



Americans with Disabilities Act 25 Years Later: Understanding and Reducing Your Risk Exposure



Learning Objectives

- Understand key Americans with Disabilities Act (ADA) Title II and related disability discrimination laws and regulatory requirements
- Learn more about the legal landscape and emerging ADA-related public entity risk exposures
- Review publicly available resources and recommended administrative/legal steps your organization can take to assist with your compliance efforts



1. Legal Framework



Americans with Disabilities Act 1990

- Until the passage of American's with Disabilities Act (ADA) in 1990, there was no comprehensive legislation in this area. Federal law only covered federal buildings, facilities or programs receiving federal financial assistance. State and local laws did not exist in some areas. Where they did, they often did not provide comprehensive coverage of various issues now covered by the ADA.
- It has been 27 years since the passage of ADA and compliance should be the norm and not the exception.
- In general, programs and activities open to the public provided by state or local public agencies are subject to several types of requirements related to access by individuals with disabilities. These requirements are a result of federal, state and local mandates.
- One type of a requirement relates to barrier/free design of physical space. Barrier/free design standards vary depending on whether new construction is involved, whether the facility is in existence at the time the legislation was passed and whether the facility is operated by a private or public entity. Other mandates include non-discrimination, reasonable modification of business practices and policies and provision of auxiliary aides.
- There are three primary titles in the ADA, Title I-III. In 2010, a substantial revision of the Title II rules and regulations were adopted by U.S. DOJ and became effective the following year.



Title I

This section involves employment and applies to employers with over 15 employees. Under this section, employers may not discriminate against qualified individuals with a disability in terms of employment. (This presentation will not explore this topic.)



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Title II

Under Title II of the ADA, state and local governments and their instrumentalities are prohibited from discriminating against otherwise qualified individuals with disabilities. While most of the statutory language refers to public transportation, it also applies to other activities of state and local governments. This would include programs such as state colleges, universities and hospitals, publically operated parks, judicial programs, state licensing agencies, police operations and many other programs are prohibited from discriminating on the basis of disability in any aspect of the programs under Title II. Title II requires reasonable modifications, accommodations and access to the programs in the most integrated setting appropriate.



Title III

Title III applies to private entities that are considered public accommodations. These include places of lodging, restaurants and bars, places of entertainment, places of public gathering, stores and shopping centers and service providers, public transportation terminals and stations, professional offices, educational facilities, social services establishments and places of exercise and recreation.

Generally, this portion of the ADA requires that individuals with disabilities may not be discriminated against on the basis of their disability. It further requires that access to public accommodation should be in the most integrated setting appropriate. The greatest impact of this section, however, are the mandates related to barrier removal in existing facilities and accessible design in new construction and alterations.



Rehabilitation Act - Section 504

In 1973, the first major comprehensive federal law involving rights of people with disabilities went into effect. The 1973 Act extended applicability beyond just employment. Unlike sections 501 and 503 of the Rehabilitation Act, which applies solely to employment, section 504 of the Rehabilitation Act has much broader coverage.

Section 504 provides, “No otherwise qualified individual with disabilities... shall, solely by reason of his disability, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”

This section applies to programs and activities, such as schools, higher education, and some public facilities (courthouses, transportation and housing), and other areas.



Rehabilitation Act - Section 504

- Access to programs and activities that receive federal funding, including public school districts.
- Section 504 contains comparable programmatic access provisions and definitions to ADA Title II, specifically for federally funded programs.
- Several federal agencies have section 504 implementing regulations. They include the U.S. Department of Education/Free and Appropriate Public Education (FAPE) for children with disabilities; section 504 plans.
- If ADA Title II requirements exceed those in section 504, the public entity must comply with the ADA Title II provisions.



Rehabilitation Act - Remedies Under Section 504

- Termination of federal financial assistance.
- Injunctive relief.
- Damages – monetary damage awards usually require showing of intentional discrimination. Punitive damages are usually not allowed.
- Attorney's fees – allowed when plaintiff prevails on a section 504 discrimination claim.



