Architectural Barriers and Alterations under the Americans with Disabilities Act: the Tenant's Rights and Responsibilities

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by

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If you are like many other office tenants, you have probably wondered on more than one occasion about your obligations under the Americans With Disabilities Act ("ADA"). You may have even encountered one or more of the following circumstances and asked yourself the following questions:

1) There seem to be a number of features in my building located outside of my premises that are inaccessible to people with disabilities. For example, to get into my building, one has to climb several steps. Also, though the elevator cabs in many buildings have braille lettered control buttons, the cabs in my building do not. Additionally, the bathrooms I share with the other tenants on my floor do not appear to have an accessible toilet stall. Don't these inaccessible features of my building violate the ADA? Can I be found liable if any of those features do, in fact, violate the ADA? My lease doesn't even mention the ADA. Does that mean I don't have to comply with it?

2a) I lease space in two different buildings. In my downtown space, I am about to redo the kitchen and employee eating area, as well as two or three offices. All of the work combined affects perhaps ten percent of my premises. Does any of this work have to comply with the ADA? My offices are not open to the public generally, although various business clients, vendors, and repair and maintenance people visit my offices from time to time.

2b) I have just entered into a lease for space in a suburban office building and the entire space is about to be completely built out. As is the case with my Loop space, the suburban space bathrooms are located outside of my suite. Does this work have to comply with the ADA? If so, who is reponsible for compliance ... me or my landlord?

The first question involves the respective obligations of the office tenant and its landlord to remove so-called architectural "barriers," *i.e.*, physical elements of the building or the premises that impede its accessibility or usability by a person with a disability, such as a sight, hearing or mobility impaired individual. The second question concerns your ADA obligations

with respect to alterations to your premises. The following discussion of these questions will serve to illustrate the principal ADA rules of which, as an office building tenant, you should be aware.[1]

Barrier Removal

The fundamental ADA rules concerning barrier removal are as follows:

1) **Places of Public Accommodation.** Not every tenant and not every landlord has an obligation to remove barriers; rather, *only so-called "public accommodations" have the obligation to remove barriers.* A "public accommodation" is any privately owned entity that owns, leases, leases to, or operates a "place of public accommodation." A "place of public accommodation" is, generally, any privately owned facility that falls within one of twelve *exclusive* categories of facilities spelled out in the ADA, including facilities such as places of lodging, restaurants, movie theaters and retail businesses. A complete listing of the twelve exclusive categories of places of public accommodation can be found at the end of this article.

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1 This article focuses only on the real estate related provisions of the ADA pertaining to existing (as opposed to *new*) buildings that are applicable to private entities (*i.e.*, the architectural barrier removal and the alterations provisions). Those provisions are articulated in title III of the ADA. The article does not discuss the ADA's accessibility provisions for *new* buildings, *i.e.*, those buildings 1) for which a building permit or permit extension application was certified as complete after January 26, 1992, and 2) for which the first certificate of occupancy was issued after January 26, 1993. Those provisions, which, in general, require *new* buildings to be designed and constructed in compliance with the ADA's accessibility requirements, are covered by titles II and III of the ADA. Further, the article does not discuss a tenant's obligations, as an employer, under the ADA. Those obligations are covered by title I of the ADA. Finally, the article does not address those provisions of title III of the ADA concerning a "*public accomodation's*" obligations to provide individuals with disabilities auxiliary aids and services and to modify policies, practices and procedures that might discriminate against such individuals. Those tenants who are "*public accommodations*" (see definition in text at page 2 of this article) would be well advised to become familiar with their responsibilities in this regard, but that discussion is beyond the scope of this article.

Although oftentimes it is easy to know whether a particular business falls within one of the twelve categories of places of public accommodation, sometimes it is less than clear. One thing to keep in mind, therefore, is that *all* places of public accommodation are places that are *open to the public generally* -- meaning to the man, woman or child in the street. Notice, for example, a telling difference between some easily identifiable places of public accommodation such as hotels, restaurants, and movie theaters and an office tenant such as an advertising agency or management consulting firm. In the case of a hotel, restaurant or movie theater, the operator of such an establishment conducts its business with *individuals* of the public generally on a non-selective basis. In the case of the advertising agency and the consulting firm, however, those business establishments may have non-employee visitors to their places of business, but, typically, those visitors are not visiting in their capacity as, say, John or Jane Q. Public; rather, they are there as a representative of another *business* establishment.

