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Equal Access: Removing Access Barriers

Introduction

- The prevention of discrimination based on disability is a relatively new area of law. It started with Section 504 of the Rehabilitation Act of 1973, which followed in 1990 by the adoption of the Americans with Disabilities Act (ADA). Title II of the ADA is the section that governs the activities of public entities. The language of the Act is rather simple – it requires that all programs, services and activities of the entity must be accessible for individuals with disabilities. The difficulty lies in the application of the Act to an entity's day-to-day functions. This paper will attempt to provide some helpful guidance on how to accomplish the goals of the ADA.

Legal Standards

- The prevention of discrimination on the basis of disability is housed in several different statutes. The laws apply to various government actions and differ in their approach and application.
  - Section 504 of the Rehabilitation Act of 1973
  - Americans with Disabilities Act of 1990 (ADA)
  - California Fair Employment and Housing Act (FEHA)
    - Cal Gov't Code section 12900 et seq
  - The Unruh Civil Rights Act ("Unruh")
    - Cal. Civil Code section 51 et seq

Title II of the ADA

- Title II applies to all public entities. It requires that all programs, services and activities of the entity must be accessible to individual with disabilities.

Title II of the ADA: Basic Rule

- To qualify for coverage under the ADA:
  - An individual must have a disability or relationship with someone who has a disability
- Disability means:
  - Physical mental impairment
  - Record of such impairment
  - Regarded as having such an impairment

Title II of ADA: Establishing a Violation

- Plaintiff must demonstrate:
  - He or she is a qualified individual with a disability
    - Reminder: this must substantially limit one or more major life activities
  - He or she has been denied or excluded from participation in the benefits of a public entity's services
  - The exclusion, denial, or discrimination was by reason of his/her disability

Title II of ADA: Physical or Mental Impairment

- The definition of impairment is very broad. It includes physical, mental and psychological disorders
- It excludes:
  - Homosexuality, bisexuality, simple physical characteristics, environmental, cultural, or economic or other disadvantages – such as a prison record or being poor, poor judgment or quick temper

Title II of ADA: Record of Such Impairment

- An individual is considered disabled for purposes of ADA coverage if he or she has a record of an impairment that substantially limits a major life activity.
- This includes the misclassification of an individual having an impairment.

Title II of ADA: Being Regarded as Having an Impairment

- This test applies when an individual is treated by the public as if he or she has an impairment that substantially limits a major life activity, even if the individual does not in fact have such impairment.
- Public perception is essential – however, personal perception is irrelevant in that the individual perceives himself as having a recognized impairment.

Title II of ADA: Substantially Limits

- This explains the degree in which an individual must be affected
- It is applicable to all three tests
- For purposes of coverage, the individuals life activit(ies) must be "restricted as to the condition, manner, or duration under which they can be performed" compared to an individual without a disability
- Temporary and transitory disabilities are excluded from this definition depending on the circumstances

Title II of ADA: Major Life Activities

- Generally: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, AND
- Bodily Functions: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Title II of ADA: Program Accessibility Standard

- The service, program or activity must be readily accessible to and usable by individuals with disabilities when viewed in its entirety
- The entity may need to make reasonable modifications to its polices, procedures and practices to accommodate the needs of disabled individuals
- The public entity has discretion in addressing accessibility issues, but it still must make its facilities accessible to and usable by persons with disabilities
- Public entities are entitled to safe harbor protection where it already has compliant elements unless those elements are altered

Title II of ADA: Program Inaccessibility Is Prohibited

- Public entities' facilities must be accessible to and usable by individuals with disabilities
- Inaccessibility can be found where discrimination is intentional and/or results in disparate impact

Title II of the ADA: Program Inaccessibility is Prohibited

- Where a plaintiff brings a claim against a public entity alleging that he/she could not access a program, the plaintiff must establish:
  - Program is not readily accessible to and usable by individuals with disabilities, and
  - Suggest a plausible method of making the program readily accessible, the costs of which, facially, do not clearly exceed its benefits