Rehabilitation Act – Section 508 origin

- In 1998 the U.S. Congress amended the Rehabilitation Act to require federal agencies to make their electronic and information technologies accessible to people with disabilities. Section 508 was enacted to eliminate barriers in information technology, to make available new opportunities for people with disabilities, to encourage development of technologies that will help achieve these goals.
- Electronic and information technology (EIT) is any equipment or system that is used to create, convert, duplicate or access information in data.
- In 1999 the first Web Content Accessibility Guidelines (WCAG 1.0) was released by World Wide Web Consortium (W3C).
- In 2001 section 508 § 1194.22 Web Accessibility Compliance Criteria was released.



Rehabilitation Act - Section 508 developments and Application to State Governmental Agencies

- In 2003 the California Government Code § 11135 requires all state government entities to comply with section 508.
- In 2008 the WCAG 2.0 Accessibility Guidelines were released.
- In January 2017, section 508 “refreshed” and final rule was released incorporating the WCAG 2.0 Guidelines.
- In January 2018, the updated section 508 regulations officially take effect.



Individuals with Disabilities Education Act (IDEA)

The IDEA was originally the Education for All Handicapped Children Act (EAHCA), which was originally enacted in 1975 and renamed by congress in 1990. The IDEA has the following major underlying principles:

- Education is to be provided to all aged children with disabilities;
- Education is to be provided in the least restrictive appropriate placement;
- Education is to be provided at no cost to the parents;
- Compliance with substantive requirements is ensured by means of detailed procedural safe guards; and
- Education is to be individualized for each student.



Relevant California Disability Discrimination Laws

- California Unruh Civil Rights Act (Civil Code § 51 et. seq.) – The Unruh Act prohibits discrimination based on disability. It incorporates the American's with Disability Act as violations of this act. It authorizes statutory damages, punitive damages and attorney's fees. This is a typical claim that is made part of any disability/discrimination lawsuit.
- California Disabled Persons Act (Civil Code § 54-55 et. seq.) – The CDPA incorporates the ADA. It also guarantees persons with disabilities the same rights as the general public to full use of public facilities and public places. It allows recovery of damages and injunctive relief.
- California Gov't Code § 11135-11139 – These sections prohibit disability discrimination in programs and activities that are conducted, operated or administered by the state or a state agency receiving state financial assistance.



Federal vs. State Legal Requirements – Interaction and Overlap

In general, federal law is the base line and state law must at least meet the federal requirements. However, state law can exceed the federal requirements and many times does.

- Case example with both state and federal causes of action and remedies.



2. Obligations



ADA Title II Principles: Key Elements to Understand

- “Program accessibility” – primary guiding disability nondiscrimination principle

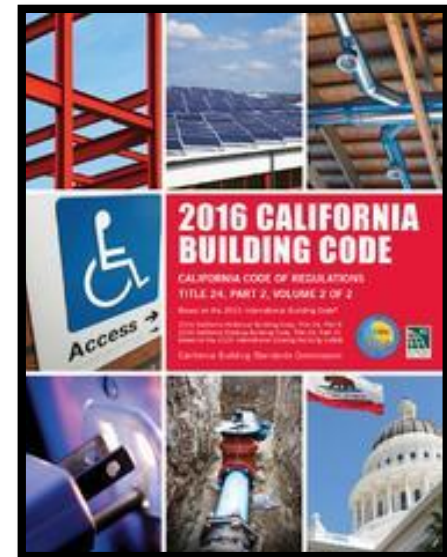
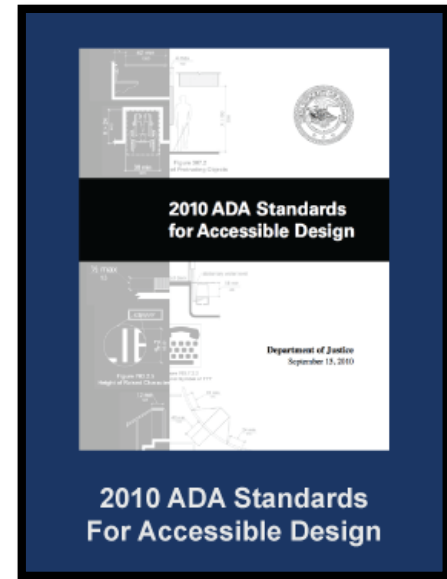
Qualified individual with a disability cannot be excluded from participation or denied benefit afforded to others of “programs, services or activities” based on disability. This can require:

- Accessible facilities and non-facility services
 - Reasonable modifications to “policies, practices and procedures”
 - Provision of aids, benefits and services
- Broad criteria for denial – 1) Do not meet essential eligibility requirements 2) “Legitimate safety concerns” based on actual risk not stereotype. 3) Action results in a “fundamental alteration in the nature of a service, program or activity” or “undue financial or administrative burden”.
- Federal administrative and built environment regulations are baseline requirements but California may and often does exceed those standards.



