. § 12181(9).
93. *See also* 28 C.F.R. § 36.304.
94. 42 U.S.C. § 12181(9).
95. See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).
96. *Id.*
97. *Grove v. De La* Cruz, 407 F.Supp.2d 1126 (S.D. Cal. 2005).
98. *Segal*, 2012 WL 2393769.
99. *Harty v. Mal-Motels, Inc.*, 2012 WL 2885991, *1 (M.D. Fla. July 13, 2012).
100. *Id*. at *2-3.
101. *Hoewischer v. Sailormen, Inc.*, 2012 WL 2865788 (M.D. Fla. July 10, 2012).
102.. *Id*. at *7.
103. *U.S.A. v. Rosa Mexicano Co.* Available at: http://www.ada.gov/rosa-mexicana_cd.htm (last accessed April 29, 2013).
104. *United States of America v. Mrs. K's Toll House Restaurant*, No. 202-35-248 (D. Md. 2012). Available at: www.ada.gov/mrs_k_sa.htm (last accessed April 29, 2013).
105. 28 C.F.R. § 36.302.
106. For extensive general information on service animals under the recent DOJ Regulations, please see the Great Lakes ADA Center Legal Brief titled, *Service Animals Under the ADA*, available at: www.adagreatlakes.org/Publications/Legal_Briefs/BriefNo015ServiceAnimals.pdf.
107. See, 28 C.F.R. pt. 36 App. B; DOJ Comments at *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 CFR Part 36 at page 56272.
108. 28 C.F.R. § 36.302(c)(1).
109. 28 C.F.R. § 36.104 (emphasis added).
110. See Comments to 28 C.F.R. Part 36, p. 56266.
111. 28 C.F.R. § 36.302(c)(6).
112. *Id*.

113. *Id*.
114. *Id*.
115. *Id*.
116. 28 C.F.R. § 36.302(c)(2).
117. 28 C.F.R. § 36.302(c)(3).
118. *Davis v. Patel*, 2013 WL 427740, *1 (9th Cir. Feb. 5, 2013).
119. *Id*.
120. *Johnson v. Gambrinus Co. / Spoetzl Brewery*, 116 F.Supp.3d 1052 (5th Cir. 1997).
121. *Id*. at 1065.
122. 28 C.F.R. § 36.104.
123. *Davis v. Ma*, 848 F. Supp. 2d 1105 (C.D. Cal. 2012).
124. *Krist v. Kolombos Restaurant Inc*., 688 F.3d 89, 91 (2nd Cir. 2012).
125. *U.S.A. v. Shanghai Cottage at Fairhope, Inc.*, No. 202-3-18 (D. Ala. 2012). Available at: www.ada.gov/shanghai_settle.htm (last accessed April 29, 2013).
126. *U.S.A. v. Dragon City I, Inc.*, No. 202-3-21 (D. Ala. 2012). Available at: www.ada.gov/dragon-city/dragon-city.htm (last accessed April 29, 2013).
127. *U.S.A. v. Micro-Hospitality Partnership*, No. 202-71-73 (M.D. Tenn. 2012). Available at: www.ada.gov/microtel_settle.htm (last accessed April 29, 2013).
128. *U.S.A. v. Budget Saver Corporation*, No. 202-22-36 (D. Idaho. 2012). Available at: www.ada.gov/budget_motel_settle.htm (last accessed April 29, 2013).
129. *U.S.A. v. Shanghai Cottage at Fairhope, Inc.*, No. 202-3-18 (D. Ala. 2012). Available at: www.ada.gov/shanghai_settle.htm (last accessed April 29, 2013).
130. *U.S.A. v. Micro-Hospitality Partnership*, No. 202-71-73 (M.D. Tenn. 2012). Available at: www.ada.gov/microtel_settle.htm (last accessed April 29, 2013).
131. 28 C.F.R. § 36.302(e).
132. 28 C.F.R. § 36.302(e)(1)(i).
133. 28 C.F.R. § 36.302(e)(1)(ii).
134. 28 C.F.R. § 36.302(e)(1)(iii).
135. 28 C.F.R. § 36.302(e)(1)(v).
136. 28 C.F.R. § 36.302(e)(2).
137. *U.S.A. v. Westgate Resorts, Ltd.* (E.D. Tenn. 2012). Available at: www.ada.gov/westgate_sa.htm (last accessed April 29, 2013).
138. Consent Decree between the United States of America and Hilton Worldwide Inc (D.D.C. 2010). Available at: www.ada.gov/hilton/hilton.htm (last accessed April 28, 2013).
139. Press release: Department of Justice Reaches Agreement with Hilton Worldwide Inc. over ADA Violations at Hilton Hotels and Major Hotel Chains Owned by Hilton. November 9, 2010. Available at: www.justice.gov/opa/pr/2010/November/10-crt-1268.html (last accessed April 28, 2013).
140. *See Extension of and Addendum to Settlement Agreement Between the U.S.A. and Motel 6 Operating, L.P.,* available at: www.ada.gov/motel62.htm (last accessed April 28, 2013); *Second Extension of and Addendum to Settlement Agreement Between the U.S.A. and Motel 6 Operating, L.P.,* available at: www.ada.gov/motel6ext2.htm (last accessed April 28, 2013).

