

Remaining ADA Compliant During COVID-19

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DIFFERENT WORKS

RLI Design Professionals
DPLE 315
April 21, 2021


MCNEAL SCHICK
ATTORNEYS AT LAW

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Presenter Bio



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Course Description

All for Access *and* Access for All

ADA issues in the age of COVID-19

Under the best circumstances, compliance with the Americans with Disabilities Act (ADA) can be difficult to navigate.

These requirements are based on laws written by legislators, implemented and enforced by different governmental agencies, interpreted by changing government officials, and can be further refined through judicial decisions. Keeping up can be a lot even for the most skilled and well-intentioned design professional. Throw in a global pandemic and the unprecedented changes being made in response to it, and well, it only adds to those challenges.

Design professionals are uniquely positioned to be able to assist their clients and communities as they adapt to this "new normal." In this role, design professionals must continue to make accessibility a priority. This course is designed to review the ADA and the impact of COVID 19 on the responsibilities and obligations of design professionals, so that they can continue creating works that are in compliance with the requirements of the ADA and which promote the health, safety, and welfare of a building's occupants, users, and the general public.

Learning Objectives

Participants will learn:

- 1** Examine the requirements of the ADA and the impact of COVID-19 on a firm's practice and the community-at-large;
- 2** Discuss the duty to provide reasonable accommodations under the ADA and how this duty protects public health, safety, and welfare;
- 3** Identify ways in which design professionals can be held liable under the ADA for failing to protect the public; and
- 4** Study strategies for staying compliant with the ADA requirements during this pandemic.

What is the ADA?

The Americans with Disabilities Act (ADA)

a civil rights law that prohibits discrimination against individuals with disabilities.

The ADA was enacted in 1990. It is divided into five titles:

- Title I – Employment
- Title II – Public Services
- Title III – Public Accommodations
- Title IV – Telecommunications
- Title V – Miscellaneous

Revisions to Titles II and III (aka “The 2010 ADA Standards for Accessible Design” or “2010 Standards”) were published on Sept 15, 2010 and effective beginning March 15, 2012.



General Rule

General Rule Against Discrimination

Prohibition of Discrimination by Public Accommodations

42 USC § 12182

(a) No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

General Rule

General Rule Against Discrimination in Design and Construction

2010 ADA Standards for Accessible Design

28 CFR § 35.151

(a) Design and construction.

(1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

Exception

Exception to the General Rule for Structural Impracticability

2010 ADA Standards for Accessible Design

28 CFR § 35.151

(2) Exception for Structural Impracticability

(i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

Exception

Exception to the General Rule for Structural Impracticability

2010 ADA Standards for Accessible Design

28 CFR § 35.151

(2) Exception for Structural Impracticability

(ii) If full compliance with this section would be structurally impracticable, **compliance with this section is required to the extent that it is not structurally impracticable.** In that case, any portion of the facility that can be made accessible shall be made accessible to the extent that it is not structurally impracticable.

