

Americans with Disabilities Act: Title III - Public Accommodations

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42 USC § 12181 In 1990 Congress passed the Americans with Disabilities Act (ADA). This law prohibits discrimination against people with disabilities in employment, transportation, communication, and access to services, goods, and public accommodations. The ADA has five titles. This chapter will only address the public accommodation provisions or Title III. *(See ADA: Title I - Employment Discrimination and Title II - Government Programs and Services chapters, pgs. 305 and 319, respectively.)*

What is the Goal of Title III?

Title III ensures equal opportunity for individuals with disabilities. Title III guarantees that individuals with disabilities are offered full and equal enjoyment of the “goods, services, facilities, privileges, advantages, or accommodations” offered by a place of public accommodation (*defined below*). Title III is similar to the Civil Rights Act of 1964 in that it prohibits the exclusion, segregation, and unequal treatment of people with disabilities.

Who is Protected by Title III of the ADA?

Definition of disability

The definition of a “disabled” person for Title III is the same as that for the other titles of the ADA. The three categories of individuals that are protected by Title III of the ADA are: individuals who have a physical or mental impairment that substantially limits one or more major life activities; individuals who have a record of a physical or mental impairment that substantially limits one or more of the individual’s major life activities; and individuals who are regarded as having such an impairment, whether they have the impairment or not. *(Refer to ADA: Title 1 - Employment Discrimination chapter, pg. 306 for more specific language as to the ADA definition of a “disabled” person.)*

Who Must Comply with Title III of the ADA?

Public accommodations 28 CFR § 36.104

The public accommodations provision applies to any nonprofit group or private place of business that is open to the public for the sale or lease of goods or services. The Act lists 12 general categories of public accommodation, which include: places of lodging; places serving food or drink; places of exhibition and/or entertainment; places of public gathering; sales or rental establishments; service establishments; stations used for specified public transportation; places of public display or collection; places of recreation; places of education; social service center establishments; and places of exercise or recreation.

Exempted entities

Restaurants, doctor's offices, day care centers, hotels, grocery stores, sporting facilities, movie theaters, and museums are all considered public accommodations. Title III includes all businesses, even small ones. Private clubs and religious organizations are the only private entities explicitly exempted from the requirements of Title III.

What is Required by Title III?

Program modifications
28 CFR § 36.202 and 36.203

Most integrated manner

Public accommodations are required to make reasonable modifications to their policies, practices, and procedures in order to make their goods and services available to people with disabilities. In addition, these modifications must be made available in the most integrated manner possible. There are several broad principles that underlie the nondiscrimination requirements of Title III. These include: equal opportunity to participate; equal opportunity to benefit; and receipt of benefits in the most integrated setting appropriate.

These principles can be implemented by:

1. Modifying programs or practices.
2. Making available auxiliary aids and services.
3. Removing architectural barriers in buildings.

Program modifications

A public accommodation must provide modifications of its programs so that a person with a disability is able to participate, unless a modification would be an undue burden or fundamentally alter the nature of the goods or services provided.

Example: A museum could provide an interpreter for a tour so that people who are deaf or hard of hearing would be able to participate.

Occasionally it may not be possible to offer the exact same program or activity even with modifications. In this case, a separate program is permitted when it would ensure equal opportunity, although the program must be appropriate for the individual.

Example: An art museum could offer a "hands on" tour for people who are blind, which would allow them to touch art work.

Separate programming should only be used when it is not possible to modify the original program or activity. Individuals with disabilities cannot by default be excluded from the regular program or be required to accept special services or benefits. A person with a disability cannot be limited to certain performances at a theater, nor could a child in a wheelchair be prohibited from participating in a dance class.

Condition for exclusion
28 CFR § 36.208

A public accommodation may exclude a person with a disability from participation in an activity: if that person's participation would cause a direct threat to the health or safety of others. The assessment of risk must be made in an objective manner, and not be based upon assumptions, generalizations, or stereotypes. In addition, the public accommodation must determine that the risk cannot be eliminated or reduced to an acceptable level by modifications. It would be a violation to refuse to admit a person with HIV to a restaurant because of fears of transmission of the virus to others. HIV cannot be transmitted through casual contact, and thus the perceived risk is unfounded. In contrast, an amusement park could be permitted to establish height requirements for some roller coaster rides. These restrictions must be based upon actual risks, and not speculation, stereotypes, or generalizations.

Policy/practice modifications
28 CFR § 36.302

In addition to program modifications, public accommodations must also modify their policies or practices for people with disabilities. For example, a hotel must modify its "no pets" policy so that it does not apply to people accompanied by their service animals. In addition, a public accommodation cannot have policies or eligibility requirements that tend to, or actually do, screen out people with disabilities, unless it can show a compelling reason for those requirements. It would be a violation for a grocery store to only accept a driver's license in order to cash a personal check, because this policy would exclude people who are unable to obtain a driver's license because of a disability. A grocery store could modify this policy so that other forms of identification, such as state ID cards, are accepted as well. The prohibition against screening out people with disabilities also applies to processes related to licensing, certification, and testing. Thus, a professional organization cannot prohibit people with a history of mental illness from obtaining a license or certification simply because of that history.