Facility Accessibility - Building Standards

- ADA Title II Program Accessibility:
 - Facility accessibility – Operation of public entity service, program or activity so, when viewed in its entirety, is readily accessible to persons with disabilities.
 - Existing facilities prior to January 1992 – “does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities”.
- Must meet both federal and state accessibility building standards – “most stringent” standard. (e.g., exterior walkway min. 36” federal, min. 48” in California)
- As of 2013 CBC Title 24, ADA Standards format and content fully incorporated into CBC while maintaining existing standards unique to California.



Key Original 1990 ADA Title II Administrative Requirements

■ ADA Coordinator

- Primary role – 1) Initial point of contact on complaints, performs investigations. 2) Coordination of program modification requests, aids/services. 3) Organizer of ADA/disability discrimination compliance efforts.
- Foundational ADA knowledge needed but not expertise.
- Required for public entities with more than 50 employees, strongly recommended for all as risk management preventative measure.

■ Public notice of non-discrimination

- Required posting of public notice re: compliance with ADA laws and regs to all applicants, participants and beneficiaries.
- Website, newspaper, public hardcopy posting, etc.

■ Grievance Procedure (Schools: Uniform complaint procedure. Other public entity: Not standardized)



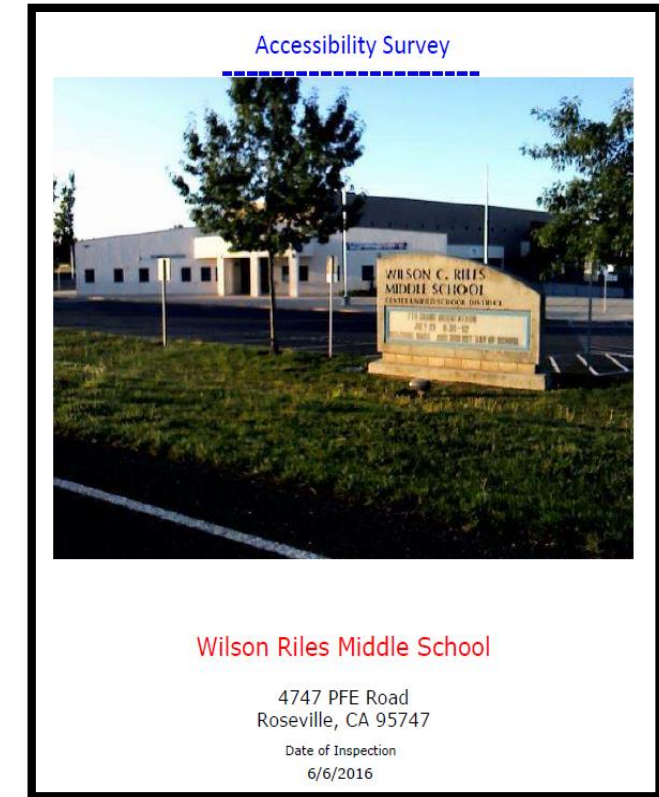
Key Original 1990 ADA Title II Administrative Requirements (cont.)

■ Transition Plan – Facility accessibility review

- Report documenting facility elements inconsistent with the state and federal accessibility building standards which may limit program accessibility.
- Master document for future remediation work to remove “accessibility barriers” as required for program accessibility.
- Required for PE over 50 employees (recommended for all from risk management perspective).

■ Self-evaluation – Programmatic review

- Identification, review and analysis of all PE services, policies and practices to ensure they do not adversely affect participation of individuals with disabilities in programs, services and activities based on their disability.
- Accomplished through internal and external review with surveys, questionnaires, ongoing assessment of PE services.



