

## **Americans with Disabilities Act Compliance Kit**

The Americans with Disabilities Act (the “ADA”) had staggered compliance dates, most of which were in 1992, but one of which occurred on July 26, 1994. As of that date, the ADA became applicable to employers with 15 or more employees. Thus, the employment section (Title I) will apply to more real estate sales offices than in the past. Additionally, it is important for a real estate broker to know the relevant number of employees under state statute. For example, the statute in California protecting individuals with disabilities applies to employers with five or more employees.

As a reminder, the ADA makes it unlawful to discriminate against people with disabilities. An individual is considered disabled if he has one of the following, (1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of such impairment, and (3) is regarded as having such an impairment. Examples include impairment in walking, seeing, caring for oneself, a history of mental illness, heart disease, cancer, cerebral palsy, muscular dystrophy, multiple sclerosis, diabetes, AIDS, and HIV infection. Title I of the ADA applies to employment and protects qualified persons with a disability who can perform the essential functions of the job with or without reasonable accommodation. Thus, if a real estate sales office has 15 or more employees, Title I applies.

Title III of the ADA prohibits entities that own, lease, lease to or operate a place of public accommodation from discriminating against the disabled. Businesses covered include hotels, restaurants, convention centers, sales establishments including real estate offices, offices of professionals such as attorneys and CPA's, etc. If a real estate broker or salesperson has a home office in which business is conducted with customers, that portion of the home must also be in compliance with the ADA. The ADA requires equal access and services to disabled individuals in the most integrated setting possible. In essence that means that architectural and communication barriers are to be removed in existing facilities where such removal is readily achievable and can be carried out without much difficulty or expense. Examples of steps to take in order to remove barriers include installing ramps, rearranging tables and chairs, repositioning telephones, adding raised markers on elevator control buttons, widening doors, installing offset hinges to widen doors, etc.

How does this impact the real estate sales office? As previously indicated, if a practitioner uses his or her home or a portion thereof as an office, the private residence or portion thereof used for business must be accessible to people with disabilities. The Office on the ADA has issued some technical guidance for the real estate industry as follows. For example, a two-story building with bathrooms on both the ground floor and the second floor will be used for a real estate office. No elevator will be installed because it is not required in a building with less than three stories. In other words, both the ground floor and the second floor bathrooms must be accessible. The Office on the ADA takes the position that even in buildings that are exempt from the elevator requirement, all of the other requirements must be met. Thus, the second floor bathroom must still be accessible. Their reasons are as follows. Many individuals walk up stairs by using crutches, but would then use wheelchairs to get around once they reach the upper floor. Additionally, accessible design of bathroom facilities will foster ease of use by all persons.

Since the ground floor is being designed to be accessible, there is little additional cost involved in designing the second floor to be accessible.

Another area in which the Office on the ADA has commented relates to model homes. If a sales office for a residential housing development is located in a model home, the area used for the sales office is considered a covered place of public accommodation and must be accessible, although model homes and open houses are generally not considered to be places of public accommodation. The Office on the ADA has stated that developers should voluntarily provide a minimal level of access to the homes for potential homebuyers with disabilities. For example, a developer could provide physical access via ramp or lift to the primary level of one or several model homes and, as an alternative, make photographs of the other levels of the home as well as of other models available to the customer.

Since auxiliary aids must be provided to individuals covered under the ADA if requested, who decides what type of aids are acceptable? The Office on the ADA has indicated that public accommodations such as real estate sales offices should consult with individuals with disabilities to determine the type of aid needed in order to ensure effective access and communication. The ultimate decision rests in the hands of the public accommodation as long as the method chosen results in effective access and communication. Thus for example, if a person has requested an interpreter, it is necessary to provide a qualified interpreter. A qualified interpreter is one "who is able to interpret effectively, accurately and impartially both receptively and expressively using any necessary specialized vocabulary." Because a certified interpreter may not meet this standard if that interpreter is not familiar with a specialized vocabulary, it is important to identify an interpreter with real estate knowledge to serve in this capacity. This is important to remember since the Office on the ADA has taken the position that if an individual is serious in purchasing a car, the services of a qualified interpreter may be necessary because of the complicated nature of the communication involved in buying a car. Obviously, buying a home is much more complicated and costly than buying a car and it would be necessary for a real estate agent to obtain the services of a qualified interpreter when working with a serious buyer who had a hearing impairment.