Use of aids and services
28 CFR § 36.303

Another way in which public accommodations can provide access to goods and services to people with disabilities is through the use of auxiliary aids and services to promote effective communication. Auxiliary aids and services include a wide variety of options such as closed captioning, telecommunication devices, interpreters, taped texts, and speech synthesizers. It could also include much simpler things such as written versions of spoken tours and telephone handset amplifiers.

28 CFR § 36.306

Although public accommodations must provide some equipment and services to people with disabilities, they are not required to provide personal or individually prescribed devices or services, such as wheelchairs, prescription eyeglasses, and hearing aids, or services such as eating or dressing. However, services of a minor nature, such as a waiter removing the paper from a straw, would not be considered services of a personal nature. **Auxiliary aids and services should be provided unless a public accommodation can show that providing these aids or services would fundamentally alter the nature of the goods or services offered, or would result in an undue burden.**

Although public accommodations are financially responsible for providing services or aids, they can choose which auxiliary aid to provide, as long as it results in effective communication. Public accommodations do not have to provide the most advanced technology, nor the specific aid requested by an individual, as long as effective communication is possible with the provided service or aid.

Example: A clerk may exchange written notes with an individual who is deaf for a clothing purchase, although this form of communication would probably not be sufficient for explaining the complicated loan information involved in the purchase of a car, when an interpreter might be needed.

Reasonable time frame

Public accommodations also have the responsibility to provide auxiliary aids and services within a reasonable time frame. What constitutes a reasonable time frame will vary and is dependent upon the circumstances of each situation. It might be reasonable for a large car dealership to need a few hours to install hand controls for a vehicle test drive, but it would not be acceptable to make a person wait days to install the hand controls merely for the convenience of the dealership. In contrast, a small dealership in an isolated area may require days or even weeks to order and receive the equipment for hand controls. The reasonable time frame standard is judged on a case by case basis. It is not acceptable to delay providing auxiliary services or aids merely for the convenience of the public accommodation, but it is recognized that occasionally it may not be possible to immediately provide auxiliary aids or services.

Interpreting undue burden standard

A public accommodation must provide modifications in policies and programs, and auxiliary services and aids, unless it would fundamentally alter the nature of the goods and services offered or result in an undue burden. An example may be a person with low vision could not require a cocktail bar to install bright lights to enable her to see better. One of the fundamental features of a cocktail bar is the low level lighting and the mood that it creates. An undue burden is defined as "significant difficulty or expense." The undue burden standard will vary from case to case because it is not based on a set dollar amount or financial cap. There are a number of factors that are considered in determining whether a modification would be an undue burden. Some of these factors include:

1. The nature and cost of the action.
2. The overall financial resources of the public entity and its parent company.
3. The impact of the action on the operation of the public accommodation.
4. The type of goods or services provided by the public accommodation.

It might be an undue burden for a volunteer theater troop, which is supported solely by patron donations, to provide interpreters for every one of their performances. However, it would probably not be an undue burden for a metropolitan performing arts theater to provide that service. Although a public entity might be able to show that a specific modification would be an undue burden, that would not negate its responsibility to provide an alternative modification. A public accommodation must attempt to meet the requirements of a person with disability to the greatest extent possible, unless the modifications would result in an undue burden.

It is the responsibility of the public accommodation to assume any financial obligations resulting from compliance with the ADA, not the person requesting modifications or services. In addition, public accommodations cannot assess people requesting aids or program modifications surcharges to provide those services, aids, or modifications.

Example: A doctor cannot bill a person for the services of an interpreter, nor could a hotel charge a person for the use of a teletype device.

Removal of barriers
28 CFR § 36.304

Another provision of Title III is the removal of architectural and structural communication barriers in facilities to ensure access for customers, clients or patrons. Architectural barriers are physical elements of a facility that impede access by people with disabilities. These barriers could include obvious impediments such as steps, but also more subtle barriers such as overhanging structures that could injure a person with a vision impairment. Structural communication barriers refers to barriers that originate from the physical structure of the building.

Example: Auditory fire alarms would present a structural communication barrier for people who are deaf or hearing impaired.

If a public accommodation is unable to provide access by removing barriers, it is required to provide alternatives. These measures must be undertaken in a safe manner, and must preserve the dignity of the person to the maximum extent possible.

Example: If a gas station is unable to redesign its gas pumps to enable people with disabilities to use them, it can allow attendants to fill the gas tanks for people with disabilities.

