



ADA's Barrier Removal Requirement

What Landlords and Tenants Should Know

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The Americans with Disabilities Act of 1990 is a wide-ranging civil rights legislation that prohibits discrimination on the basis of disability under certain circumstances. Although many landlords and tenants are already aware that the ADA precludes new construction or alterations in existing structures that create obstacles to the disabled, landlords and tenants need to also be cognizant of the so called "barrier removal" requirement of Title III of the ADA, which obligates any person who owns, leases (or leases to), or operates a place of public accommodation (as opposed to a commercial facility) to: "remove architectural, and communication barriers that are structural in nature, in existing facilities...where such removal is readily achievable."

Readily achievable barrier removal imposes a broad range of compliance obligations that may include: creating specially designated and accessible parking spaces, installing ramps and making curb cuts in sidewalks and entrances, widening doors, repositioning telephones and installing grab

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bars in toilet stalls. Because remedial action can be costly, ADA compliance issues must be carefully considered by both landlords and tenants, with the parties determining responsibility for compliance obligations.

An important concern created by the statutory language is the meaning of "readily achievable" barrier removal. The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." Factors to be considered include the cost of the remedial

action and the financial resources of the party responsible for the same (42 U.S.C. § 12181(9)).

Whether or not specific work is "readily achievable" is determined on a case-by-case basis. By defining "readily achievable" in this way, barrier removal becomes a continuing obligation of the responsible party or parties. Remedial action that may not have been "readily achievable" at one time may later become "readily achievable" as the financial resources of the responsible party, or parties, increase.

Both landlords and tenants are obligated to comply with the ADA. Such obligations may not be eliminated by contract (*Botosan v. Paul McNally Realty*, 216 F.3d 827 (2000)). However, although landlords and tenants will at all times remain fully liable to third parties for ADA compliance, they can, between themselves, allocate compliance responsibility in their leases. As such, parties to a commercial lease should consider the following ADA specific provisions:

1. **Representations and Warranties.** A tenant may want to obtain a representation and warranty from its landlord that the premises are currently ADA compliant. A landlord may want to obtain a representation and warranty from its tenant that any alterations to the premises performed by the tenant will comply with the ADA.

2. **Compliance Allocation.** The parties should determine who will bear the cost of ADA compliance and which party will be responsible for performing any necessary remedial action. If the landlord is responsible for the work, a tenant should negotiate an appropriate remedy for the landlord's failure to do so in a timely manner and ensure that such costs are not passed back as an operating expense. If the tenant is responsible for the cost, it may want to negotiate a

maximum dollar amount for which it could be obligated.

3. **Indemnification Provision.** Once the parties determine who is to bear the cost of ADA compliance, appropriate indemnification provisions should be incorporated into the lease agreement. Thus, in the event that either a landlord or a tenant

is held individually liable in an ADA enforcement action, the indemnified party can seek indemnification from the indemnifying party.

The parties should be careful to exclude lease provisions that could prevent ADA compliance. For example, a provision that restricts a tenant from making alterations to the premises might effectively impede the tenant's ability to remove architectural barriers.

Should parties to a commercial lease fail to determine, allocate and perform ADA compliance obligations, landlord and/or tenant liability to third parties may result. Moreover, unexpected compliance costs may be incurred and unnecessary litigation may ensue. To avoid these undesirable consequences, prudent landlords and tenants should address the issues discussed above in their lease negotiations and documentation. **CC**

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About the Author: David Y. Joe is an attorney with Rutter Hobbs & Davidoff specializing in real estate transactions, with particular emphasis on purchase and sale, leasing and financing of industrial, office and retail properties. Rutter Hobbs & Davidoff represents clients in matters involving business disputes and litigation, real estate, intellectual property, labor and employment, corporate and securities, bankruptcy and corporate reorganization, estate planning and probate litigation. More information is available at www.rutterhobbs.com

