

Disability Law

By IREM Legislative Affairs

Updated August, 2006



Institute of Real Estate Management

430 N. Michigan Avenue

Chicago, IL 60611

(800) 837-0706**TABLE OF CONTENTS**

<i>Disclaimer</i>	2
<i>Background</i>	2
<i>Architectural Barriers Act of 1968</i>	2
<i>Section 504 of the Rehabilitation Act of 1973</i>	3
<i>Fair Housing Act</i>	3
<i>Americans with Disabilities Act of 1990 Title III</i>	3
<i>Proposed Revised Standards to the ADA</i>	4
Effective Date	4
Triggering Effect	4
Safe Harbor	5
<i>Compliance</i>	5
<i>Sources for Information on Disability Law</i>	7
<i>IREM Statement of Policy</i>	7
<i>REALTORS® Library Field Guide to Complying with the ADA</i>	7
<i>ADA Information Line</i>	7
<i>U.S. Department of Justice ADA web site</i>	7
<i>U.S. Housing and Urban Development and the Fair Housing Act</i>	7

Disclaimer

This document is intended to acquaint property managers with an understanding of federal statutes pertaining to disabilities and those that apply to given situations faced by property owners and managers.

Background

In the late 1980s and early 1990s, Congress passed significant federal laws regarding individuals with disabilities (defined as persons with a physical or mental impairment which substantially limits one or more major life activities. People who have a history of, or are regarded as having a physical or mental impairment that substantially limits one or more major life activities, are also covered. Major life activities include caring for one's self, walking, seeing, hearing, speaking, breathing, working, performing manual tasks, and learning. Some examples of impairments which may substantially limit major life activities, even with the help of medication or aids/devices, are: AIDS, alcoholism, blindness or visual impairment, cancer, deafness or hearing impairment, diabetes, drug addiction, heart disease, and mental illness.) These new public policy directions heavily impacted the commercial real estate industry and in particular federally-assisted or subsidized housing. Each law was designed to prohibit discrimination against individuals with disabilities both through policy and practices as well as providing physical access to buildings. While each law has the same broad goals in mind, it is important to understand which laws apply to different real estate situations and property types.

There are four major federal laws of concern to commercial real estate professionals:

- Architectural Barriers Act of 1968
- Section 504 of the Rehabilitation Act of 1973
- The Fair Housing Amendments Act of 1988
- The Americans with Disabilities Act of 1990 (ADA)

There are other laws pertaining to discrimination against disabled individuals; however, those listed above are the most noteworthy to the commercial real estate industry. The Acts above set out the general prohibitions of disability discrimination law while enforcement is determined via rules and regulations promulgated by various federal agencies.

Architectural Barriers Act of 1968

When the government sets out to introduce major public policy, the process can take several decades and usually starts with those entities immediately controlled by the government, i.e. government office space and buildings, federally assisted housing projects, etc. The first significant disability law, the Architectural Barriers Act, required that any building or facility constructed for, altered by, leased to, financed by, or constructed under the authority of the federal government be made accessible to the physically handicapped. Any building or facility employing or housing physically handicapped persons was required to be designed, constructed and/or altered to ensure ready access to physically handicapped persons.

There are four agencies responsible for enforcing the Act: the General Services Administration (GSA), the Department of Defense, the Department of Housing and Urban Development (HUD), and the United States Post Office (USPS). These agencies were directed to cooperatively develop the Uniform Federal accessibility Standard (UFAS). UFAS outlines the technical standards designed to ensure accessibility.

Section 504 of the Rehabilitation Act of 1973

Section 504 states that “no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under” any program or activity that either receives Federal financial assistance or is conducted by any Executive agency or the United States Postal Service (USPS). The law also affects nongovernmental entities that receive any kind of federal funding.

