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A collaborative program between the Southwest ADA Center, Great Lakes ADA Center and members of the ADA National Network

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2

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3

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4

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5

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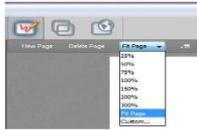
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6

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7

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8

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9



Readily Achievable Barrier Removal and Small Businesses

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10

Small Businesses and the ADA

- Title III of the Americans with Disabilities Act (ADA) requires “public accommodations” offering services to the public (hotels, restaurants, theaters, stadiums, offices, retailers), be accessible to people with disabilities.
- Requirements cover New Constructions, **Alterations** and Existing Facilities.

11

Different barrier removal standards Apply to new, altered and older existing facilities

- New Constructions;
- Alterations or Renovations;
- Readily Achievable Barrier Removal - existing facilities (not undergoing renovation).

12

New Constructions

- A facility built after January 26, 1993 must be in full compliance with Department of Justice Accessibility Standards;
- Exception applies in rare instances of “structural impracticability” caused by extreme terrain or architectural issues that cannot be reasonably resolved. 42 U.S.C. § 12183(a)(1).

13

Alterations

- Facilities built before, and altered after, January 26, 1993, altered portions must comply with ADA Standards to the maximum extent feasible, and path of travel and other amenities serving altered portions must be accessible to the extent it costs less than 20 percent of the entire cost of the project. 42 U.S.C. § 12183(a)(2).

14

What is an Alteration

- “Alteration” is a change affecting the usability of a facility or any part thereof and includes, but is not limited to, “remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the configuration of walls.

15

Normal Maintenance is not Alteration

- Normal maintenance, reroofing, painting or wallpapering, asbestos removal, or changes to mechanical and electrical systems are not alterations unless they affect the usability of the building or facility. 28 C.F.R. §§ 35.151(b), 36.402.

16

Readily Achievable Barrier Removal I

- Facilities built before January 26, 1993 have a continuing obligation to remove architectural and communication barriers that are structural in nature.
- Barriers must be removed where “readily achievable” on an on-going basis. 42 U.S.C. § 12181(9), 12182(b)(2)(A)(iv).

17

Readily Achievable Barrier Removal II

- Public accommodations are required to remove barriers only when readily achievable;
- This means when it is easily accomplishable and able to be carried out without much difficulty or expense.

18

What is an Architectural Barrier?

- Architectural barriers are physical elements of a facility that impede access by people with disabilities;
- Barriers include more than obvious impediments like steps and curbs that prevent wheelchair access.

19

What is a communication barrier that is structural in nature?

- Barriers that are an integral part of the physical structure of a facility - like:
- Conventional signage generally inaccessible to visually impaired people;
- Audible alarm systems inaccessible to hearing impaired people;

20

Barrier Removal Timing

- Identified barriers to be removed, and not readily achievable at present, will later be required when there is a change in business circumstances that makes barrier removal possible on a continuing basis.

21

Questionable Barrier Removal Activities

- An alteration that decreases or has the effect of decreasing the accessibility of a building below the requirements for new construction at the time of alteration is prohibited. See, Section 202.3.1 of the 2010 ADA Standards.
- May include removal of a non-compliant ramp or removal of an accessible parking space, where replacement is not planned.

22

“Grandfather Clause” vs. Readily Achievable Barrier Removal

- Existing facilities are not exempted by "grandfather" provisions" often incorrectly cited by business owners and code officials.
- A notion that the ADA “grandfathers” old properties – such as facilities built before the ADA is a gross misconception.

23

Again - No “Grandfather” Clause

- There is no “grandfather” exemption clause in the ADA that exempts a business from barrier removal compliance based on property age.
- Even Historical Preservation properties must undertake Readily Achievable Barrier removal.

24

Who Owns and Who Pays?

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- Ownership or operation of a business, leasing facilities to a business, or leasing a business to another business comes with on-going barrier removal obligations;
- Landlords & Tenants are jointly liable for ADA compliance.

25

Determining when Barrier Removal is Readily Achievable I

- Case-by-case judgment. Factors include;
 - 1) nature and cost of the action;
 - 2) overall financial resources of the site or sites involved; number of employees; effect on expenses and resources; legitimate safety requirements for safe operation;

26

Determining when Barrier Removal is Readily Achievable II

- 3) geographic separateness, and administrative or fiscal relationship of site or sites in question to any parent corporation;
- 4) If applicable, overall financial resources of any parent corporation; overall size of parent corporation or entity regarding number of employees; number, type, and location of facilities; and

27

Determining when Barrier Removal is Readily Achievable III

5) If applicable, type of operation or operations of any parent corporation, including composition, structure, and functions of the workforce of the parent corporation.

28

Fundamental Alteration

- A modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered.

29

Undue Burden

- Significant difficulty or expense.
- The factors to be considered in determining whether an action would result in undue burden are the same as those for Readily Achievable Barrier removal.