Since enforcement under the ADA has been stepped up, it is important for practitioners to recognize their obligations. The staggered effective dates for enforcement purposes protected small businesses with 10 or fewer employees and gross receipts of \$500,000 or less until early 1993. That safe harbor no longer exists, however, so compliance is of utmost importance.

## **INTRODUCTION**

The Americans With Disabilities Act (ADA), signed into law on July 26, 1990, makes it unlawful to discriminate against people with disabilities. The law has five sections or "titles" which apply to employment, public services, public accommodations, services operated by private entities, and telecommunications. The Department of Justice published regulations to implement the statute in the Federal Register, Volume 56, Number 114, on July 26, 1991. These regulations offer some guidance in complying with the ADA.

Following is an overview of Titles I and III. Title I affects real estate offices and Association offices if they have the threshold number of employees. Title III affects Association offices, real estate offices, and commercial facilities. Boards of REALTORS® are authorized to duplicate this kit or portions thereof for distribution to members, and for inclusion in Board newsletters. Definitions and a list of resources are included at the end of this kit.

## **TITLE I - EMPLOYMENT**

### **Employers Covered and the Requirements**

This section of the ADA has two effective dates. It is effective as of July 26, 1992 for employers with twenty-five (25) or more employees and July 26, 1994 for employers with fifteen (15) or more employees.

An individual will be considered disabled if he has one of the following: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such an impairment; and (3) is regarded as having such an impairment. Examples include impairment in walking, seeing, caring for oneself, a history of mental illness, heart disease, cancer, cerebral palsy, muscular dystrophy, multiple sclerosis, diabetes, AIDS and HIV infection, and individuals who have successfully completed or are participating in drug treatment programs. Current users of illegal drugs, homosexuals, bisexuals, compulsive gamblers, kleptomaniacs, and transvestites are not considered disabled.

Under Title I, a qualified person with a disability is someone who can perform the essential functions of the job with or without reasonable accommodation. This means that the individual must satisfy the prerequisites for the job such as experience, education, licensure, etc., and be able to perform the fundamental tasks of the job.

The ADA requires that employers make reasonable accommodation to the known physical or mental disabilities of a qualified applicant or employee, unless it would impose an undue hardship on the employer. Reasonable accommodation will be decided on a case-by-case basis, but may include job restructuring, modified work schedules, providing readers or interpreters, raising a desk for a person with a wheelchair, or allowing a person to bring a service animal into the workplace.

Whether or not an undue hardship would be imposed upon an employer will also be decided on a case-by-case basis. Undue hardship means an act requiring significant difficulty or expense or that is unduly costly, extensive, substantial, disruptive or will alter the nature of the employer's business. The case-by-case consideration will take into account the size and type of business, the nature and cost of the accommodation, and the overall financial resources of the business. If funding is available from another source such as the individual or a rehabilitation agency, undue hardship based upon cost will not be defensible.

## **Consequences of Non-Compliance**

The Equal Employment Opportunity Commission (EEOC) has jurisdiction over this title of the ADA. Charges of discrimination must be filed within one hundred and eighty (180) days of the act of discrimination, unless the act occurs in a state where the Department of Human Rights handles cases for the EEOC. Then the charge must be lodged with the state agency within one hundred and eighty (180) days and the EEOC within three hundred (300) days. If a company is found to have discriminated under the ADA, remedies may include injunctive relief, back pay, prejudgment interest, and the award of attorneys fees and costs to the prevailing party. Under the Civil Rights Act of 1991, compensatory and punitive damages are also available.

