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The Americans With Disabilities Act: How Upcoming Changes Will Impact Landlords

By Ivette P. Alvarado

It's been 20 years since the first Americans with Disabilities Act (ADA) regulations were signed into law. But landlords now need to prepare for the new ADA Standards for Accessible Design, as compliance with these new regulations may be required by March 2012. For most property owners who are in compliance with the 1991 ADA standards, and who are not planning to construct new facilities or undertake alterations to existing buildings, the 2010 ADA Standards for Accessible Design will not cause a great impact. However, a review of existing leases and proper negotiation of new leases — to adequately address the revised regulations

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and who should be responsible for them — is recommended.

The new regulations to the ADA were enacted on July 23, 2010, and while businesses had the option to start complying with the 2010 standards beginning September of last year, mandatory compliance is not required until March 15, 2012. The ADA regulations affect public accommodations like stores, restaurants, movie theaters, hotels, schools and shopping malls. Also affected are commercial facilities that do not provide goods or services directly to the public, like office buildings, factories and warehouses. The ADA and the revamped rules provide for both general nondiscrimination requirements (i.e., a department store must modify its policy permitting only one person at a time in a dressing room to accommodate a disabled person's companion), which apply to places of public accommodations only, and standards for accessible design that apply to all facilities. While a landlord may wish to confirm that its ten-

ants qualifying as public accommodations are complying with the revised general nondiscrimination requirements, of bigger concern to landlords is compliance with the new Standards for Accessible Design.

Unlike local building codes, compliance with the ADA Standards cannot be "grandfathered," but the new legislation does offer certain "safe harbors" to businesses and property owners. If a facility was previously constructed or altered in compliance with the 1991 standards, or if architectural barriers that make accessibility to the disabled difficult or impossible were removed in compliance with the 1991 standards, then no additional action is needed. Of course, there are exceptions to that safe harbor, including new requirements for swimming pools, golf facilities, play areas and bowling alleys that were not contained in the 1991 standards, but which must be complied with even though no new construction or alterations are planned for those building elements.

For those facilities not meeting the safe-harbor conditions, or those containing elements that were not regulated by the 1991 standards but that are now regulated by the 2010 standards, the revised ADA rules do give businesses and property owners a break by only requiring compliance with the new 2010 standards for barrier removal when it is "readily achievable" to do so. Title III of the ADA regulations defines "readily achievable" as "easily accomplishable and able to be carried out

without much difficulty or expense” and provides a list of factors to be considered, including nature and cost, type of operations and legitimate safety requirements. Thus, where a business or property owner cannot take advantage of a safe harbor, the required timing for removal of architectural barriers in compliance with the 2010 standards will depend on the size and financial ability of such businesses or property owners. However, property and business owners should be aware that the obligation to comply with the 2010 standards for barrier removal is a continuing one.

For landlords that are able to take advantage of the safe harbor, the only concern becomes alterations of existing facilities. Alterations, as defined by the ADA regulations, include: remodeling, renovating, rehabilitating, reconstructing, changing or rearranging structural parts or elements, or changing or rearranging plan configurations of walls and full-height partitions of a facility. Note that normal facility maintenance, including re-roofing, removing asbestos and changes to the mechanical and electrical systems of a facility, are not considered alterations unless they affect the usability of the facility. Landlords should review their existing leases to confirm whether the landlord or tenant is responsible for ADA compliance in the event alterations to the premises are undertaken. In almost all cases, the tenant is responsible for ADA compliance for alterations undertaken by or for the tenant, in which case the landlord must be sure the alterations are being undertaken in compliance with the applicable ADA standards. On the other hand, where alterations to an existing facility are part of a tenant fit-up being undertaken by a landlord, the landlord is likely responsible for ADA compliance.

Timing is key in determining whether the 1991 or 2010 standards should apply to such alterations. If the last building permit application for an alteration project is certified prior to March 15, 2012, then either the 1991 or 2010 standards may be used. In jurisdictions, like New Jersey, where certification of permit applications is not required, the permit application must be

received by March 15, 2012, if property or business owners want to take advantage of either standard. If no permits are required for the alteration, physical construction must start before March 15, 2012, if the property or business owner wants to choose between either standard.

For landlords not being able to take advantage of the safe harbor, removal of architectural barriers is an added concern. Until the March 15, 2012, deadline, business owners and property owners of existing buildings have a choice of whether to remove architectural barriers in accordance with the 1991 standards or the 2010 standards. Changes from the previous standards include the required number of handicap-accessible parking spaces, required height of service counters and new standards for accessible routes. Again, landlords should review their existing leases to determine whether the tenant or landlord is responsible for compliance with the ADA. In most cases, landlords will be responsible for ADA compliance for the building and any common areas of the property, including parking. Tenants are usually responsible for ADA compliance for the leased premises. In either case, if the existing lease indicates compliance is required in accordance with the 1991 standards and does not make reference to amendments to such regulations, the parties may wish to consider a simple lease modification to ensure that ADA compliance is in accordance with the regulations then in effect. Furthermore, landlords should consider requiring tenants undertaking alterations prior to the March deadline to comply with the 2010 Standards.

Likely the most significant impact for landlords of the new regulations will be regarding new construction. Once again, the timing of the new construction determines which standards apply. If the last building permit application for a new construction project is made (or certified, where such certification is required) by March 15, 2012, or where no permits are required and physical construction has started before the March deadline, then either the 1991 or 2010 standards may be applied. Simple

ground breaking or demolition of an existing structure does not qualify as the start of physical construction. Landlords undertaking construction of a new facility may consider using either standard, but where tenants are undertaking construction under a ground lease, landlords should consider requiring compliance with the 2010 standards even if the 1991 standards remain an option.

Financial ability may sometimes be a key negotiating factor between landlords and tenants, but landlords and business owners alike should note there are tax incentives available to assist in financing ADA compliance. Businesses with 30 or fewer full-time employees or with total annual revenue of \$1 million or less may take advantage of the IRS’ Disabled Access Credit, which provides a non-refundable credit each year the business incurs expenses in connection with providing persons with disabilities access to their facility. Business of all sizes undertaking removal of architectural barriers in existing facilities may also, in addition to the Disabled Access Credit, take an Architectural Barrier Removal Tax Deduction of up to \$15,000 per year for qualified expenses.

As the March 15, 2012, deadline approaches, landlords and others undertaking company policy improvements, removal of architectural barriers, new construction or renovations in compliance with the ADA, whether under the 1991 or 2010 standards, should carefully review their rights and obligations under existing leases and carefully draft provisions in new leases to address which standards should be met and which party should undertake such compliance. For more information on the new 2010 ADA standards, visit the Department of Justice’s ADA website at http://www.ada.gov/2010ADAstandards_index.htm. More information on the tax incentives mentioned above can be found on the IRS website at <http://www.irs.gov/businesses/small/article/0,,id=185704,00.html>. Consultation with an ADA compliance expert prior to commencing any alteration or new construction project is also highly recommended. ■