



Model Home, Jobsite and Communication Compliance Under the Americans with Disabilities Act

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The Americans with Disabilities Act (ADA) is touted as one of America's most comprehensive pieces of civil rights legislation. The Act prohibits discrimination and guarantees that people with disabilities have the same opportunities to participate in mainstream American life. The primary objectives of the ADA are to allow equal access to enjoy employment opportunities, to purchase goods and services, and to participate in State and local government programs and services. Signed into law in 1990 by President George H. W. Bush, the ADA is modeled after the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin, and Section 504 of the Rehabilitation Act of 1973. Simply stated, the ADA is an "equal opportunity" law for people with qualifying disabilities.

To be protected under the ADA, one must have a disability, which the ADA defines as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. Accordingly, the ADA does not specifically name all of the impairments that are covered. Thus, in the construction industry context, the ADA has been a mixed blessing. On one hand, the ADA has created a significant amount of additional business opportunities as construction companies are called upon for modifications to accommodate people with disabilities, but on the other hand, it can be extremely difficult to make sure that all buildings adhere completely to ADA standards when constructed. Importantly, for construction companies this issue can be twofold because while many construction companies work diligently to understand and comply with the standards required by the ADA in terms of building ADA-compliant structures, these same construction companies also need to be well-versed in making sure the company has ADA compliant policies for its own workforce.

Model Homes

Particularly important for home builders are the ADA guidelines surrounding model homes constructed within their developments. Although single-family homes are not subject to ADA standards, model homes may qualify as “public accommodations” under Title III of the ADA and can create a vulnerability from litigation to developers.¹

A developer knows that there is no better time and place for a sales pitch to a potential homebuyer than when the prospective buyer examines the model unit of the development. However, under the ADA, a builder is prohibited from discriminating on the basis of a disability “in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, leases to, or operates a place of public accommodation.” The categories of those facilities that qualify as public accommodations are construed liberally to afford the most people with disabilities equal access, but most importantly for builders, this does include a “sales or rental establishment.” Thus, although model homes are not expressly listed under the definition, the Department of Justice has come out and explicitly stated that model homes come under the regulations of the ADA as “other sales or rental establishments” if used both as a model home and sales office.

A model home qualifies as a sales office even when only one room in the model home is used for sales and if any sales efforts are conducted onsite regardless of whether or not the model home is ultimately sold as a private residence. Additionally, even if no sales are actually conducted inside the model home, the ADA will be applied when a sales representative is present in the model home and he or she approaches prospective buyers or information about the housing development is kept inside the model home. Courts have interpreted such actions as sales activities that are occurring inside the model home and deemed them sufficient to categorize the model home as a sales office, even when no actual sales or transactions occur within or at a separate designated sales office.

Violations resulting from non-compliance on model homes, absent a physical injury, are limited to an injunction mandating the facility’s compliance with the requirements of the ADA and the payment of plaintiff’s attorney’s fees. However, some states, like California, have enacted legislation granting plaintiffs monetary awards for ADA violations. Under California’s legislation, the Unruh Civil Rights Act, the law entitles plaintiffs to a minimum of \$4,000 to a maximum of three times the amount of actual damages for each violation of their rights under the ADA plus attorney’s fees. This can be costly, especially when such statutes do not depend on any showing of fault. Such statutes have now been enacted in at least three other states, Hawaii, Florida, and Illinois.

Thus, builders must seriously look at ADA compliance in their development model homes, especially if any sales activities are conducted inside the model homes. To that end, Certified Access companies exist and are available to inspect and identify all areas of the model home that may need to be brought into compliance. Alternatively, consideration of a strict separation policy from sales activities and the model homes can be considered.

¹ The ADA may also kick in for amenities within a single-family development, including infrastructure such as parking lots and sidewalks, or if the community swimming pool is open to anyone besides residents and their guests.

Employment/Jobsites

Under the ADA, it is unlawful for any employer of fifteen or more people to discriminate against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The purpose is to prevent employment discrimination against individuals with disabilities who otherwise are able to perform the essential functions of a job with or without reasonable accommodations from the employer. However, for builders, it is acceptable to require that employees maintain the appropriate licenses for the positions they seek and meet any state or federally mandated standards and do not need to lower their safety standards to accommodate these disabled persons. Still, there is much left to interpretation and, as a result, the ADA can be tricky for builders to manage if they do not familiarize themselves with the Act.