In short, places of public accommodation conduct business on a *business* to *individual* basis rather than on a *business* to *business* basis. Understanding whether you are or are not a place of public accommodation is critical because only individuals and businesses who own, lease, lease to or operate a place of public accommodation have a barrier removal obligation.

2) **Readily Achievable.** Even when you do operate a place of public accommodation and, therefore, have an obligation to remove barriers, *your obligation is only a limited one.* That is because the ADA only requires you to remove barriers when it is "*readily achievable*" to do so. Unfortunately, a bright line test does not exist for determining whether something is or is not readily achievable. Rather, a variety of factors must be looked at, including the cost of the action, the financial resources of the public accommodation who would have the responsibility to take the action, and the impact of the action on the operation of the property. The examination is largely a subjective one that is made on a case-by-case basis, meaning that what is readily achievable for one business, say General Motors, may not necessarily be readily achievable for another business, say the fifty employee office

tenant. In essence, if something cannot be accomplished without much difficulty or expense, it is not readily achievable. Keep in mind, however, that, due to the nature of the factors that are examined in determining whether something is readily achievable (cost vs. financial resources, etc.), the readily achievable concept is a fluid one. In other words, what is not readily achievable today *may, at some future point, become* readily achievable.

3) **Equal Responsibility/Legal Authority.** The ADA says that a landlord who leases space to a place of public accommodation and the public accommodation tenant, itself, have *equal responsibility* for complying with the ADA, including by removing barriers. Nonetheless, the ADA is a bit hazy on whether *equal responsibility* means that a tenant has an obligation to remove *all* barriers that impede accessibility to or within its premises. For example, is a tenant liable under the ADA for failing to remove a barrier when it is located *outside* of the tenant's space, *e.g.*, in the garage, at the building's entrances, in the elevator cabs or in the common restrooms? Or, what is the tenant's responsibility under the ADA if the barrier exists *within* the tenant's space, but, according to its lease, the work necessary to remove the barrier requires the tenant to obtain its landlord's consent?

In the writer's view, the expressed intent of the ADA is to make the tenant responsible to remove only those barriers for which its lease gives the tenant the *legal authority* to effectuate the removal. Therefore, unless the tenant has the right under its lease to make alterations in the common areas of its building (and this would be a most unusual provision), it would appear that the tenant is *not* responsible for removing those barriers that are located *outside* of its premises. That is not to say, however, that you won't end up paying for some of the costs of that compliance by virtue of an operating expense pass-through -- you more than likely will, unless, of course, your lease contains an operating expense exclusion for ADA compliance costs; some leases do contain such exclusions, especially those entered into around the time the ADA came into effect in 1991. Similarly, even where a barrier is found within your premises, if your landlord's consent is required to remove the

barrier and the landlord refuses to give you its consent, then it can at least be argued that you do not have the *legal authority* to remove the barrier and, therefore, should not have liability under the ADA for your failure to remove the same. As yet, however, there does not seem to exist a definitive answer on whether that suggested conclusion is correct.

In sum, if you are faced with having to obtain your landlord's consent in order to remove an architectural barrier, you should bear in mind the following: 1) request your landlord's consent; and 2) explain in your request why your landlord's consent is needed. This, at least, shows a good faith attempt on your part to comply with your ADA obligations. Moreover, in most instances, it will probably induce your landlord to consent to your request; after all, your landlord runs the risk of becoming liable under the ADA if it refuses to allow you to remove the barrier in question -- and, you should not feel any compunction about reminding your landlord of this fact.

Ultimately, if your landlord refuses to grant you the permission you have requested, despite your polite admonitions to it about the risk it is running, you will then be confronted with a decision about whether to breach your lease (by removing the barrier without your landlord's consent) or, possibly, violate the ADA (by failing to remove the barrier) -- good luck! Although I hesitate to say it, it might even be a good idea at this point to contact your attorney.