## **Recommendations for Employers**

### **Compliance Checklist**

- 1. Put job descriptions in writing and identify the essential tasks of each job.**
- 2. Review application forms, interviewing practices, and selection procedures to assure that uniform questions are asked of all applicants, and that disabled individuals are evaluated on whether or not they can perform the fundamental tasks of the job.**
- 3. Review office layout to determine reasonable accommodations that could be made to existing facilities to permit accessibility and use by the disabled. This includes identifying auxiliary services for the visual and hearing impaired and considering job restructuring.**
- 4. Review personnel policies to assure that none adversely impact the disabled in terms of the workplace and benefits.**
- 5. Post notice of the ADA as required by law.**

## **TITLE III - PUBLIC ACCOMMODATIONS, COMMERCIAL FACILITIES AND PRIVATE ENTITIES THAT OFFER CERTAIN EDUCATIONAL COURSES**

### **Businesses Covered and the Requirements**

This section of the ADA covers most businesses that service the public. It also covers commercial facilities and private entities that offer educational courses.

It prohibits any private entity that owns, leases, leases to, or operates a place of public accommodation from discriminating against the disabled. Examples of businesses covered include hotels, restaurants, libraries, places of education, convention centers, sales establishments (**including real estate offices**), banks, offices of professionals such as attorneys

and CPAs, and **real estate board offices**. If a real estate broker or agent has a home office in which business is conducted with customers, that portion of the home must also be in compliance with the ADA.

The intent of Title III of the ADA is to provide equal access and services to disabled individuals in the most integrated setting possible. It requires the removal of architectural and communication barriers that are structural in existing facilities where such removal is readily achievable, easily accomplishable and able to be carried out without much difficulty or expense.

**There is an exemption for facilities eligible for listing in the National Register of Historic Places under the National Historic Preservation Act or those designated as historic under state or local law, if the removal of barriers would destroy the historic significance of the buildings and facilities.**

**Examples of steps to remove barriers include but are not limited to the following actions:**

- 1. Installing ramps.**
- 2. Making curved cuts in sidewalks and entrances.**
- 3. Repositioning shelves.**
- 4. Rearranging tables, chairs, vending machines, display racks, and other furniture.**
- 5. Repositioning telephones.**
- 6. Adding raised markings on elevator control buttons.**
- 7. Installing flashing alarm lights.**
- 8. Widening doors.**
- 9. Installing off-set hinges to widen doorways.**
- 10. Eliminating a turnstile or providing an alternative accessible path.**
- 11. Installing accessible door hardware.**
- 12. Installing grab bars in toilet stalls.**
- 13. Rearranging toilet partitions to increase maneuvering space.**
- 14. Insulating lavatory pipes under sinks to prevent burns.**
- 15. Installing a raised toilet seat.**
- 16. Installing a full length bathroom mirror.**
- 17. Repositioning the paper towel dispenser in a bathroom.**
- 18. Creating and designating accessible parking spaces.**
- 19. Installing an accessible paper cup dispenser at an existing inaccessible water fountain.**
- 20. Removing high pile low density carpeting.**
- 21. Installing vehicle hand controls.**

There are two effective dates under this title of the ADA and two levels of compliance. Businesses covered must comply by January 26, 1992 by removing architectural and communication barriers and providing auxiliary services. The obligation to engage in readily achievable barrier removal is a continuing one and should be assessed periodically.

January 26, 1992 is also the effective date for businesses making alterations to existing facilities. A business that is altering parts of the building must comply with the ADA accessibility guidelines included in the Federal Register. **There is a narrow exception if an entity can demonstrate that it is structurally impracticable to meet the requirements. This exception will apply only in unusual circumstances where unique characteristics of terrain make accessibility unusually difficult. There also is an elevator exemption for new small buildings and alterations to existing facilities with less than three stories or less than 3,000 square feet per story. It does not apply, however, to a facility housing a shopping center, a shopping mall, or the professional office of a health care provider, or other categories of facilities as determined by the Attorney General.** All altered parts of the building must be accessible to the disabled, including individuals with wheelchairs. Additionally, the path of travel from the altered area to bathrooms, telephones, drinking fountains, etc., must be readily accessible unless the cost to do so is disproportionate to the cost of the alteration. This means that it must exceed twenty percent of the cost of the alteration. It is still necessary that businesses do as much as possible since the twenty percent guideline is based on the three (3) year cost of alterations.