141. *U.S.A. v. Marriott Int'l, Inc.* Available at: www.ada.gov/marriott.htm (last accessed April 30, 2013).
142. 28 C.F.R. § 36.303.
143. *Bunjer v. Edwards*, 985 F. Supp. 165 (D.D.C. 1997); *see also* National Association of the Deaf Memo on Access to Drive-Through Services. Available at: www.nad.org/sites/default/files/2010/February/NADDriveThruMemo.pdf .
144. *Bunjer*, 985 F. Supp. at 166.
145. *Id*. at 167.
146. Enforcing the ADA: A Status Report from the Department of Justice, January – March 2011. Available at: www.ada.gov/janmar11.htm
147. 28 C.F.R. Part 36, Appendix B.
148. *Camarillo v. Carrols Corp.*, 518 F.3d 153 (2d Cir. 2008).
149. *Id*. at 156.
150. *Id*. at 157.
151. *Camarillo v. Carrols Corp.*, 2010 WL 2557209 (N.D. N.Y. June 24, 2010).
152. Consent Decree between the U.S.A. and Friendly Ice Cream Corporation (D. Mass. 1997). Available at: www.ada.gov/friendb.htm (last accessed April 30, 2013).
153. DOJ Guide for Places of Lodging: Serving Guests Who Are Blind or Who Have Low Vision. Available at: www.ada.gov/lodblind.htm
154. *U.S.A. v. Westgate Resorts, Ltd.* (E.D. Tenn. 2012). Available at: www.ada.gov/westgate_sa.htm (last accessed April 30, 2013).
155. *U.S.A. v. NCL (Bahamas) Ltd., and NCL America, LLC.* Available at: www.ada.gov/ncl_2010/ncl_consentdecree.htm (last accessed May 1, 2013).
156. *See Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006) (finding in a website-access case that "[t]o limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute"); *Rendon v. Valleycrest Prod., Ltd.*, 294 F.3d 1279 (11th Cir. 2002) (finding that discrimination did not have to occur on-site in order to violate the ADA).
157. *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-16 (9th Cir. 2000) (requiring some connection between the goods or services complained of and an actual physical place); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998) (finding no nexus between challenged insurance policy and services offered to the public from insurance office).
158. *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002).
159. *Nat'l Ass'n of the Deaf, et al. v. Netflix, Inc.,* 896 F.Supp.2d 196 (D. Mass. 2012).
160. Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Governments. Available at: www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1190-AA65 (last accessed April 30, 2013).
161. 42 U.S.C. § 12112(a).
162. 42 U.S.C. § 12111(5).
163. *Holmes v. Cutchall Mgmt. Kansas LLC*, 2012 WL 3071056 (D. Kan. July 26, 2012).
164. For more information about medical examinations and inquiries, please see the following documents: EEOC Enforcement Guidance on Disability-Related Inquiries

and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA). Available at: www.eeoc.gov/policy/docs/guidance-inquiries.html; Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA). Available at: www.eeoc.gov/policy/docs/qanda-inquiries.html; Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations. Number 915.002. Date 10/10/95. Available at: www.eeoc.gov/policy/docs/preemp.html.