Title II of ADA: Existing Facility

- Defined in 28 C.F.R 35.150 which states, "a public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."
- The term "existing facility" is not expressly defined, but it includes newly constructed or altered facilities and imposes a continuing program access obligation.
- Exceptions to Existing Facilities requirement:
  - Not all facilities have to be accessible
  - Not action that would threaten or destroy historic significance of historic property
  - No action that would cause undue financial hardship or administrative burden

Title II of ADA: Ways to Make Existing Facilities Accessible

- redesign or acquisition of equipment,
- reassignment of services to accessible buildings,
- assignment of aides to beneficiaries,
- home visits,
- delivery of services at alternate accessible sites,
- alteration of existing facilities and construction of new facilities,
- use of accessible rolling stock or other conveyances, or
- any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities

Title II of ADA: Ways to Make Existing Facilities Accessible

- This does not impose an absolute requirement to achieve compliance through construction of new facilities if other effective methods are available
- Priority must be given to methods that will allow individuals with disabilities to be in an integrated setting

Title II of ADA: Ways to Make Existing Facilities Accessible

- One method that will NOT achieve compliance is for public entity to provide carrying service
- Conflicts with individual's need to be independent
- However, carrying is permitted in ***limited*** circumstances:
  - Program accessibility is can only be achieved through structural changes – carrying is a temporary solution
  - Carriers are formally instructed on safest and least humiliating means of carrying and the service is provide in reliable manner

Title II of ADA: Defense – Existing Facility

- Undue burden defense will require a consideration of all of public entity's resources available for use in the funding operation of the service, program, or activity
- Burden of compliance is on the public entity

Title II of ADA: Defense – Fundamental Alteration

- Fundamental alteration defense applies when determining the reasonableness of a public entity's modifications
- Fundamental Alteration:
  - An alteration affecting an essential aspect of a defendant's policies or programs would be unacceptable even if applied to everyone equally
  - Minor changes are unacceptable where it would give a disabled person an advantage over others
- For example, 9th Circuit in PGA Tour, Inc v Martin held that permitting Martin to use a golf cart despite PGA rules would not fundamentally alter the nature of the program

Title II of ADA: Undue Burden

- Undue burden test may apply when determining reasonableness of public entity's modifications
- Undue – any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature of or operation of the business
- Undue burden defense is not available where a public entity undertakes new construction

Title II of ADA: Undue Burden Factors

- The size of the employer
- The size of its budget
- Nature of its operation
- Number of employees
- Structures of its workforce and the nature and cost of the accommodation

Title II of ADA: New Construction

- Any construction or alterations undertaken by the public entity must be readily accessible to and usable by persons with disabilities
- New construction requirement imposes a strict compliance standard because architectural barriers can be avoided during construction
- Undue financial burden defense does not apply to new construction

Title II of ADA: Defenses – New Construction

- New construction must be structurally impracticable to meet requirements
- Structural impracticability is triggered when unique characteristics of terrain prevent incorporation of accessibility features
- Full compliance required to the extent feasible
- If providing accessibility in conformance with this section to individuals with certain disabilities would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities

Title II of ADA: What If Alterations are Done?

- An alteration is a change to a building or facility that affects or could affect the usability of the building or facility or part thereof
  - Excluding maintenance activities
  - Caveat: combination of maintenance treatments at or near same time may constitute an alteration and trigger obligation to provide curb ramps.
- Alterations must comply with accessibility features to the maximum extent possible

Recreational Facilities: Swimming Pools

- Generally, a public entity has no requirement to provide recreational activities, but where it does, it must administer them in a manner that provides equal access by persons with disabilities
- Recreational activities have a history of excluding persons with disabilities, especially swimming pools
- Program accessibility does not require that all pools be accessible to individuals with disabilities, except where the entity only has one pool.