Exception

Exception to the General Rule for Structural Impracticability

2010 ADA Standards for Accessible Design

28 CFR § 35.151

(2) Exception for Structural Impracticability

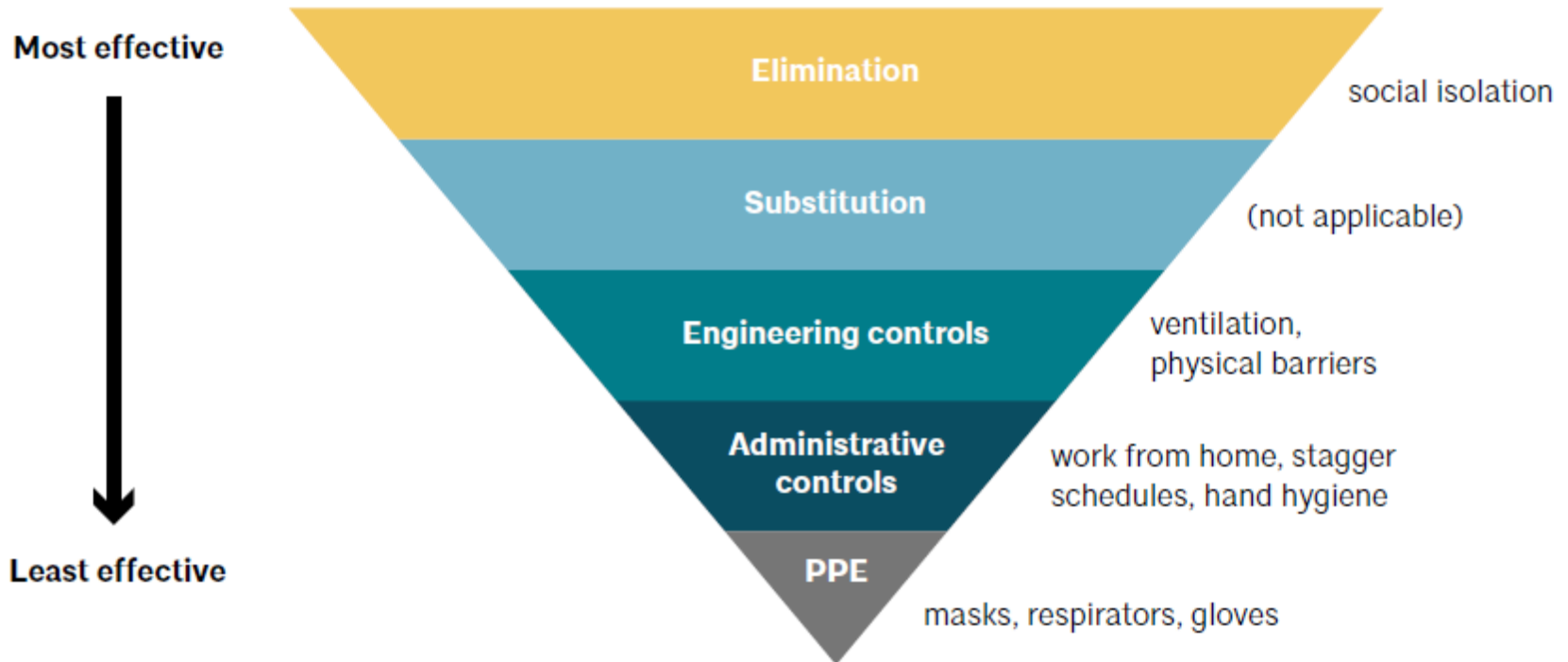
(iii) If providing accessibility in conformance with this section to individuals with certain disabilities (e.g., those who use wheelchairs) would be structurally impracticable, accessibility shall nonetheless be ensured to persons with other types of disabilities, (e.g., those who use crutches or who have sight, hearing, or mental impairments) in accordance with this section.