For developers, Title I of the ADA is especially important because that is where safety concerns that relate most directly to construction jobsites is dealt with. Under Title I a builder can lawfully exclude an individual from employment for safety reasons, however, the company must show that the employment would pose a “direct threat,” meaning a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

The ADA provides that an employer must provide reasonable accommodations without imposing an “undue hardship” on the employer. Thus, the employer does not have to provide an accommodation that would create a “significant difficulty and expense, disruption or fundamental alteration to the nature of the business.” This standard is taken into consideration with regard to the nature and cost of the accommodation, site factors, entity factors, and inconvenience. Site factors are important to builders because the ability to modify the standard jobsite is limited only by common sense and safety practices. However, ignoring the law can be costly, and not complying with the law could result in damages of up to \$300,000, including back pay and legal fees. Non-compliance causes not just the employer to be potentially liable, but supervisors who act as agents of their employers can be sued under the ADA. Thus, when a builder is considering whether the company has a duty to accommodate disabled individuals, they must carefully weigh the employee’s ability to meet legitimate business needs.

At one end, an employer does not need to create a new job to accommodate a disabled person, but at the other end it may be required to modify non-core aspects of the job. Keep in mind that a small expense or mere inconvenience to the employer is not enough “undue hardship” on the company to bring the employee outside the law’s protection. Only unreasonable or too burdensome accommodations are not required to be implemented. So, it many times becomes a process in which the employer must asses each individual situation on a case by case basis. This “interactive process” is what the ADA hopes to achieve. Ultimately, a builder must remember that an employee with a disability should only be terminated if it is impossible for him or her to perform the essential functions of his or her job with accommodations that are reasonable, while taking into account the builders size and resources. For example, a person with a partial amputation of their non-dominant hand who has difficulty using a carpenter square with one hand while being required to take measurements before

the installation of flooring, framing, and walkways can be accommodated with a grip handle clamp to enable to hold the tool and still draw with the other hand. Another example would be switching brick setters to stone if there are vision impairment issues or, moving them to pointing and cleaning if the eyesight is bad enough. Although movement from one job to another should only be made after it is determined that the person cannot perform the job and a new job is vacant.

Communication

The ADA requires that Title III entities, including those businesses that serve the public when selling their homes, communicate effectively with people who have communication disabilities. This requirement is referred to as “Effective Communication.” Simply put, “effective communication” means that whatever is written or spoken must be clear and understandable to people with disabilities as it is for people who do not have disabilities. A communication disability is one that affects a person’s hearing, seeing, speaking, reading, writing, or understanding. The purpose of the effective communication rules are to ensure that the person with a disability can communicate with, receive information from, and convey information to, such businesses. Accordingly, businesses have to provide the appropriate auxiliary aids and services when needed to communicate effectively. The key to communicating effectively is to consider the nature, length, complexity, and context of the communication as well as the person’s normal methods of communication. Moreover, the rules will apply to communications with a person’s parent, spouse, or companion in appropriate circumstances. However, such accommodations will not be required when they result in an “undue burden” making it significantly difficult or expensive. expensive.

People who have communication disabilities use different ways to communicate. First, people who are blind may give and receive information audibly rather than in writing and second, people who are deaf may give and receive information through writing or sign language rather than through speech. Thus, the ADA uses the term “auxiliary aids and services” to refer to the ways businesses should communicate with people who have such disabilities. For example, for people who are blind, have vision loss, or are deaf-blind, this includes being able to provide qualified readers, information in large print, Braille, or electronically for use with a computer screen-reading program or an audio recording of the printed information.² Additionally, for people who are deaf, have hearing loss, or a deaf-blind, this will include providing a qualified note taker, sign language interpreter, oral interpreter, cued-speech interpreter, real time captioning, written materials, or a printed script of a stock speech.³ Further, for people with speech disabilities, accommodations may include providing a qualified speech to speech transliterator (a person trained to understand unclear speech), keeping paper and pencils on hand for notes or just allowing more time to communicate with someone who uses a communication board or device. Ultimately, the rule over aids and services accommodation can be satisfied by use of a variety of technologies and no specific one is appropriate for all circumstances.⁴

² A qualified reader means someone who is able to read effectively, accurately, and impartially, using any necessary specialized vocabulary.