Pool Basics

- Two accessible means of entry that are different
- One accessible means of entry required for pool with less than 300 linear feet
  - Means of entry should either a swimming pool lift or sloped entry
- Pool program accessibility applies to other forms of water, such as wave action pools, leisure rivers, and sand bottom pools

Ways to Make a Pool Accessible

- A pool may be accessible by installing:
  - 1) swimming pool lifts (1009.2);
  - 2) sloped entries (1009.3);
  - 3) transfer walls (1009.4);
  - 4) transfer systems (1009.5); and
  - 5) pool stairs (1009.6)

  ADA 2010 Design Standards and 2013 California Building Code

Title II of ADA: On-Street Parking

- No current regulations expressly addressing on-street parking
- However, 2010 Design Standards impose technical requirements for parking in sections 208 and 502
- The current controversy is that because there are no regulations, courts should not impose requirement on public entities to provide accessible on-street parking

Title II of ADA: On-Street Parking

- *Fortyune* case is currently on appeal regarding accessible on-street parking
- *Fortyune* district court held, "…broad language of the ADA requires public entities to ensure that all services, including on-street parking, are reasonably accessible to and usable by individuals with disabilities.

Title II of ADA: On-Street Parking

- California League of Cities filed an Amicus Curiae Brief, authored by Alison D. Alpert of Best, Best & Krieger, LLP, opposing District court's ruling, arguing:
  - Requiring cities to provide on-street parking disabled parking without any standards or guidelines is contrary to the purpose of the ADA and will lead to inconsistency in on-street parking
  - Requiring cities to provide on-street disabled parking without any guidelines or standards would waste cities' limited resource and invite litigation
  - Public entities cannot reasonably rely on the ADAAG or the Draft Right-of-Way guidelines to ensure compliance with any on-street parking obligations

Title II of ADA: Curb Ramps

- What Is a Curb Ramp?
  - A curb ramp is a short ramp cutting through a curb or built up to it, which is designed and constructed to be accessible, thus providing an accessible route that persons with disabilities can use to safely transition from road way to curbed sidewalk and vice versa.
- 28 C.F.R 35.150(d)(2) includes an express requirement to include provisions for curb ramp installation in a transition plan for existing facilities where public entity has control of streets, roads or walkways
- (28 CFR 35.151(i).) includes an express requirement to include provisions for curb ramps in all newly altered and constructed facilities

Title II of ADA: Service Animals

- Title II does not specifically address service animals
- Public Entities may need to modify its policies, procedures and practices to permit persons with disabilities to use service animals to avoid discrimination

Title II of ADA: Service Animals

- A service animal is any dog that is individually trained to do the work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability
- This definition excludes any other species of animal from being a service animal

Title II of ADA: Service Animals

- Service animals work and perform tasks that directly benefit the individual with a disability
  - Service animals recognize and respond to the individual's distress
- Animals that provide comfort and emotional support are not service animals

Title II of ADA: Service Animals

- A public entity is not allowed to intrude upon an individual's privacy with respect to his/her disability, however, a public entity may inquire the following about a service animal
  - Is the animal required because of a disability?
  - What tasks is the animal trained to perform?
- The inquiry must be minimally evasive as possible to extract only necessary information

Title II of ADA: Service Animals

- Service animals are subject to the following restrictions:
  - Removal or denial if the service animal is out of control and acting unreasonably
  - Removal if the service animal is not house-broken
    - Consider all the facts before taking action - the service animal may just be sick

Title II of ADA: Service Animals – Miniature Horses

- Additional provisions have approved miniature horses as service animals
- Miniature horse are generally 24 to 34 inches in height and weigh 70lbs to 100lbs
- Permissible inquiries about miniature horses include:
  - Is it house-broken
  - Under owner's control
  - Can the miniature horse's size, type and weight be accommodated
  - Will presence of miniature horse compromise safety requirements

How Can Public Entity's Comply

- Conduct a Self-Evaluation : A self-evaluation is a public entity's assessment of its current policies and practices. The self-evaluation identifies and corrects those policies and practices that are inconsistent with title II's requirements. All public entities must complete a self-evaluation by January 26, 1993. A public entity that employs 50 or more employees must retain its self-evaluation for three (3) years. Other public entities are not required to retain their self-evaluations, but are encouraged to do so because these documents evidence a public entity's good faith efforts to comply with title II's requirements.
- Develop a Transition Plan identifying the necessary steps to remedy any areas of noncompliance and the timeline for completion. Be sure to include and/or consider public comment/input.
- The Transition Plan must be developed within 6 months of January 26, 1992 where public entity employs 50 or more employees.
- The Transition Plain must:
  - Identify limiting physical obstacles
  - Identify with detail remedial methods
  - Identify the time necessary to achieve compliance, if the time is longer than one year, identify steps that will be taken during each year of the transition period
  - Identify the responsible official for implementation

What If We Already Have a Plan?