Each Federal agency has its own set of Section 504 regulations that apply to its own programs and each agency is responsible for enforcing those regulations. In addition to Agency regulations, Section 502 of the Act created the Architectural and Transportation Barriers Compliance Board (ATBCB) to enforce standards requiring that certain facilities covered by federal accessibility law be accessible to the physically disabled. The ATBCB also provides technical assistance and information on accessible facility design models.

In 1978, the Rehabilitation Act was amended to require the ATBCB to issue minimum accessibility guidelines and requirements for the Agencies to issue as standards. Eventually, the Uniform Federal Accessibility Standard was designed to conform to the ATBCB’s minimum guidelines and requirements in addition to those standards developed by the American National Standards Institute (ANSI). ANSI standards are commonly used by private entities and state and local governments.

Fair Housing Act

The Fair Housing Act, as amended in 1988, prohibits housing discrimination on the basis of race, color, religion, sex, disability, familial status, and national origin. It covers private housing, housing that receives Federal financial assistance, and state and local government housing. The Act requires owners of housing facilities to make reasonable exceptions in the policies and operations to afford people with disabilities equal housing opportunities.

In addition, tenants with disabilities would be allowed to make reasonable access-related modifications to their private living space, as well as to common use spaces (the landlord is not required to pay for the changes.) The Act further requires that new multifamily housing with four or more units be designed and built to allow access for persons with disabilities. This includes accessible common use areas, doors that are wide enough for wheelchairs, kitchens and bathrooms that allow a person using a wheel chair to maneuver, and other adaptable features within the units.

Americans with Disabilities Act of 1990 Title III

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and telecommunications. It also applies to the United States Congress.

To be protected by the ADA, one must have a disability or have a relationship or association with an individual with a disability. An individual with a disability is defined by the ADA as a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such impairment. The ADA does not specifically name all of the impairments that are covered.

Title III covers businesses and nonprofit service providers that are public accommodations, privately operated entities offering certain types of courses and examinations, privately operated transportation, and commercial facilities. Public accommodations are private entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors’ offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports’ stadiums and fitness clubs.

Public accommodations must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. They also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable accommodations to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. In addition, public accommodations must remove barriers in existing buildings where it is “readily achievable” without much difficulty or expense, given the public accommodation’s resources.

The ADA lists the following factors to consider in determining whether or not barrier removal is readily achievable:

- the nature and cost of the action;
- the overall financial impact on facility operation;
- the overall financial resources of the facility owner;
- the number of employees; and
- the type of operation involved.

It is important to note that Title III, generally, does not apply to private housing, including apartments and condominiums, except for spaces within that serve as places of public accommodations, such as sales and rental offices. If residential properties contain any of the aforementioned facilities, they may be required to comply.

If a property is found to violate ADA requirements, courts may order compensatory damages and the Justice Department may obtain civil penalties from \$50,000 for a first offense to \$100,000 for subsequent offenses.

Proposed Revised Standards to the ADA

IREM submitted comments to the Department of Justice (DOJ) Civil Rights Division on proposed changes to the regulations for the Americans with Disabilities Act (ADA) and the Architectural Barriers Act (ABA) in the spring of 2005, before the May 31, 2005 due date. These regulations will not be effective until the DOJ adopts a final ruling, which is not expected until August 2007.¹ When the final rule is issued, IREM Legislative Staff will highlight it in the IREM Legislative Bulletin, available on the IREM web site.

Three questions were posed regarding an effective date for the proposed rule, the triggering effect, and safe harbor; IREM responded to each question.

Effective Date

DOJ first asked should the effective date of the proposed revised ADA standards be modeled on the effective date used to implement the current ADA standards (18 months after publication of the final rule) or a shorter period. IREM responded that neither should be used stating it is almost imperative that the effective date of the proposed new rule allow a minimum of 18 months and possibly even more time depending upon the “triggering event” after the publication of the final rule.

Triggering Effect

Secondly, DOJ asked the public to identify any facilities for which the current triggering events might prove unworkable. Further, DOJ asked if there are facilities covered by the revised ADA standards that are subject to Title III for which first occupancy/physical alteration do not apply in the context of new construction.