ADA Title II Reasonable Modification requirements

- Reasonable modifications/accommodations – Action required to alter or change any PE policy, procedure or practice to avoid discrimination on the basis of disability.
- Examples: 1) No pet policy that allows for service animals 2) No food inside facility policy that allows exception for persons with diabetes to control glucose level.
- Not examples: 1) Provision of an accessible path of travel to ball fields. 2) Adding an accessible pool lift to a public entity swimming pool.
- Reasonable accommodation - ADA Title I and state employment requirement. Modifications or adjustments to a job, employment practice or work environment that will allow an individual with a disability to enjoy an equal employment opportunity.



Key Revised 2010 ADA Title II Reg Requirements— *Service Animals*

- Rules substantially revised in 2010 ADA (i.e., defined SA as only a dog or mini horse).
- General rule: A qualified individual with a disability (QID) will have right to travel in all areas with SA where members of public are allowed to go.
- Understand the two questions: 1) Is SA required because of disability. 2) What task does the SA perform?
- Which rules apply?: Students, parents, members of public – ADA Title II “service animal”. Employee: California Fair Housing and Employment Commission – “assistive animal”.
- “Service dog in training” rules different in California than through ADA. Does not allow. California = Allows if person is QID or is a state-authorized licensed trainer.



Key Revised 2010 ADA Title II Reg Requirements— *Effective Communications*

- Broad responsibility for communications to “applicants, participants and members of public” including parents, spouses and companions to be “as effective as communications with others”.
- “Auxiliary aids and services” - may include sign language interpreters (including video remote), assistive listening devices, large text and Braille print formats, qualified readers, etc., appropriate to circumstance and individual.
- “Primary consideration” to choice of aid or service requested.
- Captioning on all publicly provided video/multimedia.
- Public entity cannot rely on minor or other accompanying adult to interpret/facilitate communications.



Key Broad ADA Title II Non-Discrimination Issues – *Web Accessibility*

- Hottest topic in Disability Discrimination.
- What is web accessibility? Website provides full functionality for keyboard only, screen reader and other assistive technology usage.
- High profile private cases (Target Corp., Netflix, Scribd Inc.), then colleges/universities (Harvard, MIT), then first K-12 case in Nightingale vs. Seattle Public Schools (September 2015). Total cost: \$600-800K <http://www.seattletimes.com/seattle-news/education/blind-parent-wins-battle-to-get-access-to-online-school-resources/>
- Recent Activity: Over 1000 complaints filed with U.S. Dept. of Education Office of Civil Rights in last few years, many by one individual.
- Section 508 compliance now includes Web Content Accessibility Guidelines (WCAG) 2.0 Level A and AA.



3. Risks and Consequences



ADA Title II/Section 504 – *Enforced by Complaint and Litigation*

- Methods of Disability Discrimination complaints
 - Verbal or written complaint directed to public entity
 - Federal agency Office of Civil Rights (Education, Health and Human Services, Transportation, etc.)
 - File tort claim
- No requirement to inform public entity prior to filing.
- Attorney fee/legal expense typically the largest cost, injunctive relief highest in some cases.
- Civil rights claims not covered by JPA Liability coverage.



U.S. Dept. of Justice - Project Civic Access

- DOJ-initiated comprehensive program and facility site review of City/County governments for ADA Title II compliance.
- 220 completed since 1999 - randomly chosen generally smaller cities near universities or tourist attractions.
- Nine completed in CA (last in Merced County in 2015)
- Settlement Agreement categorical contents include:
 - Physical modifications of public buildings, parks, facilities and sidewalks
 - Effective communications including for 911 and law enforcement
 - Polling places (including at schools)
 - Emergency management planning
 - Website accessibility