30

U.S. Chamber of Commerce on the ADA

America prospers when... its citizens can contribute their talents and energy to improving our economy, our country and our way of life.

[The business community] is committed to advancing the ADA's legacy of equality of opportunity for all. For businesses, employing individuals with disabilities is not only the right thing to do, it's the smart thing to do.

31

The ADA Drive-by Lawsuit - 1

- A disparagement of what could be a legitimate complaint;
- News headlines alleging “minor” violations by a business suffering wrath of “disabled people.”
- Alleged by “tester” who has not patronized the business.

32

The ADA Drive-by Lawsuit - 2

- Non-specific lawsuits allegedly over height of a paper towel dispenser, the width of a parking space, or height of a toilet seat;
- Cases seldom go to trial;
- Business told that settlement to comply avoids costs to defend a federal lawsuit;
- Business reaches settlement paying plaintiff attorney.

33

The ADA Drive-by Lawsuit - 3

- These are neither class actions nor mediations so no consideration whether a settlement is fair and reasonable.

34

Headlines and Misinformation

- In one story CBS's 60 Minutes highlighted the ADA in a segment on drive-by lawsuits;
- Focused on the assumed strain that complying with ADA puts on small businesses and how serial complaint filers appear to play the system using Google Earth to identify violations.

35

Congress Response

- Congress responds yearly to the business lobby by proposing bills that require giving advanced notice of ADA violations before a business can be sued;
- A requirement not attached to other Civil Rights laws; and,
- Despite the ADA being almost 30 years old.

36

Old Business Realities

- In the U.S. businesses are always on notice of applicable laws;
- ADA Readily Achievable Barrier Removal is on-going;
- Customers have no obligation to educate businesses under any law;

37

The Universal Inclusion Problem: Stigmatizing Attitudes

The 60 Minutes segment highlighted a hotel owner who was sued for not having an accessible pool. He stated the injustice of his situation by saying: "At no point in time we ever had a customer on the property that requested it or that was even in a room that requested it."

38

Further...

- The CBS 60 minutes segment depersonalized a concerned individual with a disability by not showing her head;
- The story failed to delve into why there are as many ADA violations as "abusive" lawsuits;

39

Furthermore...

- Stories typically do not question why business owners are unaware of responsibilities implying that ignorance is reasonable;
- One irony of drive-by lawsuits is that they happen because of a real lack of care to remove barriers by businesses that, in many cases, had been previously warned by a customer with a disability.

40

Basic Guidance I

- Proactively review your business by making use of the free **ADA Existing Facilities Checklist** for Readily Achievable Barrier Removal located at:
- www.ADAChecklist.org
- Create detailed documentation of the site review. This shows “good faith” in an effort to remove barriers.

41

Basic Guidance II

- Seek specificity and clarity for “broad” or non-specific allegations;
- For instance: parking was not located “on the safest most direct route,” slopes were “dangerous and difficult to overcome,” and there were not proper accessible parking and bathrooms...

42

Basic Guidance III

Federal Rules of Civil Procedure require that complaints allege clear violations for the sake of fair notice through a lawsuit. Hence:

- What parking lots and what is the problem?
- What routes, and what is the problem?
- Which bathrooms, and what is the problem?

43

Basic Guidance IV

- Courts tend to reject the idea that plaintiffs have standing to sue for any violations their experts might identify during discovery. Courts tend to require that a plaintiff suffer a real injury before having standing to sue:
- Plaintiffs cannot sustain a claim for barriers of which they have no knowledge and only seek to identify during discovery. See, **Creel v. Rowan University**, 2017 WL 2734709 (D.N.J. June 23, 2017).

44

Basic Guidance V

In **Kennedy v. Puleio Enterprises, LLC et al.**, 2017 WL 2600789 (M.D. Fla. June 15, 2017) the court took a simpler view of such coercive *drive-by* tactics. The Court held that plaintiff standing is measured at the time the lawsuit is filed, and therefore cannot include barriers to access that are not discovered until later during discovery.

45

A Point of Departure

- Cases like these invariably indicate that ADA compliance is a matter determined on a case-by-case basis. Challenges may be asserted against either side.
- Whether ADA “drive-by lawsuits” end up delayed by Congressional action will not do away with the on-going Readily Achievable Barrier removal obligation applicable to existing facilities.

46

A Point of Departure II

- Existing facilities bear the lowest obligation in ADA barrier removal. What may not be modifiable now will hopefully be modified later when fiscal resources permit.
- The Existing Facilities Checklist is a formidable tool that can be used, not only to review a site for accessibility, but should also serve to document future plans for compliance.

47

Questions?



48

Contact Your Regional ADA Center

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49

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50



Next ADA Legal Webinar Session

September 20, 2017

Reasonable Accommodation Update

Featuring: Barry Taylor and Rachel Weisberg
Equip for Equality



51