The second date for compliance of January 26, 1993 applies to new construction where the completed application for a building permit or permit extension was filed after January 26, 1992 and occupancy is after January 26, 1993. For new construction, the ADA accessibility guidelines referenced above must be followed. **Id.**

A deduction is available under the Internal Revenue Code of up to \$15,000.00 per year for the expense of removing architectural barriers. A tax credit is available for certain costs of compliance for small businesses whose gross receipts are not greater than \$1,000,000.00 or which employ no more than thirty workers. The credit is for fifty percent of the eligible access expenditures that exceed \$250.00 but do not exceed \$10,250.00.

**Real estate practitioners should inform sellers and buyers of the existence of the ADA, and that it applies to public accommodations and commercial facilities. Sellers and buyers can then discuss the ADA compliance requirements during contract negotiations in consultation with their respective attorneys. This is particularly important in commercial transactions.**

### **Consequences of Non-Compliance**

The Department of Justice has jurisdiction over Title III of the ADA. Both private parties and the Attorney General may initiate actions for alleged violations. Suits by the Attorney General can arise if there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to compliance with the ADA or that any person or group of persons has been denied any of the rights granted under the ADA, and such denial raises an issue of general public importance.

Courts may grant equitable relief which may include temporary, preliminary, or permanent restraining orders, requiring the provision of auxiliary aids or services and modification of

policies to make facilities readily accessible to and usable by individuals with disabilities. In addition, courts may award other relief as considered appropriate, including monetary damages to persons aggrieved. In order to vindicate the public interest, the court also is allowed to assess a civil penalty in an amount not exceeding \$50,000.00 for a first violation and not exceeding \$100,000.00 for any subsequent violation.

For purposes of the removal of barriers that are readily achievable, no civil action will be brought for a violation that occurs before July 26, 1992 against businesses with twenty-five or fewer employees and gross receipts of \$1,000,000.00 or less. No action will be brought before January 26, 1993 against businesses with ten or fewer employees and gross receipts of \$500,000.00 or less.

## **Recommendations for Buildings that are Public Accommodations or Commercial Facilities**

### **Compliance Checklist**

- 1. Have an audit of your office conducted to determine readily achievable changes in order to comply with the ADA. You may want to discuss these changes with representatives of agencies for the disabled to assure their effectiveness. If a leased office space is involved, determine whose responsibility it is to make various changes, the landlord or the tenant. The provisions in the lease governing the authority to make alterations will determine which party bears responsibility for compliance.**
- 2. Following is the suggested order of priority for barrier removal to make a public accommodation accessible:**
  - a. Remove barriers so that the disabled can get through the door. This may include ramping and the widening of entrances.**
  - b. Modify policies, practices, and procedures to permit the use of a service animal by an individual with a disability.**
  - c. Provide access to those areas where goods and services are made available to the public. This may require raised letter markings on elevator control buttons and installing flashing alarm lights.**
  - d. Make restroom facilities accessible to the disabled.**
  - e. Other readily achievable changes.**

## **Meetings, Conventions and Trade Shows**

Any private entity, including trade associations, that leases space for a meeting or convention becomes a public accommodation and must comply with the ADA as of January 26, 1992, by assuring that the space is readily accessible and auxiliary services are available. Responsibility for compliance rests with the organization sponsoring the meeting, convention or trade show. However, compliance can be shifted to the meeting facility utilized by the sponsor pursuant to the terms of a contract. Boards of REALTORS® can comply by doing the following:

### **Compliance Checklist**

- 1. Since many contracts for meetings and conventions are negotiated and signed years in advance, review existing contracts to determine if they have a compliance clause which allocates responsibility to one of the parties for compliance with all relevant federal, state, and local laws.**
- 2. If a compliance clause does not exist in your contracts, negotiate an amendment to existing contracts requiring the facility to comply with the ADA in areas such as access and setup for meeting functions and displays. In addition, include an indemnification clause whereby the facility will hold the sponsor harmless from ADA violations within the scope of the facility's activities. The following language is suggested:**

**Hotel acknowledges that it is a "place of public accommodation" as defined in the Americans with Disabilities Act ("the ADA") and hereby represents that its goods, services, facilities, privileges, advantages, and accommodations are in full compliance with the ADA. Hotel agrees to indemnify and hold harmless (insert name of Board) and all of its officers, directors, and employees from and against all claims, damages, losses and expenses, including attorneys fees, arising out of or resulting from any allegation or claim that the goods, services, facilities, privileges, advantages, or accommodations provided by hotel pursuant to this agreement violated the ADA.**