4) **Allocating Responsibility in the Lease.** As between you and your landlord, the ADA says that you can specify in your lease how you wish to allocate responsibility for complying with the ADA. In other words, even though vis a vis the public and the federal government you cannot avoid your responsibilities under the ADA, you can, by virtue of your lease, shift the risk of a failure to comply with the ADA to your landlord (or the landlord can shift that risk to you). For example, if your lease says that your landlord must comply with the ADA, including by building out your space in compliance with the ADA and by removing barriers in those portions of the building that are outside of your premises, and must indemnify you for its failure to do so, then you have at least given yourself a contractual

right to sue your landlord should the ADA be enforced against you by some third party.

Bear in mind, too, that virtually every lease has at least one provision that concerns, directly or indirectly, the parties' respective obligations for complying with the ADA even if the ADA is not specifically mentioned by name. Therefore, it is important to examine your lease. If your lease does not address the ADA expressly, take a look at your lease's provisions regarding (a) the definition of your premises, (b) your obligation to comply with laws, codes, ordinances, etc., and (c) your rights with respect to alterations. Why these particular provisions? Read on.

First, your lease generally limits your obligations (*e.g.*, repair, maintenance, alterations, etc.) to your premises. Additionally, as already noted, the ADA probably does not require you to remove barriers outside of your premises. Therefore, it is important to know what your premises includes and does not include. Is the front door part of your premises? What about the bathrooms?

Second, although you may think that because your lease does not mention the ADA by name it does not oblige you to comply with the ADA, your lease probably contains a provision that requires you to comply with all applicable laws, codes, ordinances, etc., even those that are enacted after you signed your lease. Such a provision *could* be read to include the ADA even though it is not mentioned by name.[2]

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2 If the ADA was not in effect when you signed your lease, then, whether your covenant to comply with all laws will be deemed to include compliance with the ADA is likely to be decided by examining your and your landlord's intent when the lease was signed. In other words, did you and your landlord intend for you to make, at your expense, the kinds of alterations that the ADA now requires you to make? For example, if your lease is for a short term or only has a short time remaining (say, three or five years) and your ADA barrier removal obligation requires you to make one or more costly structural modifications to your premises (note that, generally, this would not be the case under the ADA), then it might be reasonable to conclude that it was *not* intended that you would have to make the required alterations -- in short, that your covenant to comply with all laws does *not* include, in this instance, the ADA. Remember, however, that this conclusion only affects

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Third, because the removal of a barrier will involve an alteration to your space, as noted above, you need to know what your lease says regarding your right to make alterations. For example, do you have the right to make alterations with or without your landlord's consent? And is your right to make alterations confined to your premises, or can you make changes outside of your premises?

Now, having laid out the ADA's essentials concerning your barrier removal obligations, let's see if we can answer the first questions you have been wondering about. First, although your building does not appear to have an accessible entrance or accessible elevator cabs, and the bathrooms that you share with the other tenants on your floor also appear to have a barrier or two, whether these barriers exist in violation of the ADA depends upon whether it is readily achievable for your landlord to remove them. It is more than likely that removal of at least some of those inaccessible elements would be readily achievable, but a variety of factors, including the cost of removing each barrier and your landlord's overall financial resources, would have to be examined. Note, however, that the readily achievable limitation does *not* apply to barriers in *new* buildings -- in this case, by *barrier* we mean any aspect of the building that does not comply with the ADA's accessibility requirements. As noted in footnote 1 of this article, the ADA requires new buildings to be designed and constructed in compliance with the ADA's accessibility requirements. Therefore, if you occupy space in a new building and that building, as in our example, does not have an accessible entrance, accessible elevator cabs or accessible restrooms, your landlord has an *absolute* obligation, regardless of cost, your landlord's financial resources, etc., to remove those barriers by bringing those items into full compliance with the ADA.

