

Date: January 9, 2012

Attorney Work Product
Attorney-Client Privilege

To: Paul Bambei
Jeff Sims

From: David D. Ransom
Cecilia R. Showalter

Re: ADA Requirements for Barrier Removal in Pools and Spas: Additional Analysis

Introduction

You requested additional analysis regarding whether a business, which is a place of public accommodation, can satisfy the requirements of the 2010 ADA regulations for pools by having staff on-hand that can assist guests in getting into and out of pools. In addition, you asked whether it would be helpful for ARVC to send a letter to the Department of Justice (DOJ) requesting specific guidance on this issue.

In short, the DOJ is not likely to endorse this measure as being in compliance with the regulations. First, the DOJ will likely remind ARVC that each business must go through an independent analysis of whether the requirements that adhere to the 'letter of the law' in the regulations is "readily achievable" or not. If the analysis concludes that the requirements as written are not "readily achievable," DOJ is not likely to accept an alternative solution, such as having staff on-hand to assist disabled guests.

The second reason DOJ is not likely to endorse this solution for businesses is that it leaves persons with disabilities completely dependent upon others to enter a pool. It is important to remember that the goal of removal of barriers is independent access for those with a disability. Indeed, the term "independent operation" appears many times throughout the regulations.

Finally, the IRS offers a tax credit for small businesses to offset costs associated with compliance. Because hiring staff physically able to assist persons with disabilities could be potentially costly, and is not mentioned as a method of compliance in the regulations (and therefore not eligible for an offsetting tax credit), it is possible that this solution could end up being more expensive than a ramp or a pool lift after all.

Readily Achievable Analysis

The ADA regulations require businesses to remove architectural barriers in existing facilities when it is "readily achievable" to do so. The definition of "readily achievable" is "easily accomplishable without much difficulty or expense." According to DOJ's primer for small

businesses, this requirement is based on “the size and resources of a business,” so small businesses with fewer resources are expected to remove less barriers than businesses with more resources. It further provides that “When removing barriers, businesses are required to comply with the Standards to the extent possible.” Also, “any deviation from the Standards must not pose a significant safety risk.”

In a telephone conversation in December 2011, a DOJ ADA specialist reminded us that what is readily achievable is a changing analysis that will depend on economic conditions and the specific resources of a business. This means that although a business may not be in a position to comply with the standards for a year or two, it should reevaluate its situation each year to see whether barrier removal becomes “readily achievable.”

According to this guidance, each ARVC member should start from a position of analyzing whether it is possible to comply with the requirements provided in the regulations “by the letter of the law,” and if it is not, whether some portion of the requirements can be met. A business appears to be exempt from making the required changes if doing so in any given year would require too much “difficulty or expense.” By contrast, the regulations and guidance do not appear to suggest that businesses craft creative, alternative solutions that do not appear in the regulations, such as hiring staff to assist guests in and out of pools. In part, this could be to ensure that barrier removal solutions remain safe and regulated, and so that they do not pose additional safety risks to disabled guests, or even potential liability risks to the business.

Independent Operation

Independent operation is a requirement that appears throughout the 2010 Standards for Accessible Design (technical requirements), including, most importantly, Section 1009.2.7 providing technical standards for pool lifts. This section provides:

“Pool lifts must be capable of unassisted operation from both the deck and water levels. This will permit a person to call the pool lift when the pool lift is in the opposite position. It is extremely important for a person who is swimming alone to be able to call the pool lift when it is in the up position so he or she will not be stranded in the water for extended periods of time waiting assistance. The requirement for a pool lift to be independently operable does not preclude assistance from being provided.” 1009.2.7

Indeed, the requirement of “independent operation” appears throughout the standards, such as in Section 240.2 (play areas); 404.1 (doorways); 707.5 (communication elements); 1002.5 (recreation facilities); 1002.6 (amusement rides); and 1008.4.2 (recreation areas).

It appears quite clear from this technical standard that the regulations do not conceive of staff assistance as an appropriate substitute for a ramp or a pool lift. However, it does clarify that staff assistance is always welcome.

Cost/Benefit Analysis: Tax Credit for Barrier Removal

In order to assist small businesses with compliance with the ADA, the IRS code includes a Disabled Access Credit (Section 44) for businesses with 30 or fewer full-time employees or with a total revenue of \$1 million or less in the previous tax year. Eligible expenses may include the

cost of undertaking barrier removal and alterations to improve accessibility, among other costs not applicable to ARVC members' pools.

In addition, Section 190 of the Internal Revenue Code provides a tax deduction for businesses of all sizes for costs incurred in removing architectural barriers in existing facilities or alterations. The maximum deduction is \$15,000 per year.

Because having staff on-hand to assist with entry and exit to pools is not listed in the ADA regulations as an acceptable means of barrier removal, this cost is not likely eligible for a tax credit. Accordingly, complying with the regulations by installing a ramp or a pool may be more cost-effective for ARVC members than having special staff on hand.