- 3. Include similar language in all new contracts.**
- 4. If the site does not provide auxiliary aids and services, identify organizations or individuals to provide such auxiliary aids and services as required by the ADA.**
- 5. For future meetings and conventions, include a question on the registration form as follows:**

**Do you have any disabilities which require special accommodation? If so, please identify your special needs:**

***When registrants identify their needs for special accommodation, follow up with them to discuss the special needs and arrange for such aids or services. (The entity pays for such***



*aids and services, not the individual.) If registrants are part participating in educational courses or examinations, additional steps may be necessary (see next section).*

## **Educational Courses**

Examinations or courses offered by trade associations which are related to licensing, certification, or continuing education credit must be accessible to persons with disabilities on and after January 26, 1992. This means such courses and examinations must be offered in a place and manner accessible to the disabled or alternative arrangements must be made to provide comparable service to the disabled individual. The goal, however, is to provide the exam or course in the most integrated setting possible. As well, auxiliary aids and services, such as assistive listening devices or qualified readers, may be required to address the special needs of the disabled.

### **Compliance Checklist**

- 1. At the time individuals register for an exam or course, ask the following question:**

**Do you have any disabilities which require special accommodation, including the provision of auxiliary aids and services? If so, please identify your special needs.**

*When registrants identify their need for special accommodation, follow up with them to determine the special needs and arrange for such aids or services. The entity pays for such aids and services, not the individual.*

- 2. Arrange to accommodate the special needs in the integrated classroom setting unless impossible. Only if it is not possible to achieve an integrated setting should alternative arrangements such as in-home examinations be provided. Auxiliary aids and services may include taped examinations, Braille examinations, assistive hearing devices, or transcribers for those with manual disabilities.**
- 3. Structure and administer examinations so that they accurately reflect a disabled person's aptitude or achievement level, rather than merely measuring his or her impaired sensory, manual or speaking skills.**

## **Conclusion**

The Americans With Disabilities Act will impact all of us. Most importantly, it will have a positive impact on those 43 million people with disabilities by bringing them into the mainstream of America.

The ADA and its implementing regulations are technical and have many gray areas. Definitions follow to provide guidance. A list of resources for you to contact with your questions or for technical assistance is also included.

## DEFINITIONS

### TITLE I

1. The term "**covered entity**" means an employer, employment agency, labor organization, or joint labor-management committee.
2. The term "**disability**" means with respect to an individual: (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment. If an individual meets any one of these three tests, he or she is considered to be an individual with a disability for purposes of coverage under the Americans With Disabilities Act.
3. The term "**qualified individual with a disability**" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this Title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.
4. The term "**reasonable accommodation**" may include: (a) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (b) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.
5. The term "**undue hardship**" means an action requiring significant difficulty or expense, when considered in light of the following factors. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include: (a) the nature and cost of the accommodation needed under this chapter; (b) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (c) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its employees, the number, type and location of its facilities; and (d) the type of operation or operations of the covered entity, including the composition, structure, and

functions of the work force of such entity, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

### **TITLE III**

1. The term "**alteration**" is a change to a place of public accommodation or a commercial facility that effects or could effect the usability of the building or facility or any part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full height partitions.
2. The term "**auxiliary aids and services**" includes: (a) qualified interpreters, note takers, computer aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed captioned decoders, open and closed captioning, telecommunications devices for deaf persons (TDDs), video text displays, or other effective methods making orally delivered materials available to individuals with hearing impairments; (b) qualified readers, taped texts, audio recordings, Braille materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments; (c) acquisition or modification of equipment or devices; and (d) other similar services and actions.
3. The term "**commercial facilities**" means facilities: (a) that are intended for nonresidential use; and (b) whose operations will affect commerce.
4. The term "**place of public accommodation**" means a facility whose operations affect interstate commerce.
5. The term "**public accommodation**" means a private entity that owns, leases or leases to, or operates a place of public accommodation.
6. The term a "**qualified interpreter**" means an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively using any necessary specialized vocabulary.
7. The term "**readily achievable**" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include: (a) the nature and cost of the action needed under this Title; (b) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility; (c) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (d) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work force of such entity; the

geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

8. The term "**service animal**" encompasses any guide dog, signal dog, or another animal individually trained to provide assistance to an individual with a disability.
9. The term "**undue burden**" is analogous to the definition of undue hardship and, in essence, means significant difficulty or expense.