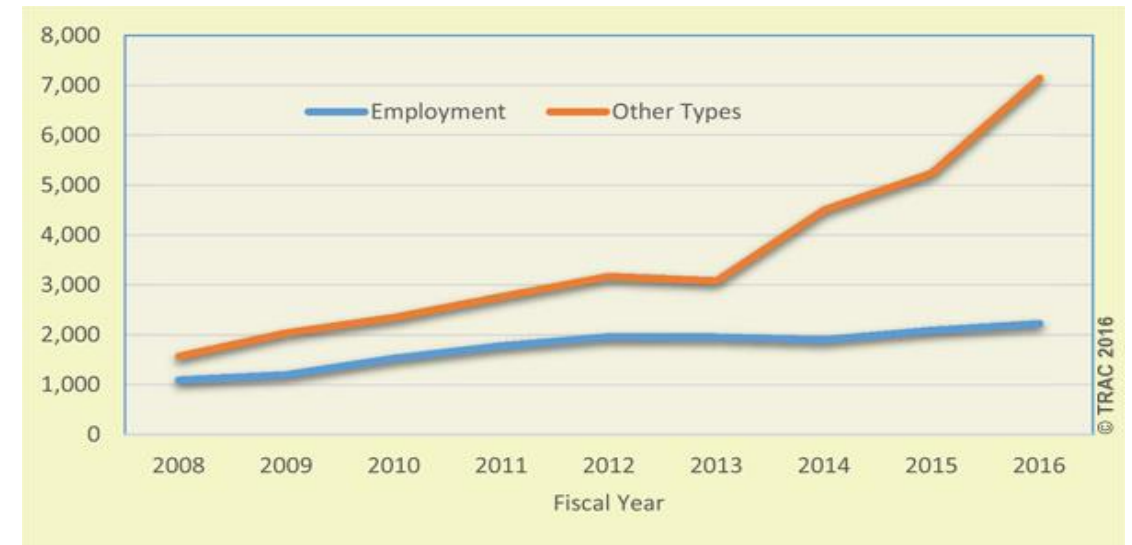


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ADA Legal Activity Trends by the Numbers

- ADA lawsuits in Federal courts: Combined Title II and III - 7143 total cases, up 36% from FY 2015 and 157% from FY 2011 (CA only: 2372 cases)
- Substantially Title III cases - difficult to isolate PE cases, out-of-court settlements
- Increase driven in part by active serial filers (in CA, Los Angeles and San Diego).
- U.S. Dept. of Ed OCR Resolution Agreements ADA/Section 504 Oct 2013-Oct 2016: U.S. 1241, California 168
- CA Commission on Disability Access - Tracks Title III only: In 2016, 3340 construction related complaints submitted in 2016
- Top 10 Violations: Parking (44%) and AC Route and Entry (31%)



(Source: Transactional Records Access Clearinghouse, Syracuse University <http://trac.syr.edu/tracreports/civil/444/> - October 2016)



What is your Risk Exposure?

Title II Case Examples:

- Special Education/Access case against a school district. (*Doe v. Hayward Unified School District* (2006))
- *Barden v. City of Sacramento* (2002).
- Individual disability access case against a school district. (*Doe v. Folsom Cordova Unified School District* (2010))
- *Californian's for Disability Rights, Inc. v. California Department of Transportation*. (2010)
- *Willits v. City of Los Angeles* (2016)

Enforcement by a lawsuit, injunction and recovery of damages can come from various plaintiffs. They include government agencies, both at the state and federal level, disability rights organizations and individuals with a disability. These can be individual cases or class actions.



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4. Recommendations



Recommended Legal and Administrative Actions to Reduce your ADA-related Risk Exposure

Don't Get Mad Get Smart!

1. Be proactive. If you are not and there is a lawsuit, there usually is not a very good defense.
2. Name an ADA Coordinator.
3. Perform/obtain facility accessibility surveys for both ADA Title II compliance and risk management purposes.



Recommended Legal and Administrative Actions to Reduce your ADA-related Risk Exposure

4. The “grandfathered” facility defense does not work. Develop a Transition plan and work on it. Establish priorities for work, such as entrances and areas of frequent public access. Make facilities accessible and remove barriers.
5. Reduce or eliminate use of maximum allowable accessibility building standards unless required by field conditions, space constraints or terrain.
6. Website accessibility: Evaluate and work toward independent certification of your website for Section 508/WCAG Level A and AA conformance.



Recommended Legal and Administrative Actions to Reduce your ADA-related Risk Exposure

7. Effective communications: Take appropriate proactive steps and make advance service arrangements to facilitate equally effective communications for persons with hearing, visual, cognitive or communication disabilities.
8. Contractual language. Review and strengthen indemnification and additional insured endorsement protections, particularly in architect and construction contracts.
9. Emergency planning: Incorporate appropriate individual and programmatic access and functional needs planning into your emergency processes and procedures.