COVID-19 Considerations



AIA Reoccupancy Assessment Tool

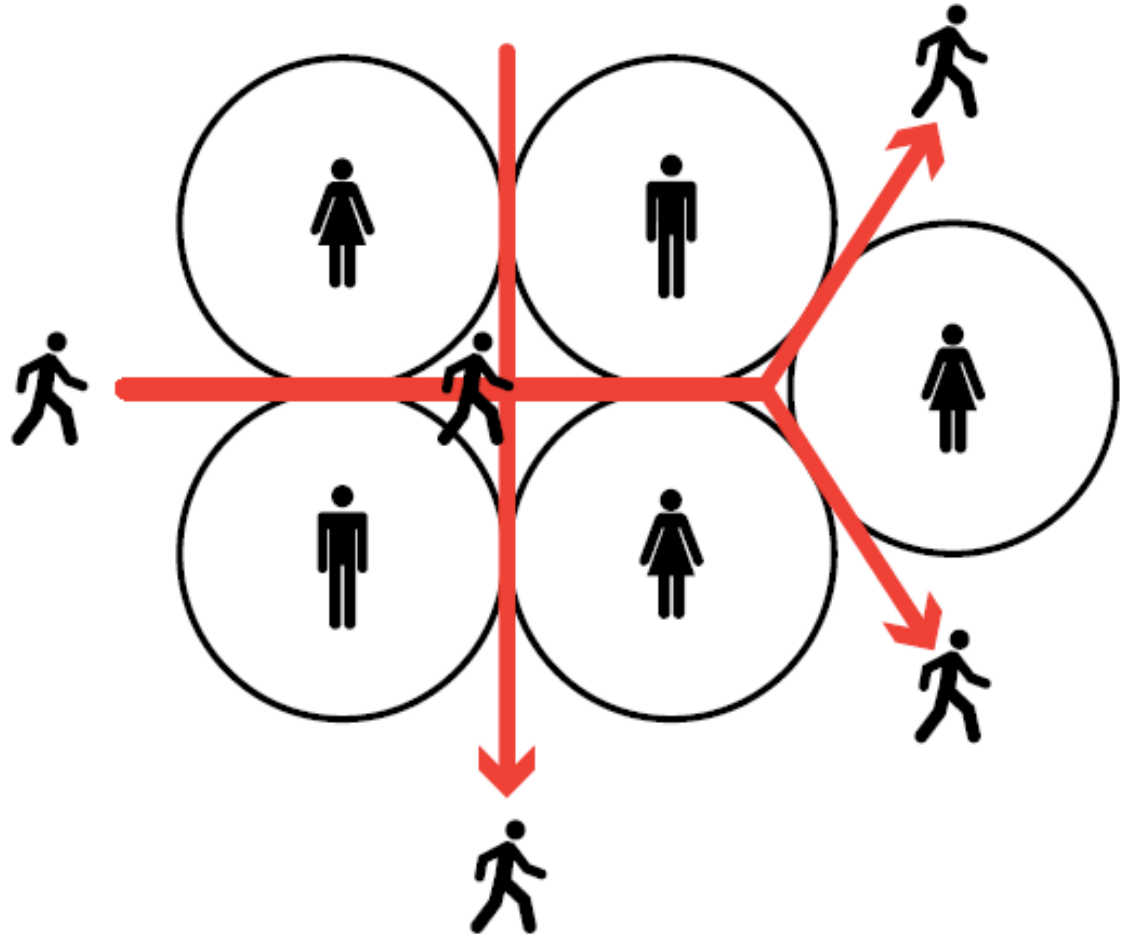
Applying the hierarchy of controls for COVID-19



Compliance Example

Compliance with 6ft distancing guidelines may, in actuality, require 12ft between individuals, to allow for safe passage.

What are the implications of this for allowable occupancy levels?



Title III

Prohibition of Discrimination by Public Accommodations

42 USC § 12182

(a) No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

Title III

New Construction and Alterations in Public Accommodations and Commercial Facilities

42 USC § 12183

(a) ... as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes –

(1) a failure to **design and construct** facilities for first occupancy later than July 26, 1990, **that are readily accessible to and usable by individuals with disabilities...** [Emphasis added]

Title III

New Construction and Alterations in Public Accommodations and Commercial Facilities

42 USC § 12183

(a) ... as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes –

(1) a failure to **design and construct** facilities for first occupancy later than July 26, 1990, **that are readily accessible to and usable by individuals with disabilities...** [Emphasis added]

Case Law

Potential Liability Issues: Title III of the ADA

1

Design professionals can be liable under Title III of the ADA

United States v. Ellerbe Becket, Inc., 976 F. Supp 1262 (D. Minnesota 1997).

2

Potential liability based on “significant degree of control”

United States v. Days Inn of America, 151 F.3d 822 (8th Cir., 1998).