### **LIST of RESOURCES**

Americans With Disabilities Act (Department of Justice Information Line)	202-514-0301 800-514-0301
Architectural and Transportation Barriers Compliance Board (accessibility guidelines)	202-653-7848
Telecommunications Commission (telephone adapters - hearing impaired)	202-634-1816
NATIONAL ASSOCIATION OF REALTORS® Legal Affairs Division	312-329-8270

### **Technical Resource Centers Identified by the ADA:**

University of Southern Maine (Portland, Maine) Region I - Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	207-780-4430
United Cerebral Palsy Association of New Jersey (Trenton, New Jersey) Region II - New Jersey, New York, PR	609-392-4004
Independence Center of Northern Virginia (Arlington, Virginia) Region III - Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia	703-525-3268
The United Cerebral Palsy Association (Atlanta, Georgia) Region IV - Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee	404-888-0022
University of Illinois at Chicago (Chicago, Illinois) Region V - Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin	312-413-1647
Independent Living Research Utilization (Houston, Texas)	

Region VI - Arkansas, Louisiana, New Mexico, Oklahoma, Texas	713-520-0232
University of Missouri at Columbia (Columbia, Missouri) Region VII - Iowa, Kansas, Nebraska, Missouri	314-882-3807
Meeting the Challenge, Inc. (Colorado Springs, Colorado) Region VIII - Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming	719-444-0252
Berkeley Planning Associates (Oakland, California) Region IX - Arizona, California, Hawaii, Nevada, PB	415-465-7884
Washington State Governor's Committee (Olympia, Washington) Region X - Alaska, Idaho, Oregon, Washington	206-438-3168

## **AMERICANS WITH DISABILITIES ACT**

### **QUESTIONS AND ANSWERS**

This Question and Answer information packet supplements the ADA Compliance Kit distributed by the NATIONAL ASSOCIATION OF REALTORS® in January 1992 and covers the most frequently asked questions from REALTORS® in relation to the ADA. (Prepared by the Legal Affairs Division of the NATIONAL ASSOCIATION OF REALTORS®, November, 1992).

#### **TITLE I - Employment**

**QUESTION #1:** Does Title I cover independent contractors and apply if a real estate office has 15 independent contractors rather than employees?

**ANSWER:** Title I covers employees, although the Office on the ADA has indicated that whether an individual is an employee or independent contractor will be carefully evaluated under federal law. For real estate brokers, that means that the broker/agent relationship will be scrutinized to determine whether an independent contractor relationship actually exists or whether agents are treated as employees.

**QUESTION #2:** If a real estate company has a number of branch offices, are employees in each branch office counted separately or are the numbers totaled to reach the threshold number for Title I?

**ANSWER:** The numbers are totaled (example: three branch offices with 5 employees at each location total 15 employees). Since the threshold number of 15 has been exceeded, Title I applies.

**TITLE III**  
**Public Accommodations, Commercial Facilities and**  
**Private Entities that Offer Certain Educational Courses.**

**QUESTION #3:** Can a place of public accommodation be covered by both the ADA and the Fair Housing Act (FHA)?

**ANSWER:** Yes. The analysis for determining whether a facility is covered by the ADA is entirely separate and independent from the analysis used to determine coverage under the FHA. A facility can be a residential dwelling under the FHA and still fall in whole or in part under at least one of the 12 categories of places of public accommodation.

**QUESTION #4:** How does the "readily achievable" standard relate to other standards in the ADA?

**ANSWER:** The ADA establishes different standards for existing facilities versus alterations to existing facilities and new construction. In existing facilities, where retrofitting may be expensive, the requirement to provide access is less stringent than it is in new construction and where alterations to existing facilities are being made, where accessibility can be incorporated in the initial stages of design and construction without a significant increase in cost.