165. The FDA Food Code is a model code developed by the FDA which is offered for adoption by local, state, and federal government jurisdictions for administration by the various departments, agencies, and other units within each jurisdiction that has been delegated compliance responsibilities for food service, retail food stores, or food vending operations. The 2001 Food Code is available online at: http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/FoodCode2001/default.htm.
166. *Id*. at Chapter 2. (discussing Salmonella Thyphi, Shigella spp., Shiga toxin-producing Escherichia coli, and Hepatitis A virus). Note that FDA Food Code was updated in 2009 and is available here: www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM2019396.htm.
167. 42 U.S.C. § 12112(d)(2).
168. How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers. Available at: www.eeoc.gov/facts/restaurant_guide.html (Last accessed April 28, 2013).
169. 42 U.S.C. § 12112(d)(3).
170. 42 U.S.C. § 12112(d)(3)-(4).
171. 42 U.S.C. § 12112(d)(4).
172. *See* How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers, *supra* note 168.
173. *Id*.
174. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m); 29 C.F.R. pt. 1630 app. § 1630.2 (o).
175. 29 C.F.R. § 1630.2(n).
176. *Equal Employment Opportunity Commission v. Denny's, Inc.*, 2010 WL 2817109 (D. Md. July 16, 2010).
177. *Id*. at *2.
178. *Burnett v. Pizza Hut of Am., Inc.*, 92 F.Supp.2d 1142, 1146 (D. Kan. 2000).
179. *Id*. at 1147.
180. *Kerr v. Emerald Hospitality, Inc.*, 2013 WL 395453, *1 (N.D. Okla. Jan. 31, 2013).
181. *Id*
182. This legal brief is not intended to be an in-depth discussion on the legal requirements regarding reasonable accommodation; nor will it provide a full discussion of many important ADA terms and concepts, such as the definitions of "disability," "qualified," "undue hardship," "fundamental alteration," "interactive process," appropriate "medical inquiries," "direct threat," and "essential functions." For additional information on these topics, please see *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, No. 915.002

(October 22, 2002), www.eeoc.gov/policy/docs/accommodation.html; *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, No. 915.002 (July 27, 2000), www.eeoc.gov/policy/docs/guidance-inquiries.html; 42 U.S.C. §§ 2102(2), 12111(8); 29 C.F.R. §1630.2(g)-(n); 29 C.F.R. pt. 1630 app. §§ 1630.2(g)-(n).

183. 42 U.S.C. § 12112(b)(5)(A).
184. 42 U.S.C. §12111(10)(A).
185. *See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, *supra*, note 182 Questions 1 and 2.
186. 29 C.F.R. § 1630.2(o)(1)(ii)-(iii).
187. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o).
188. *See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, *supra*, note 182. *See also e.g.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (modifying workplace policies); *Garcia-Ayala v. Lederle Parenterals, Inc.,* 212 F.3d 638, 646 (1st Cir. 2000) (leave); *Carr v. Reno*, 23 F.3d 525, 530, (D.D.C. 1994) (work at home).
189. *See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship*, *supra*, Questions 1 and 2.
190. *Id.* at Question 3.
191. *Id.* at Question 1; 29 C.F.R. § 1630.2(o)(3).
192. *Id.* at Question 35; *see also,* 29 C.F.R. pt. 1630 app. §1630.9.
193. *See* How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers, *supra* note 168.
194. *Id*. at Question 25.
195. *Fjellestad v. Pizza Hut of America*, 188 F.3d 944, 947 (8th Cir. 1999).
196. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 276 (1987).
197. *Id*.
198. *Arline*, 480 U.S. at 280–86, 285.
199. *Id.* at 287.
200. *Id.* at 288.
201. 42 U.S.C. § 12113(a).
202. 42 U.S.C. § 12113(b).
203. 42 U.S.C. § 12111(3).
204. 29 C.F.R. § 1630.2(r).
205. *Id*.
206. *Id*.; *see also* EEOC Interpretive Guidance ("Such consideration must rely on objective, factual evidence—not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes—about the nature or effect of a particular disability, or of disability generally."). Available at http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1630.xml (last accessed April 30, 2013).
207. 29 C.F.R. § 1630.2(r).
208. EEOC Interpretive Guidance, *supra* note 206.
209. *Id.*
210. *Id.*
211. 42 U.S.C. § 12113(e)(1).

212. 42 U.S.C. § 12113(e)(2).
213. Food Code, *supra* at notes 164-165, Question 9.
214. *Henderson v. Thomas*, 2012 WL 6681773 (M.D. Ala. Dec. 21, 2012).
215. *Id*. at *31.
216. How to Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers, *supra* note 168, Question 19.
217. *Navarre v. White Castle System, Inc.,* 2007 WL 1725382 (D. Minn. June 14, 2007) (granting employee's ADA claims regarding constructive discharge, failure to accommodate and retaliation).
218. *Id*. at *3.
219. *Id*. at *4.
220. *EEOC v. BobRich Enter.,* No. 3:05-CV-01928-M (N.D. Tex. Jul. 27, 2007).
221. *Mitchell v. Fowler Foods/Kentucky Fried Chicken*, 2013 WL 1508293 (W.D. Ky. April 10, 2013).