

Guidance for ARVC Members Regarding the New ADA Requirements for Pools and Spas

As you may know, the Department of Justice created new guidelines for public accommodations under the Americans with Disabilities Act (ADA) in September 2010. These new regulations may affect your business in various ways. In particular, you will be required to comply with new regulations governing access to pools and spas within your parks and campgrounds. The regulations went into effect on March 15, 2011. But you will have until March 15, 2012, to make sure that your pools and spas are in compliance with the 2010 regulations.

We have received many questions about the new regulations from our members on this matter. Our counsel at McDermott Will & Emery in Washington, D.C., prepared this guidance after analyzing the 2010 ADA regulations and standards, and confirmed their interpretation and conclusion with the U.S. Department of Justice.

We hope the following Frequently Asked Questions (FAQs) provide you with some answers and clarity on this important issue. We also recommend that you review the U.S. Department of Justice booklet “ADA Update: A Primer for Small Business,” which is available at:

<http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.pdf>

Key Takeaways for ARVC Members

- **The “safe harbor” is not available for swimming pools.** The revised ADA rules and 2010 Standards contain new requirements for elements (e.g., swimming pools, play areas) in existing facilities that were not addressed in the 1991 Standards. Because these elements were not included in the 1991 standards, they are *not* subject to the safe harbor. To be clear, the safe harbor does not apply to elements that were not included in the 1991 Standards. Thus, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so.
- **Just because the safe harbor does not apply to your swimming pool does not mean that you must immediately and automatically renovate your pool to bring it into compliance or close it altogether.** The ADA requires that you remove architectural barriers in existing facilities when it is “readily achievable” to do so. Readily achievable means “easily accomplished without much difficulty or expense,” and will vary from business to business and sometimes year to year.
- **If you do remove barriers or improve accessibility to your pool, you may qualify for a tax credit or be able to deduct eligible expenses from your taxes.** Please consult your tax attorney, accountant or business adviser on this issue.

Frequently Asked Questions

Q: Would an RV park or campground be considered a “public accommodation” under the law?

A: Yes. The ADA’s definition of “public accommodation” includes stores, restaurants, bars, service establishments, theaters, hotels, recreational facilities, private museums and schools, doctors’ and dentists’ offices shopping malls, and other businesses.

The definitions section of the regulations at 28 C.F.R. § 36.104 provides that a “Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories-”

(1) Place of lodging (see the regulations for specific definition of lodging)

...

(9) A park, zoo, amusement park, or other place of recreation;

...

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

28 C.F.R. §36.104

Q: How long do I have to get my pools and spas in compliance?

A: Until March 15, 2012

Q: The regulations say that public accommodations that were built after 1991, and in compliance with the 1991 Standards may not have to make any changes (a “safe harbor rule”). Why doesn’t this apply to my pool?

A: It is true that some elements in a public accommodation are subject to the safe harbor rule and will not have to be updated by March 15, 2012, so long as they conform with the 1991 Standards. However, pools, like play areas, marinas, golf facilities, and mini golf facilities were not included in the 1991 Standards. Therefore, these elements must comply with the 2010 Standards.

28 C.F.R. §36.304(d)(2)(iii) provides that,

The safe harbor provided in §36.304(d)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (i.e. elements for which there are neither technical nor scoping specifications in the 1991 Standards), and therefore those elements must be modified to the extent readily achievable to comply with

the 2010 Standards...Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows...

- (E) fishing piers and platforms
- (F) Golf facilities
- (G) Miniature golf facilities
- (H) Play areas
- (I) Saunas and steam rooms
- (J) *Swimming pools, wading pools, and spas***

...

28 C.F.R. §36.304(d)(2)(iii)(emphasis added).

Furthermore, as the U.S. Department of Justice guidance notes: *“The revised ADA rules and the 2010 Standards contain new requirements for elements in existing facilities that were not addressed in the original 1991 Standards. These include recreation facilities such as swimming pools, play areas, exercise machines, miniature golf facilities, and bowling alleys. Because these elements were not included in the 1991 Standards, they are not subject to the safe harbor. Therefore, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so.”* (Italics added.) U.S. Department of Justice, ADA Update: A Primer for Small Business (2011).

Q: What if I cannot afford to make the required changes to my pool/spa?

A: The regulations require only that barriers to entry are removed so that your pool conforms with the requirements for disabled access “to the extent readily achievable.” The DOJ has stated that “readily achievable” means that it is “easily accomplishable without much difficulty or expense.”