**QUESTION #5:** How does a public accommodation determine when barrier removal is readily achievable?

**ANSWER:** Determining if barrier removal is readily achievable is a case-by-case decision. Factors to consider include:

- 1) The nature and cost;
- 2) The overall financial resources of the entity involved; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements necessary for safe operation, including crime prevention measures; or any other impact of the action on the operation of the business;
- 3) The administrative or fiscal relationship of the business in question to any parent corporation or entity;
- 4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

5) If applicable, the type of operation of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

**QUESTION #6:** Are public accommodations required to retrofit existing buildings by adding elevators?

**ANSWER:** A public accommodation generally would not be required to remove a barrier to physical access posed by a flight of steps, if removal would require extensive ramping or an elevator. The readily achievable standard does not require barrier removal that requires extensive restructuring or burdensome expense. Thus, where it is not readily achievable to do, the ADA would not require a public accommodation to provide access to an area reachable only by a flight of stairs.

**QUESTION #7:** Does the ADA require barrier removal in historical buildings?

**ANSWER:** Yes, if it is readily achievable. However, the ADA takes into account the national interest in preserving significant historic structures. Barrier removal would not be considered "readily achievable" if it would threaten or destroy the historic significance of a building or facility that is eligible for listing on the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470, et seq.), or is designated as historic under State or local law.

**QUESTION #8:** Are portable ramps permitted?

**ANSWER:** Yes, but only when the installation of a permanent ramp is not readily achievable. In order to promote safety, a portable ramp should have railings and a firm, stable, nonslip surface. It should also be properly secured.

**QUESTION #9:** If a public accommodation determines that its facilities have barriers that should be removed, but it is not readily achievable to undertake all of the modifications now, what should it do?

**ANSWER:** The Office on the ADA recommends that a public accommodation develop an implementation plan designed to achieve compliance with the ADA's barrier removal requirements. Such a plan, if appropriately designed and diligently executed, could serve as evidence of a good faith effort to comply with the ADA's barrier removal requirements.

**QUESTION #10:** Must a real estate agent who uses his/her home (or a portion thereof) as an office, comply with Title III?

**ANSWER:** Yes. If a private residence (or a portion thereof) is used for business purposes and clients/customers frequent that location, Title III applies to those areas used

for business purposes even if they're also used for residential purposes. The entrance to the office must also be accessible such as the sidewalk, door, and entryway.

**QUESTION #11:** Are model homes and open houses places of public accommodation?

**ANSWER:** Generally, no. Model homes and open houses do not fall under the 12 categories of places of public accommodation. If, however, the sales office for a residential housing development is located in a model home, the area used for the sales office would be considered a place of public accommodation. Although model homes are not covered, the Office on the ADA encourages developers to voluntarily provide at least a minimal level of access to model homes for potential homebuyers with disabilities. For example, a developer could provide physical access (via ramp or lift) to the primary level of one of several model homes and make photographs of other levels of the home as well as of other models available to the customer.

**QUESTION #12:** Do both a landlord who leases space in a building to a tenant and the tenant who operates a place of public accommodation have responsibilities under the ADA?

**ANSWER:** Both the landlord and the tenant are public accommodations and have full responsibility for complying with all Title III requirements applicable to places of public accommodation. The landlord and tenant must allocate responsibility, in the lease, for complying with particular provisions of the regulation. However, any allocation made in a lease or other contract is only effective as between the parties, and both landlord and tenant remain fully liable for compliance with all provisions of the ADA relating to that place of public accommodation.

**QUESTION #13:** What if a tenant remodels his store in a manner that would trigger the path of travel obligation, but the tenant has no authority to create an accessible path of travel because the common areas are under control of the landlord? Does this mean the landlord must now make an accessible path of travel for the remodeled store?

**ANSWER:** No. Alterations by a tenant do not trigger a path of travel obligation for the landlord. Nor is the tenant required to make changes in areas not under his control.

**QUESTION #14:** How do we determine if committee members or registrants to our meetings and educational courses are disabled and have special needs?