¹ IREM Legislative Staff contacted the Department of Justice Civil Rights Division on August 2, 2006, inquiring when the final rule would be released. DOJ staff said a final rule on the revised ADA standards is not expected until the summer or fall of 2007.

In regards to new construction, the effective “triggering event” for the current Access Board’s revised ADA Accessibility Guidelines (ADAAG) is the major issue that created the problem in obtaining compliance with the current ADAAG, and for that matter Fair Housing Accessibility Guidelines (FHAG). For new construction a “triggering event” based on “first occupancy” or even “first use” is quite unrealistic based on the time frame involved in getting a project to the point of “first occupancy” or “first use.” IREM recommended that at *minimum* the rule for new construction should be 18 months before the application for the building permit. Designers would then be on notice early in the design stage at a time when they can make changes while the plans are still being developed.

IREM stated the “triggering activity” for *existing buildings* can be different than for new construction. However, DOJ needs to take into consideration the issues being addressed in Question 3 concerning “safe harbor,” and the revised standards need to be responsive to what has or has not been done to the existing building for compliance with current ADAAG.

Existing buildings that are compliant with current ADA standards should be grandfathered and not be required to update to the new ADAAG. The exception being any new work in the portions of the building that comply with current ADAAG, which should comply with the new updated ADAAG.

Safe Harbor

Lastly, DOJ asked if they should provide any type of safe harbor so that elements of facilities already in compliance with the current ADA standards need not comply with the revised ADA standards. IREM responded yes, a very definite yes.

IREM stated a “safe harbor” should be granted to any and all buildings, facilities, or elements that comply with current ADAAG as long as they are not modified or changed. Modifications and changes should be done in accordance with the new ADAAG. The concept of grandfather or “safe harboring” for existing buildings is well established and is the basis for determining if a building complies with the appropriate building, fire or other construction code. Building, Fire, and other codes specifically apply to new construction, alterations, or modifications made after the effective adoption date of the code. Buildings in existence at the time of the adoption of the new code are grandfathered as long as they comply with the code in existence at the time they were constructed. The enforcement date for a new code is published well in advance by the adopting governmental agency, and it is not uncommon for the actual enforcement date to be 6, 12 or even, 3 years later.

Buildings under construction with a valid building permit are allowed to be constructed to the code being enforced at the time the building permit was issued. Buildings under construction are not required to be redesigned or required to meet the requirements of the newly adopted code. The same should be true for ADAAG compliance and thus the reason for the comments under “triggering event” in response to Question 2 and that the “trigger event” should be based on the application for the building permit.

Compliance

Property owners and managers should analyze their space to determine whether access barriers for the disabled exist. Architects or engineers can be retained to analyze space, but at a minimum, a common-sense review of the space and potential obstacles or barriers should be considered. If barriers are found, the next level of analysis is whether removal of such barriers is readily achievable.

Before any property owner or manager is found to violate ADA requirements, the party alleging discrimination has the burden of establishing that barriers exist and proposing modifications to remove them.

Finally, property owners and managers subject to ADA requirements should remember that when any renovation or remodeling is done, the architect must comply with and incorporate the detailed requirements into the plans. Once those requirements are triggered, failure to comply may mean that the work needs to be redone — likely at even greater expense.

Sources for Information on Disability Law

IREM Statement of Policy

<http://www.irem.org/sec1ins.cfm?sec=publicpolicy&con=regulatory.cfm&par=#am>

REALTORS® Library Field Guide to Complying with the ADA

<http://www.realtor.org/libweb.nsf/pages/fg716>

ADA Information Line

Toll-free number for the 24-hour hotline: 1-800-514-0301

U.S. Department of Justice ADA web site

<http://www.ada.gov/>

U.S. Housing and Urban Development and the Fair Housing Act

<http://www.hud.gov/offices/fheo/FHLaws/yourrights.cfm>