

DISABILITY LAW

July 2010

Department of Justice Marks 20th Anniversary of the Americans with Disabilities Act with Flurry of Regulatory Activity

On Monday, July 26, 2010 – the 20th Anniversary of enactment of the Americans with Disabilities Act (ADA) – the U.S. Department of Justice (DOJ) issued four Advance Notices of Proposed Rulemaking (ANPRMs) under the Americans with Disabilities Act (ADA). The four new ANPRMs solicit public comment with respect to establishing accessibility requirements for the following: 1) websites through which places of public accommodation and state and local governments offer goods, services, programs or activities; 2) equipment and furniture; 3) movie captioning and video description; and 4) next generation 9-1-1 service. Issuance of these rulemakings reflects DOJ's increased efforts in applying and enforcing Title II (state and local governments) and Title III (places of public accommodation) of the ADA. DOJ also is expected shortly to issue final regulations amending its current Title II and Title III regulations and adopting the July 2004 ADA Accessibility Guidelines promulgated by the U.S. Access Board as legally enforceable accessible design standards.

Collectively, these new rulemakings and DOJ's forthcoming final regulations amending its Title II and III regulations will impact all entities that make goods, services or other programs available to the public – whether through actual buildings or facilities or through Internet websites. They address not only physical accessibility of buildings and facilities, but also communications accessibility for individuals with sensory impairments, provision of auxiliary aids and services, and policies regarding service animals and mobility aids (such as Segways). The new ANPRMs will impact not only websites, but also technological devices, equipment and furniture in facilities covered by Titles II or III.

The ANPRMs issued today provide for a 180-day public comment period. DOJ also intends to hold at least one public hearing during that period to obtain additional public comment. Copies of the ANPRMs appear in the *Federal Register*. Set forth below is a brief summary of the four ANPRMs.

1. Website Accessibility

DOJ seeks public comment regarding whether websites maintained by entities subject to Title II (state and local governments) and Title III (places of public accommodation) should have to comply with two different accessibility criteria: 1) the Web Content Accessibility Guidelines 2.0 (Level AA Success Criteria), which are voluntary guidelines issued by the World Wide Web Consortium in December 2008; or 2) the electronic and information technology accessibility standards issued by the U.S. Access Board under Section 508 of the Rehabilitation Act, which presently apply only to the federal government and which the Board currently is in the process of revising.

DOJ's statements in the ANPRM regarding coverage highlight that this rulemaking will have far-reaching application. The distinctions DOJ presently envisions in coverage raise numerous issues for covered entities with a Web presence. Generally, DOJ indicates that the rulemaking will apply to the "provision of goods, services, programs or activities" to the public via Internet websites maintained by Title II and Title III entities. DOJ distinguishes information posted to such websites by website users for their personal use (such as postings to online communities, forums and networks), but also notes that covered entities should provide website users the ability to make such posts accessible. Significantly, DOJ also states that although a covered entity generally will not be held liable for the accessibility of websites linked to its website, the covered entity will be held liable for the accessibility of any other linked website that the user is required to use, such as third-party payment sites. This raises serious issues for all Title II and Title III entities that conduct website functions, whether in whole or in part, through third parties.

DOJ is contemplating an effective date of six months after issuance of the final regulations for newly created websites or newly created pages in existing websites (which necessarily could entail making other portions of the website accessible). Alterations to websites or pages undertaken six months after issuance of the regulations would have to comply to the maximum extent feasible. Existing websites and webpages would have to be made accessible within two years.

2. Equipment and Furniture

DOJ intends to provide regulatory guidance regarding the extent to which the ADA Standards for Accessible Design, 28 C.F.R. part 36, App. A, which by their express terms apply only to fixed or built-in elements, also are appropriate for elements that are not fixed. DOJ notes that for many elements, such as ATMs, whether such elements are fixed or not is irrelevant to accessibility of the element. DOJ broadly seeks public comment on the types of equipment and furniture that should be addressed in this rulemaking, and specifically seeks public comment regarding accessibility requirements for the following types of equipment and devices:

1. Medical Equipment and Furniture
2. Exercise Equipment and Furniture
3. Golf Cars
4. Beds (both in transient lodging and medical or other care facilities)
5. Electronic and Information Technology Equipment (*e.g.*, point-of-sale devices, ticketing devices, information kiosks, security screening)

As noted above, the U.S. Access Board presently is in the process of updating its standards for electronic and information technology, and as part of that rulemaking also is proposing to amend the July 2004 ADA Accessibility Guidelines to address “self-service” devices, such as point-of-sale devices. Accordingly, DOJ’s rulemaking will overlap with the Board’s own rulemaking. The Board also is presently working on accessibility standards for medical equipment.

3. Movie Captioning and Video Description

As described in the ANPRM, this rulemaking appears limited to entities that own and operate movie theaters. DOJ is contemplating requiring that owners and operators of movie theaters provide captioning and video description for 50% of movie screens within five years of the effective date of the regulations. DOJ also is contemplating a “rolling” implementation, whereby each year 10% of screens would have to provide captioning and video description until a minimum of 50% is reached.

4. Next Generation 9-1-1 Service

Under DOJ’s current Title II regulation, public entities operating 9-1-1 call-taking centers (also known as Public Safety Answering points), must provide equal and direct access for individuals who use analog text telephones (TTYs). As the call center industry shifts from analog telecommunications technology to Internet Protocol-enabled Next Generation 9-1-1 services, and as many individuals with disabilities rely on Internet-Protocol-based and digital wireless devices, as opposed to analog-based TTYs, DOJ seeks to amend its Title II regulation to address accessibility to Next Generation 9-1-1 services.

For more information, please contact the Barnes & Thornburg attorney with whom you work, or Teresa L. Jakubowski, a partner in our Disability Law Practice and Washington, D.C. office, (202) 371-6366, teresa.jakubowski@btlaw.com. You can also visit us online at www.btlaw.com.

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