**ANSWER:** Ask! Add a question to your committee appointment letters and all of your registration forms as follows:

**Please check here if you have a disability which will require special services at a (meeting/course). Attach a written description of your needs.**



And, include a notice in the registration packet (for on-site registrants) asking those with disabilities who require special accommodation to contact the Registration Desk.

**QUESTION #15:** At our Convention, we're sponsoring certain tours and recreational activities. Do they need to be accessible to the disabled?

**ANSWER:** Generally yes, if they can be made accessible. Since tour company services are open to the public, tour companies are considered public accommodations and may already have taken the steps necessary to comply with the ADA. If they haven't, you may want to consider a different company that is in compliance. In respect to recreational activities, they should be made accessible to the disabled to the extent it's readily achievable to do so.

**QUESTION #16:** If we provide ground transportation to certain social functions during our Convention, do we need to provide special transportation for those in wheelchairs?

**ANSWER:** Yes.

**QUESTION #17:** When auxiliary aids are to be provided, who decides what type of auxiliary aids are acceptable?

**ANSWER:** Public accommodations should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective access and communication. In many cases, more than one type of auxiliary aid or service may be acceptable. While consultation is strongly encouraged, the ultimate decision as to what measures to take to ensure compliance rests in the hands of the public accommodation, provided that the method chosen results in effective access and communication.

**QUESTION #18:** Who is a qualified interpreter?

**ANSWER:** There are a number of sign language systems in use by persons who use sign language. (The most common systems of sign language are American Sign Language and signed English.) Individuals who use a particular system may not communicate effectively through an interpreter who uses another system. When an interpreter is required, the public accommodation should provide a qualified interpreter, that is, an interpreter who is able to sign to the individual who is deaf what is being said by the hearing person and who can voice to the hearing person what is being signed by the individual who is deaf. This communication must be conveyed effectively, accurately, and impartially, through the use of any necessary specialized vocabulary.

**QUESTION #19:** Can a public accommodation use a staff member who signs "pretty well" as an interpreter for meetings with individuals who use sign language to communicate?

**ANSWER:** Signing and interpreting are not the same thing. Being able to sign does not mean that a person can process spoken communication into the proper signs, nor does it mean that he or she possesses the proper skills to observe someone signing and change

their signed or fingerspelled communication into spoken words. The interpreter must be able to interpret both receptively and expressively.

**QUESTION #20:** If a sign language interpreter is required for effective communication, must only a certified interpreter be provided?

**ANSWER:** No. The key question in determining whether effective communication will result is whether the interpreter is "qualified," not whether he or she has been actually certified by an official licensing body. A qualified interpreter is one "who is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary." An individual does not have to be certified in order to meet this standard. A certified interpreter may not meet this standard in all situations, e.g., where the interpreter is not familiar with the specialized vocabulary involved in the communication at issue.

**QUESTION #21:** What obligations does an examiner have if its facilities are inaccessible?

**ANSWER:** Examinations must be administered in facilities that are accessible to individuals with disabilities or alternative accessible arrangements must be made. If the facility in which the examination is offered is not accessible, it may be administered to an individual with a disability in a different room or other location. For instance, the entity might provide the examination at an individual's home with a proctor. The alternative location must, however, provide comparable conditions in which the test is administered to others.

**QUESTION #22:** May an examiner require that an applicant provide documentation of the existence and nature of the disability as evidence that he or she is entitled to modifications or aids?

**ANSWER:** Yes, but requests for documentation must be reasonable and must be limited to the need for the modification or aid requested. Appropriate documentation might include a letter from a physician or other professional, or evidence of a prior diagnosis or accommodation, such as eligibility for a special education program. The applicant may be required to bear the cost of providing such documentation, but the entity administering the examination cannot charge the applicant for the cost of any modifications or auxiliary aids, such as interpreters, provided for the examination.

**QUESTION #23:** If a public accommodation makes good faith efforts to comply with the ADA, will that be considered in determining the amount of a civil penalty if non-compliance is found to exist?

**ANSWER:** Yes. In considering what amount of civil penalty, if any, is appropriate, the court is required to give consideration to any good faith effort or attempt by the covered entity to comply with its obligations under the ADA. One of the factors to be considered in evaluating good faith is whether the entity could have reasonably anticipated the need

for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.