

Hi All,

ARVC requested McDermott, Will & Emery to research questions concerning the ADA Guidelines as to what is "readily achievable" with the Department of Justice. I have included an excerpt of MWE's findings and is intended to give good guidance. According to MWE the key takeaway is at the bottom. The DOJ will talk to individual property owners about their particular circumstances.

(Correspondence from MWE)

I spoke to someone at the ADA hotline, and I conducted case law research regarding the definition of "readily achievable" barrier removals. The case law was not particularly helpful in depicting exactly what kind of cost/effort courts consider "readily achievable." The case law was instructive, however, in showing how lawsuits over accessibility are resolved. For instance, Plaintiffs bringing a suit against a business owner have to make an initial showing that there are barriers preventing disabled access and they have to detail the accommodations that the business owner would have to make. Through the course of litigation, a Plaintiff will then have to hire an expert to provide evidence of how much the required barrier removal would cost the business owner. Then, the burden of persuasion shifts to the defendant (business owner) to demonstrate that the scope of compliance (the proposed alterations and the estimated costs) would be disproportionate or not "readily achievable."

We provided the following factors to ARVC, which is the only guidance DOJ gives on "readily achievable" (I've copied it here as a reminder). The hotline person told me two additional things about this (which appears below):

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.

1. The hotline DOJ staffer told me that the hotline itself was created so that businesses could call in with their specific questions about the regulations. She told me specifically that business owners may call to tell the hotline about their specific situation, and that they could provide guidance to the business owners about whether a proposed barrier removal would be readily achievable or not. Also, for specific, technical questions, business owners may call the Access Board, which drafted the technical requirements for elements like pools and spas. The numbers for each are below.

ADA Info Line: 800-514-0301

Access Board: 800-872-2253

2. She also told me that, by way of illustration, the DOJ has found that for most businesses with a pool, constructing a sloping entrance (ramp) is not readily achievable because it is so expensive and requires so much construction to accommodate. By contrast, pool lifts have generally been considered readily achievable because of their relatively low cost, because they take up relatively little space, and because they are easy to install.

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**ARVC is not in a position to give individual legal advice and we encourage members to use the hotline for their specific questions about the regulations.**

**Jeff Sims, CPO**

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