

MARCH 18, 2011

LAW ALERT

NEW ADA REGS & DESIGN STANDARDS IN EFFECT; NOTABLE CHANGES

In September of 2010 the U.S. Department of Justice revised the regulations implementing the Americans with Disabilities Act (ADA) for Title II (State and Local Government Entities) and Title III (Public Accommodations and Commercial Facilities). The new ADA regulations incorporate the **2010 ADA Standards for Accessible Design**. These revised regulations and standards take effect **March 15, 2011** (subject to certain phasing-in as set forth below).

State and Local Government Entities covered by **Title II** of the ADA, must follow both the Title II regulations at 28 CFR 35, and the 2010 ADA Standards for Accessible Design. The 2010 Standards are made up of 28 CFR Part 35.151 (which covers New Construction and Alterations) and the 2004 ADAAG (36 CFR part 1191, appendices B and D). In places where the 2004 ADAAG and 28 CFR 35.151 conflict, the requirements of 28 CFR 35.151 will prevail.

Places of Public Accommodation and Commercial Facilities covered by **Title III** of the ADA, must follow both the Title III regulations at 28 CFR 36, and the 2010 ADA Standards for Accessible Design. The 2010 Standards are made up of 28 CFR 36 Subpart D (which covers New Construction and Alterations) and 2004 ADAAG (36 CFR part 1191, appendices B and D). In places where the 2004 ADAAG and 28 CFR 36 Subpart D conflict, the requirements of 28 CFR 36 Subpart D will prevail.

March 15, 2011 is the compliance date for the **revised Title II and Title III Regulations** which include new or expanded provisions on

general nondiscrimination policies, including the use of service animals, the use of wheelchairs and other power-driven mobility devices, selling tickets for wheelchair-accessible seating at sports and performance venues, and providing interpreter services through video conferencing. New requirements on reserving and guaranteeing accessible rooms at hotels have a compliance date of March 15, 2012.

March 15, 2012 is the compliance date for using the **2010 ADA Standards** for new construction, alterations, program accessibility, and barrier removal.

State and Local Government performing **New Construction and Alterations** on or after September 15, 2010 and before March 15, 2012, may comply with the 1991 Standards, the Uniform Federal Accessibility Standards (UFAS), or the 2010 Standards (the entirety of each standard must be used for all elements, not a mix of the standards). For projects commencing physical construction or alterations on or after March 15, 2012, State and Local Governments must comply with the 2010 Standards (they can no longer use UFAS).

Places of Public Accommodation and Commercial Facilities performing **New Construction and Alterations** on or after September 15, 2010 and before March 15, 2012 may comply with the 1991 Standards, or the 2010 Standards (the entirety of each standard must be used for all elements, not a mix of the standards). For projects commencing physical construction or

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alterations on or after March 15, 2012, Places of Public Accommodation and Commercial Facilities must comply with the 2010 Standards.

There is a **safe harbor** where elements in covered facilities that were built or altered in compliance with the 1991 Standards or UFAS as applicable, do not need to be brought into compliance with the 2010 Standards until the elements are subject to a planned alteration. This safe harbor does not apply to elements subject to requirements which are in the 2010 Standards but which were not in the 1991 Standards.

For Places of Public Accommodations subject to the "**barrier removal**" requirement, if elements do not currently comply with the 1991 Standards, the elements must be modified *to the extent readily achievable* using either the 1991 Standards or the 2010 Standards up until March 15, 2012. On or after March 15, 2012, the 2010 Standards must be used.

Of note, newly added to the Title II Regulations for **State and Local Government Entities**, are design requirements applicable to **for-sale housing**. Dwellings designed and constructed or altered by public entities and offered for sale to individuals must comply with the 2010 Standards, including housing where design and construction take place only after a specific buyer

has been identified. In those instances the public entity must offer the accessible units to the pre-identified buyers with disabilities.

Section 233 of the 2010 Standards applies to Residential Facilities, differentiating between entities subject to **HUD's Regulations implementing Section 504 of the Rehabilitation Act** and those not. To avoid conflict with the HUD Regulations, the 2010 Standards require residential dwellings subject to the HUD Section 504 Regulations to comply with the scoping requirements in the HUD Section 504 regulations instead of the scoping requirements in the 2010 Standards, but to comply with all other aspects of the 2010 Standards. In addition, such dwelling units must be dispersed according to HUD's Section 504 criteria. A public entity with a program for building for-sale housing receiving federal financial assistance, must comply with the applicable Section 504 regulations.

The regulations and other information related to ADA may be found at www.ada.gov.

For further information, please contact Isabel Brown, Heather Gould, or any other Goldfarb & Lipman attorney at 510-836-6336.

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