However, if a public accommodation must remove barriers through alternative means, it cannot charge people with disabilities for the service or modification. Thus, the gas station in the example above, must charge customers with disabilities the self-service price for gasoline, and not the full-service price. The Americans with Disabilities Act Accessibility Guidelines (**ADAAG**) can serve as a guide for identifying the various kinds of measures that can be taken to remove barriers.

Priority list for barrier removal

The Department of Justice (**DOJ**) has recommended an order of priorities for barrier removal. First, provide access from parking areas, sidewalks and entrances so that the person can get “through the door.” Second, provide access to those areas where goods and services are provided. Third, provide access to rest room facilities. Finally, take any other measures to provide access to the goods, services, or facilities. Complying with barrier removal obligations is an ongoing process. It is expected that public accommodations will develop a compliance plan that outlines the process by which an entity will become accessible. An ongoing schedule should be established for the implementation of the accessibility modifications, and a public accommodation must continue to make “readily achievable” modifications until it is compliant.

Remodeling

28 CFR § 36.402 et seq.

A public accommodation has additional obligations when altering or remodeling a building. Any alteration must follow the ADAAG to the maximum extent feasible. An alteration would include any renovation, remodeling, or rearrangement in structural parts, but not normal maintenance of a building unless it affects the usability of the building. When an alteration is made to a “primary function area” there must also be an accessible path of travel from the altered area to the entrance. A primary function area includes any area where major activity takes place, such as customer service areas and work areas. The “path of travel” is a continuous route connecting the altered area to the entrance. It can include such areas as bathrooms, telephones, drinking fountains, elevators, lobbies, and sidewalks. Spending to make alterations to meet the “path of travel” requirement must be made up to 20% of the cost of the original alteration to the primary function area. If the cost of the alterations would exceed 20%, the public accommodation must still make the path of travel accessible to the greatest extent possible up to the 20% limit. The alterations should then be made in the following order: accessible entrance, accessible route to the altered area, at least one accessible restroom, phones, drinking fountain, and the other areas such as parking, storage, and alarms.

Places of historic significance

28 CFR § 36.405

There is one exception to the requirements for alterations and building accessibility. Alterations are not required for buildings that are listed or eligible for listing in the National Register of Historic Places or properties designated as historical under state or local law. Alterations that would threaten or destroy a historic significance of a feature of the building are not required, but it would be necessary to attempt other modifications to ensure a minimal level of access.

Example: A ramp may be steeper than ordinarily permitted, or the accessible entrance need not be the one used by the general public. If even these minimal changes would threaten or destroy the historical significance, then access could be provided through other methods, such as offering a video tour of an inaccessible room in a historical building.

Old vs. new building standards The standards of accessibility and barrier removal differ slightly between old and new buildings. Older public accommodations are required to remove barriers only when it is “readily achievable” to do so. “Readily achievable” means easily accomplished and able to be carried out without much difficulty or expense. It does not mean extensive remodeling or burdensome expense. In addition, the readily achievable standard is flexible and determined on a case-by-case basis. Factors considered in this standard include the nature and cost of the action, the overall financial resources and size of the public accommodation, the type and location of the facility, and the operations of the public accommodation. The administrative and fiscal relationship between a site and its parent corporation should be considered as well.

28 CFR § 36.401 **New buildings are held to a higher standard than old buildings.** All newly constructed buildings must be readily accessible to and usable by people with disabilities to the extent that it is structurally practical. All new construction must be built in strict compliance with the ADAAG. Structurally impracticable means that unique characteristics of the land prevent the incorporation of accessible features into the new building. This exception is very narrow, and can only be used in rare and unusual circumstances.

How are Complaints Made?

There are two avenues for filing ADA Title III complaints. Both individuals and the Department of Justice can file complaints. Individuals can file a civil action for injunctive relief. The remedies available in a private suit may include a permanent or temporary injunction, a restraining order, or other type of order, such as one to remove barriers or provide an auxiliary aid or service. Compensatory or punitive monetary damages cannot be granted in a private suit. The other avenue is through the Department of Justice (**DOJ**). Suits by the DOJ focus on complaints that show a pattern or practice of discrimination, or discrimination that raises an issue of public importance. The remedies available in civil actions brought by the DOJ include those available to individual suits, but can also include monetary damages. Monetary damages do not include punitive damages, but do include all forms of compensatory damages, such as out-of-pocket expenses and damages for pain and suffering. The court may also assess a civil penalty against the violator in an amount up to \$50,000 for the first violation, and up to \$100,000 for any subsequent violation.

The ADA also encourages the use of alternative means of dispute resolution, such as settlement negotiations, conciliation, facilitation, mediation, minitrials, and arbitration. These types of procedures may be more efficient and less expensive than judicial procedures. Use of alternative procedures is completely voluntary and must be agreed to by both parties involved. The suggestion to try alternative dispute resolution can come from either party, the DOJ, or a court where the matter is pending.