Second, insofar as your potential liability is concerned, if your premises is not a place of public accommodation, then you absolutely do not have any

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2 your lease obligation (*i.e.*, your obligation vis a vis your landlord) to remove an architectural barrier; it does not allow you to escape liability under the ADA as your ADA obligations are obligations that are imposed on you by statute (*i.e.*, by the ADA itself) and exist regardless of what your lease says or does not say. Finally, if your lease is completely silent on the issue, *i.e.*, it does not mention the ADA and does not have a compliance with laws provision, the same conclusion would obtain.

liability even if the continued existence of those barriers were found to be in violation of the ADA. If, on the other hand, your space is a place of public accommodation, it is still very unlikely that you would have any liability for the failure to remove those barriers since they exist within the common areas of the building and do not fall within your premises.

Alterations

The ADA's essential rules concerning alterations are as follows:

1) **Applicability.** Unlike the case with barriers, the ADA's rules concerning alterations apply to you whether or not you are a place of public accommodation.

2) **Definition of "Alteration."** Any change within your premises that affects or could affect the usability of your premises by a person with a disability is considered by the ADA to be an "alteration." Therefore, an alteration can be as simple as changing the carpeting, moving an electrical outlet, changing the door hardware or rearranging the furniture. Or, it can be as involved as building out your entire space. Normal maintenance, painting or wallpapering and changes to mechanical and electrical systems are not considered to be alterations.

3) **Alteration of a Single Element.** Any time an element (such as the carpeting, the electrical outlet or the door hardware) is altered, the alteration must be done in accordance with the ADA's accessibility guidelines for alterations unless the element is located *within* a work area.

4) **Alteration of Multiple Elements.** If multiple elements within a space are being altered such that the alterations, when considered together, amount to an alteration of the space, then the entire space must be made to comply with the ADA's accessibility guidelines for alterations, but, again, those guidelines do not apply *within* the work areas of the space.

5) **The "Work Area" Exemption.** The ADA's accessibility requirements for alterations do not apply *within* "work areas," *i.e.*, areas used by employees *exclusively* as work areas. The ADA does, however, require

that a person with a disability be able to approach, enter and exit the work area. Common areas such as lounges, dining areas and restrooms are not considered work areas.

6) **Areas of Primary Function.** If the alteration affects or could affect (a) the usability of that portion of your premises that contains a major activity for which your premises is used (an "Area of Primary Function"), *e.g.*, the work areas in general office space, as opposed to, for example, kitchens and employee dining areas and lounges, or (b) access to that area, then, not only must that Area of Primary Function be made to comply with the ADA's accessibility guidelines for alterations, but the *path of travel* to that area and the *restrooms, drinking fountains* and *telephones* serving that area must also be made to comply with those guidelines ("Ancillary Alterations").

When making Ancillary Alterations to satisfy the ADA's accessibility requirements, you do not have to expend on such items, in total, more than 20% of the costs associated with the alterations you are making to the Area of Primary Function itself. If the total cost of the alterations to the Area of Primary Function is $100,000, your obligation to make the Ancillary Alterations is limited to $20,000. Additionally, to the extent the path of travel, the restrooms, drinking fountains or the telephones are situated outside of your premises, you do *not* have an obligation to make that element or those elements comply with the ADA. Note, too, that it is conceivable that you would not have an obligation to make the alterations *within* your Area of Primary Function comply with the ADA (because it is an employee work area) and, at the same time, still be required by the ADA to make the Ancillary Alterations.

Now, let's apply what we have just learned about the ADA's alterations rules to the second question you have been pondering. First, with respect to your downtown space, because the contemplated alterations affect only about ten percent of your premises, only those particular alterations would have to comply with the ADA's accessibility guidelines for alterations. The alterations *within* the offices, however, do not have to comply with those guidelines because those areas are work areas and are exempt from the ADA's accessibility requirements. Don't forget, however, that the ADA says

that a person with a disability must still be able to approach, enter and exit those offices. The kitchen and employee eating area are common use areas and are not considered employee work areas. Accordingly, all of the work that you are contemplating with respect to those areas must comply with the ADA's accessibility requirements. Finally, the fact that your offices are not open to the public generally means only that you are not a place of public accommodation. While this fact lets you off the hook with respect to the ADA's barrier removal rules, you are not as fortunate when it comes to the question of alterations. This means that you must comply with the ADA's requirements concerning alterations to the extent just discussed.