3

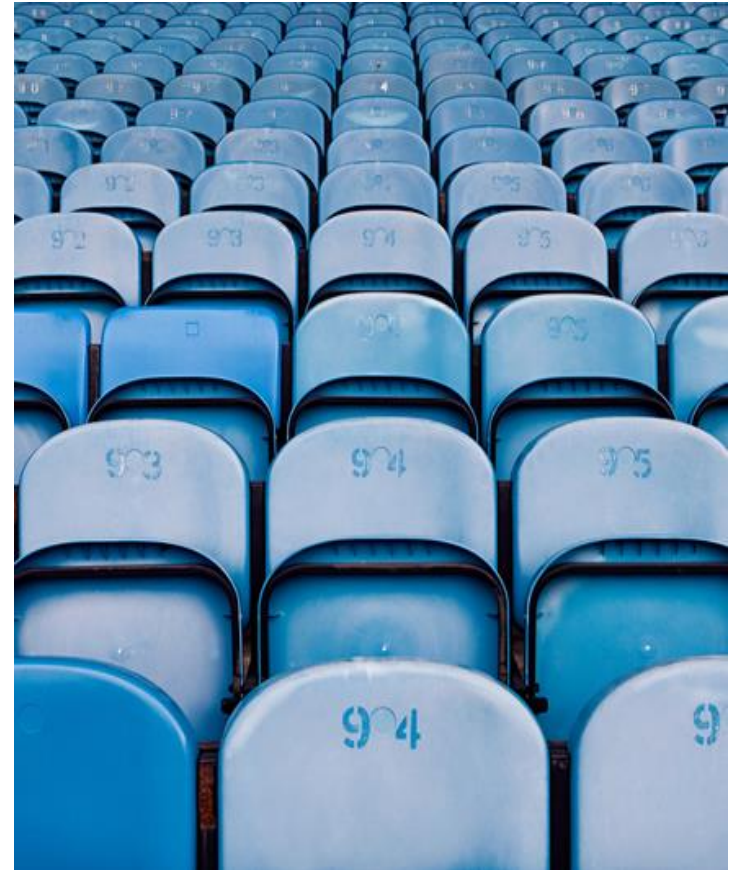
Design Professional found *not* liable

Lonberg v. Sanborn Theaters, Inc., 99-56221, 2001 U.S. App. LEXIS 21065 (9th Cir. August 6, 2001).

Liability Under the ADA

[Design Professionals] are not excluded from liability under the ADA as a matter of law.

“The United States’ Complaint clearly alleges that Ellerbe provided design, architectural and engineering services and participated in and monitored construction of some or all of the named facilities...Ellerbe participated in design and construction of the facilities at issue...”

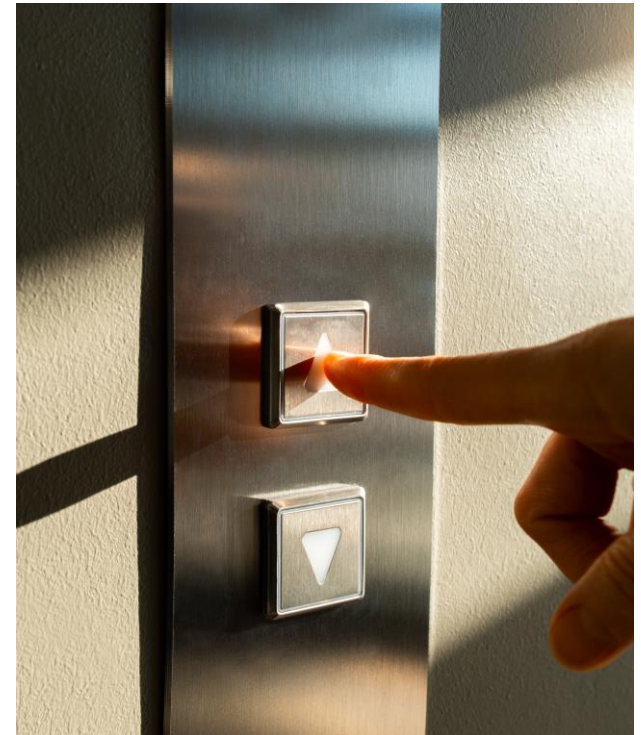


“Significant Degree of Control” Test

Liability can be imposed where there is a “significant degree of control”.

“To bear responsibility for an inaccessible facility under section 303, a party must possess a significant degree of control over the final design and construction of a facility.

*Note – For a finding of liability by the entity exercising significant degree of control, actual knowledge of violations may be required.



No Liability Under the ADA

Liability for “design and construct” discrimination.

“...only an owner, lessee, lessor, or operator of a noncompliant public accommodation can be liable under Title III of the ADA for the “design and construct” discrimination described in § 12183(a).



No Right to Indemnity or Contribution

Each co-defendant has a non-indemnifiable, non-delegable duty to comply with the FHA

“...to allow [Builder] to seek indemnity from [Design Professional] would run counter to the purpose of the FHAA and undermine the regulatory goal by allowing the [Builder] to escape any liability for violating the Act.

*Note – This only applies to the transfer of liability for violations of the FHA. Design Professional may still be liable under *other* causes of action.



Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
Continuing Education Systems Program



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