- Reassessment… Has anything changed?
  - New programs?
  - Remodeled or new facilities?
  - Has our web based presence/activities changed?
  - Staffing changes?
  - Have we "privatized" anything?
  - Have the regulations changed (local or federal)?
- If we have a plan, are we following it?
- Is it current?

Important ADA Dates

- http://www.ada.gov/qandaeng.htm
  - January 26, 1992-Effective date for State and Local Govt.
  - January 26, 1995-Structural Changes needed for program accessibility
  - July 26, 1992- Transition Plans musts be developed
- http://www.adasoutheast.org/ada/publications/ADA_Revised_Regulations_March-15-2011.htm
  - March 15, 2011 – Revised ADA Regulations Affecting Title II became effective
- Program Accessibility Dates (http://www.ada.gov/revised_effective_dates-2010.htm)
  - **From September 15, 2010, to March 15, 2012,** State and local governments (public entities) have the option of choosing to follow the 1991 Standards, the UFAS, or the 2010 Standards when making architectural changes to provide program access. The elevator exception in the 1991 Standards may not be used.
  - **On or after March 15, 2012,** public entities must comply with the 2010 Standards in making architectural changes to achieve program accessibility and for all new construction and alterations.
  - **On or after March 15, 2012,** public entities must consider the supplemental requirements (such as swimming pools, play areas, and fishing piers) in the 2010 Standards to assess compliance with program accessibility.
  - **Please Note**: If elements in existing facilities already comply with corresponding elements in the 1991 Standards or the UFAS and are not being altered, then title II entities are not required to make changes to those elements to bring them into compliance with the 2010 Standards.

Program Accessibility Scenarios

- Abe is a senior citizen who was visiting Do Good, CA for the funeral of his best friend. Unfortunately, Abe suffers from dementia and has difficulty navigating. Evilina, a local psychic had set up a table outside of Abe's hotel to read palms for $5. Evilina mailed in her permit request to the Do Good City, but in her haste, she forgot to complete the address. Evilina's table was beautiful and colorful and was located near the curb ramp outside of Abe's hotel. Abe was very tired and ready for his afternoon nap, he looked to his left & right and did not see another curb ramp, so he decided to walk around Evilina's table and step up on the sidewalk because it was quicker. Sadly, while Abe was trying to step up onto the sidewalk, he tripped and fell and sustained moderate injuries.
- **Is there a violation under program accessibility?** (Cohen v. Culver City (2014) WL 2535329).
- See next slide for answer.

Program Accessibility Scenario

- Answer: This scenario comes from the 9th Circuit decision of *Cohen v. City of Culver City* (9th Cir. 2014) F. 3d 690, 699, 700. In this case, the 9th Circuit reversed the District reasoning that a genuine dispute of material fact existed whether the City had violated Cohen's access to the sidewalk on the basis of his disability by permitting a private vendor to completely block the existing curb ramp. The court went on to reason that because of the private vendors presence, the City may have violated a regulation requiring it to maintain disabled access features in good working order....A jury could conclude that the City discriminated against Cohen by reason of his disability by failing to take, simple, low-cost, reasonable measures to accommodate persons who rely on curb ramps to navigate public sidewalks....