³ A qualified interpreter means someone who is able to interpret effectively, accurately, and impartially, both receptively (understanding the person with a disability) and expressively (the skill needed to convey the information back to the disabled person) using any necessary specialized vocabulary.

⁴ Some technologies include 1) assistive listening systems and devices; 2) open, closed, and real time captioning and caption decoders and devices; 3) telephone handset amplifiers, hearing aid compatible telephones; 4) videotext displays; 5) screen reader software, magnification software and optical readers; 6) video description and secondary auditory programming devices; and 7) accessibility features in electronic documents.

As mentioned above, the key to deciding what aid or service is needed to communicate effectively is to consider the nature, length, complexity, and context of the communication as well as the person's normal method of communication. For example, some situations can be as simple as pointing to product information during sales pitches to allow a person who is deaf to decide what product they like and to be able to ask questions about the product by writing notes back and forth. However, other solutions may be more appropriate when the information being communicated is more extensive or complex. For legal documents, for example, providing an accessible electronic copy for a client who is blind allows the client to read the document at home using a computer screen-reading program. But remember, a person's method of communication is also key, thus, having copies of documents available in Braille will only be useful if the disabled person knows how to read Braille and sign language interpreters are only effective for people who use sign language. Plus businesses are also required to accept telephone calls placed through TRS and VRS systems.⁵ Such calls must be treated, by employees, just like any other call or communication with a client. Furthermore, in many situations, businesses communicate with someone other than the person who is receiving a good or service. Employees talk to spouses, other relatives, or friends, to name a few. The rules refer to such people as "companions" and require that businesses provide effective communication for companions who have communication disabilities.⁶ Finally, when choosing an aid or service, one must keep in mind that Title III encourages businesses to consult with the disabled person to discuss what aid or service is appropriate for them.

However, businesses do not have to provide any or all aids and services for effective communication if it would result in an undue burden on the company. An undue burden is defined as a significant difficulty or expense. But if a particular aid or service would result in an undue burden, the entity must provide another effective aid or service, if possible, that would not result in an undue burden. Determining what constitutes an undue burden varies from company to company and sometimes from one point in time to the next. Businesses should take into consideration the nature and cost of the aid or service relative to their size, overall financial resources, and overall expenses. Thus, generally, a business with greater resources is expected to do more than one with fewer resources.⁷ Also, businesses can require reasonable advance notice from people requesting aids and services, based on the length of time needed to acquire the aid or service, but may not impose excessive advance notice requirements and "walk-in" requests must still be honored to the extent possible.

⁵ Telecommunications Relay Services (TRS) is a free nationwide service reached by calling 7-1-1, which uses communications assistants who serve as intermediaries, the communications assistant tells the telephone user what the other party is typing and types to tell the other party what the telephone user is saying. TRS also provides speech to speech transliteration for callers who have speech disabilities. Video Relay Services (VRS) is a free service for people who use sign language and have video-phones. A VRS interpreter serves as an intermediary, the interpreter tells the telephone user what the person is signing and signs to the person what the telephone user is saying.

⁶ The term "companion" includes any family member, friend, or associate of a person seeking or receiving any entity's goods or services who is an appropriate person with whom the entity should communicate.

⁷ Additionally, if the business has a parent company, the administrative and financial relationship, as well as the size, resources, and expenses of the parent company, would also be considered.

Conclusion

In conclusion, homebuilders must tread lightly when it comes to the ADA. The requirements are numerous and complex, however, the best strategy to adopt is a proactive one. Contractors can revise their hiring and employment practices by taking actions such as monitoring compliance, preparing specific job descriptions that identify essential functions of the job, identifying potential problems, and making reasonable accommodations before terminating a disabled employee. Homebuilders should also be proactive in their approach to online content of their websites, specifically, virtual tours accessible to those with disabilities, and closed captioning for audio content and coding that is compatible with web reading software to provide access to users with hearing and vision impairments. While the nuances of the ADA may seem daunting at first, homebuilders and contractors who are proactive can take precaution in the contracts they have with designers and subcontractors to make sure the requirements are clear and that their interests are protected.



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