Second, relative to the build-out of your suburban office space, because this build-out amounts to an alteration of the entire space, all of the work must comply with the ADA's accessibility requirements for alterations. But, again, if any portion of that space is an employee work area, the ADA's accessibility requirements do not apply *within* that area.

Who is responsible for making that work comply, you or your landlord? The answer depends on who is responsible for the design and construction of the build-out. Therefore, your lease should be reviewed to see who has that responsibility. Even if your lease indicates that your landlord is primarily responsible for the design and construction of your space (*e.g.*, the landlord's architects prepare the plans and the landlord's contractors build out the space), you probably will at least play a role in the design phase by either initially providing your landlord with various design requirements, including perhaps a floor plan and/or other design drawings, and/or by reviewing, requiring changes to and approving construction drawings. Therefore, it is more than likely that you, along with your landlord, will be held responsible if your space is built out in a fashion that does not comply with the ADA's accessibility requirements.

Lastly, because the work you are contemplating will probably involve the alteration of an Area of Primary Function, you also have a *limited* obligation to make the Ancillary Alterations (the path of travel to your space, and the restrooms, drinking fountains and telephones serving your space). However, where the Ancillary Alterations are located *outside* of your premises, as is the case with the restrooms, you would not have to make those Ancillary Alterations.

Conclusion

In sum, if your place of business is a *place of public accommodation*, you have an obligation to remove architectural barriers. This obligation means only that you must remove architectural barriers when it is *readily achievable* for you to do so, *i.e.*, it can be accomplished without much difficulty or expense. Your barrier removal obligation is probably limited to removing those barriers that lie *within* your premises, and your landlord, more than likely, has the responsibility for removing barriers in the common areas of your building.

The ADA's rules concerning alterations apply to you whether or not your place of business is a place of public accommodation. Therefore, whether you are about to completely build out raw space at the start of your lease, do a major renovation midway through your lease term, or merely change the carpeting in your suite or the door hardware on a single door, you will have to comply with the ADA's accessibility guidelines for alterations. Those guidelines do not apply, however, within *work areas*, *i.e.*, areas used by your employees exclusively as work areas; but, a person with a disability must still be able to approach, enter and exit the work areas. If the alterations affect or could affect the usability of or access to an Area of Primary Function, *e.g.*, the work areas in general office space, then, in addition to ensuring that the planned alterations comply with the ADA, you must also expend up to a specified dollar amount on those alterations that are necessary to make the path of travel to, and the restrooms, drinking fountains and telephones serving, the Area of Primary Function accessible to persons with disabilities.

One final note -- be sure you understand what your lease says (expressly or implicitly) about the ADA. Although you will not be able to escape ADA obligations you owe to the public because of what your lease says, your lease may give you contractual rights against your landlord relative to those obligations. ■

Places of Public Accommodation

The Americans With Disabilities Act identifies the following twelve exclusive categories of places of public accommodation:

1. Places of Lodging (except for establishments that let out 5 rooms or less and which are owner occupied)
   (*e.g.*, hotels, motels)
2. Establishments Serving Food or Drink
   (*e.g.*, restaurants, bars)
3. Places of Exhibition or Entertainment
   (*e.g.*, movie theaters, concert halls, stadiums)
4. Places of Public Gathering
   (*e.g.*, auditoriums, convention centers, lecture halls)
5. Sales or Rental Establishments
   (*e.g.*, bakeries, grocery stores, clothing stores, hardware stores, shopping centers)
6. Service Establishments
   (*e.g.*, laundromats, dry cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, gas stations, lawyers' offices, doctors' offices, pharmacies, insurance offices, hospitals)
7. Terminals or Stations for Public Transportation
8. Places of Public Display or Collection
   (*e.g.*, museums, galleries, libraries)
9. Places of Recreation
   (*e.g.*, parks, zoos, amusement parks)
10. Places of Education
    (*e.g.*, private schools [nursery, elementary, secondary, graduate and undergraduate])
11. Social Service Centers
    (*e.g.*, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies)
12. Places of Exercise
    (*e.g.*, gymnasiums, health spas, bowling alleys, golf courses)

While the foregoing categories represent the only categories of places of public accommodation, the examples cited under each category do not constitute a comprehensive listing of the various types of places of public accommodation.

About the Author

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