Specifically, the definitions section of the regulation at 28 C.F.R. § 36.104 provides the following factors to be considered when evaluating whether a barrier removal is readily achievable:

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites 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 or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

28 C.F.R. §36.104

Furthermore, the U.S. Department of Justice guidance states: *“Determining what is readily achievable will vary from business to business and sometimes from one year to the next. Changing economic conditions can be taken into consideration in determining what is readily achievable. Economic downturns may force many public accommodations to postpone removing some barriers. The barrier removal obligation is a continuing one and it is expected that a business will move forward with its barrier removal efforts when it rebounds from such downturns.”* (Italics added.) U.S. Department of Justice, ADA Update: A Primer for Small Business (2011).

It is important to consult with an expert on what changes you will need to make under the new rules and how much of a financial burden it will be for your business.

Q: I was told that public accommodations will only have to comply with new 2010 regulations in the event that I am making extensive renovations or constructing a new pool. Is that true?

A: It is true for some elements in your business, but it is not true for pools. Because the 1991 regulations did not provide technical standards for pools, the ADA is requiring public accommodations to bring their pools up to the standards provided in the 2010 regulations.

Q: What specific changes do I have to make to my pools?

A: First, we recommend that you hire a professional consultant or attorney to help guide you in the changes that you can make which are “readily achievable” and in compliance with the regulations. Both the evaluation of whether changes are “readily achievable” and the specific changes you may need to make must be determined on a case-by-case basis. This guidance is only a primer to help you understand the general requirements. Remember that your pools and spas must be in compliance by March 15, 2012, which is less than one year from now, so we recommend you begin evaluating your specific situation now.

Section 242 of 36 C.F.R. part 1191, the scoping requirements, govern the requirements for swimming pools, wading pools, and spas. It provides:

Swimming pools. At least two accessible means of entry shall be provided for swimming pools. Accessible means of entry shall be swimming pool lifts complying with 1009.2; sloped entries complying with 1009.3; transfer walls complying with 1009.4; transfer

systems complying with 1009.5; **and** pool stairs complying with 1009.6. At least one accessible means of entry provided shall comply with 1009.2 or 1009.3.

Exceptions:

1. Where a swimming pool has less than 300 linear feet (91m) of swimming pool wall, no more than one accessible means of entry shall be required provided that the accessible means of entry is a swimming pool lift complying with 1009.2 **or** sloped entry complying with 1009.3.
2. Wave action pools, leisure rivers, sand bottom pools, and other pools where user access is limited to one area shall not be required to provide more than one accessible means of entry provided that the accessible means of entry is a swimming pool lift complying with 1009.2, a sloped entry complying with 1009.3, **or** a transfer system complying with 1009.5.
3. Catch pools shall not be required to provide an accessible means of entry provided that the catch pool edge is on an accessible route.

Advisory 242.2 Swimming Pools: Where more than one means of access is provided into the water, it is recommended that the means be different. Providing different means of access will better serve the varying needs of people with disabilities in getting into and out of a swimming pool. It is also recommended that where two or more means of access are provided, they not be provided in the same location in the pool. Different locations will provide increased options for entry and exit, especially in larger pools.

Advisory 242.2 Swimming Pools Exception 1. Pool walls at diving area and along pool walls where there is no pool entry because of landscaping or adjacent structures are to be counted when determining the number of accessible means of entry required.

242.3 Wading Pools. At least one accessible means of entry shall be provided for wading pools. Accessible means of entry shall comply with sloped entries complying with 1009.3.

242.4 Spas. At least one accessible means of entry shall be provided for spas. Accessible means of entry shall comply with swimming pool lifts complying with 1009.2; transfer wall complying with 1009.4; **or** transfer systems complying with 1009.5.

Exception: Where spas are provided in a cluster, no more than 5 percent, but no fewer than one, spa in each cluster shall be required to comply with 242.4.

(Emphasis added.)

Q: Is it true that there are tax credits and deductions available if I have to make changes to my pool and the change is readily achievable?

A. Yes, there are. While you should consult a tax attorney, accountant or business adviser, the Internal Revenue Service includes a Disabled Access Credit (Section 44) for

businesses with 30 or fewer full-time employees for with total revenues of \$1 million or less in the previous tax year. Eligible expenses may include the cost of barrier removal and alterations to improve accessibility. Furthermore, Section 190 of the IRS 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.