Program Accessibility Scenario

- Busy City was working toward achieving compliance with the ADA by modifying its existing facilities, including its city hall, library, bus stops, and sidewalks… Some Plaintiffs were upset that curb ramps were not installed at every intersection and that they had to travel to other nearby curb ramps to access Busy City's programs, services, and activities.
- Did Busy City discriminate against plaintiffs by reason of their disabilities by making them use other nearby curb ramps?
- Answer: 28 C.F.R. 35.150 did not require Carlsbad to build a curb ramp at every intersection. Rather, that provision simply required Carlsbad's programs and services to be accessible as a whole…The ADA allowed Carlsbad to compel disabled persons to travel a 'marginally longer route' under some 'limited circumstances' as long as its programs were still accessible as a whole." (*Cohen v. City of Culver City*, (9th Cir. 2014) 754 F. 3d 690, 697.

Program Accessibility Scenario

- A public entity may succeed on an undue burden defense when it is asserted for construction or an alteration taking place in 2014?
- **True or False?**
- A:Such a defense is foreclosed under Title II of the ADA with respect to streets, pedestrian rights of way, sidewalks, and curb ramps that have been newly constructed or altered since January 26, 1992…" (*Willits v. City of Los Angeles (2013)* 925 F. Supp. 2d 1089)

Program Accessibility Scenarios

- Harry and Sally have been married for 50 years and are celebrating their 50th anniversary with a vacation to Hawaii. Sadly, Harry and Sally both lost their eyesight in an unfortunate accident 10 years ago. They each have a golden-retriever guide dog. Upon arriving to Hawaii, they are informed that the dogs have to be quarantined for 90 days before entering. Harry and Sally are permitted to stay with the dogs but they cannot leave the premises with the dogs until the 90 days is up. **Harry and Sally have filed suit alleging violation of Title II of ADA, will they be successful?**
- **A:** *Crowder v. Kitagwa* (9th Cir. 1996) 81 F. 3d 1480 conclude[d] that Hawaii's quarantine requirement is a policy, practice or procedure which discriminates against visually-impaired individuals by denying them meaningful access to state services, programs and activities by reason of their disability in violation of the ADA. (id. 1485)
- Alternate facts: Hawaii offered Harry and Sally two guide dogs to use in the place of their dogs during the quarantine period, but Harry and Sally refused. **Would they be successful under this set of facts?** (Caution: there is no answer to this alternate factual scenario.)

Program Accessibility Scenarios

- Abe and Sue want to get apply for a marriage license. They have to go downtown to the marriage license building. The marriage licensing clerks are located on the 2nd Floor. Abe and Sue both broke their legs in a Crossfit competition and have to use crutches. The elevator is out of service until next week.
- What can the public entity do to achieve compliance?
  - A. Carry Abe and Sue up the stairs?
  - B. Move Marriage licensing department to the accessible building next door until the elevator is fixed?
  - C. Send a clerk to the first floor to work with Abe and Sue on filling out and filing the marriage license application
  - D. All of the above
- The simple answer is C.
- II-5.2000, http://www.ada.gov/taman2.html
- Does anyone remember what is wrong with answer A?

Program Accessibility Scenarios

- Public entity has decided to build a brand new building and parking lot. Public entity does not want to include accessible parking spaces because it will limit the number of spaces the parking lot can accommodate. Plus, the appeal of the *Fortyune* case has not been decided yet.
- Should the public entity include accessible parking in absence of the court's decision?
- Answer: A public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction. **II-5.4000,** http://www.ada.gov/taman2.html
- Does any see any other reasons why the public entity should include accessible parking?

Program Accessibility Scenarios

- Easy City is a tiny rural city that does not have any disabled residents. Everyone is fit and limber, including its seniors. The building that Easy City uses for council meetings is accessible only by stairs, but all the residents able to gain access. Easy City government does not feel that it is legally required to include any accessible features because its city does not have any disabled individuals. Are they right?
- [Residents], who currently do not have a disability may become individuals with disabilities through, for example, accidents or disease…Consequently, the apparent lack of[residents] with disabilities in a [city's] service area does not excuse the [City] from taking whatever appropriate steps are necessary to ensure that its programs, services, and activities are accessible to qualified individuals with disabilities. (II-5.1000, http://www.ada.gov/taman2.html)

Resource Page

- www.ada.gov
- www.disability.gov
- www.askJan.org
- Evan Terry & Associates
- www.access-board.gov
- http://www.justice.gov/crt/about/drs/