Recommended Legal and Administrative Actions to Reduce your ADA-related Risk Exposure

10. Budget ongoing maintenance and quick-fix account: Establish annually funded account to address ADA complaint and/or facility maintenance of accessibility.
11. Understand the principles of “undue financial and administrative burden” and “fundamental alteration of the program” before attempting to use as a defense.
12. Purchasing - Incorporate protocols for purchase of facility elements with required accessible dimension or features including counters, work stations, tables, etc.



Recommended Legal and Administrative Actions to Reduce your ADA-related Risk Exposure

13. Become educated and educate employees and staff responsible for ADA compliance including the front-line staff who interact directly with the public.
14. Know where to find accurate and applicable resource information: Confirm organizational use of accurate, up-to-date and applicable ADA and disability discrimination legal and regulatory resource information.



5. Resources



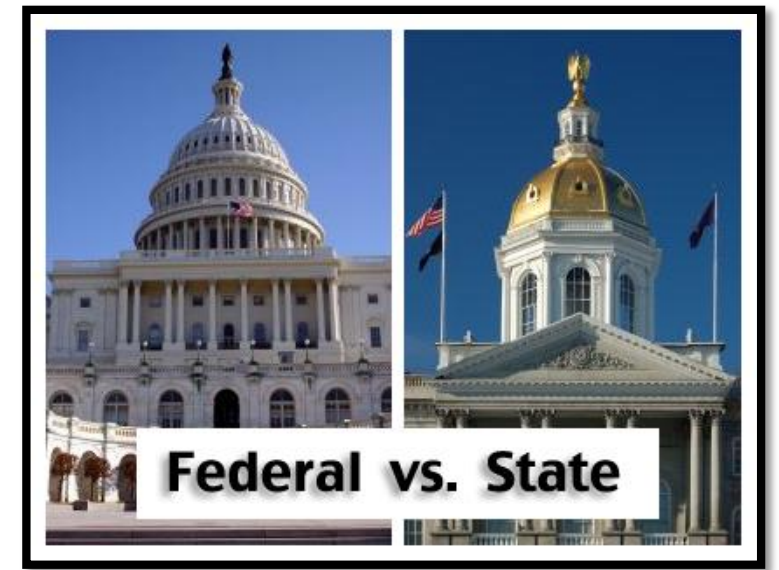
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Resources Review –

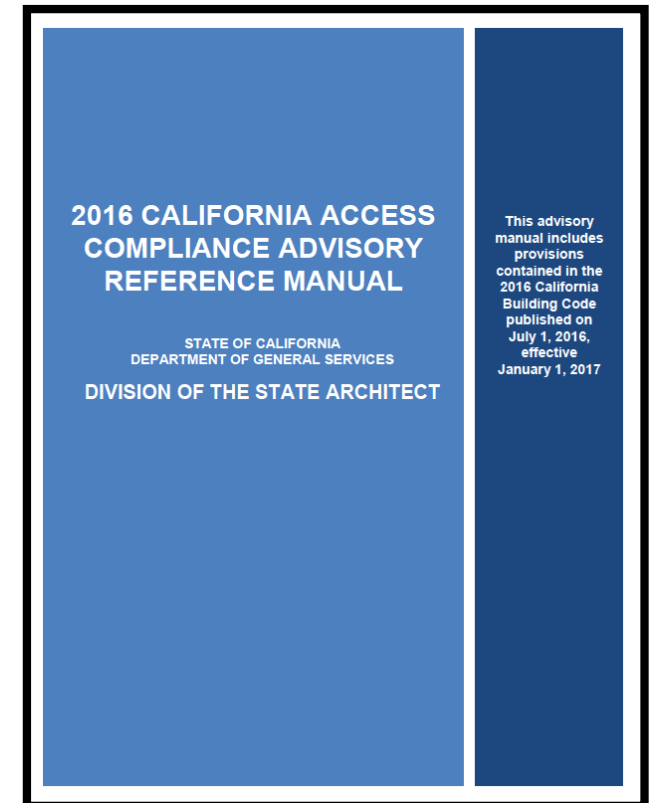
Criteria for Finding the Right Legal and Regulatory Information

- Google search – Lots of information, not always relevant
- Using wrong information can be worse than none at all.
- Federal v. State - “ADA” is used as a catch-all phrase but does specifically refer to the federal act and regulations.
- Federal law/regs are always the baseline standards.
- General rule of thumb: Administrative rules - Use federal source documents. Facilities standards - Use state source
- Always exceptions to the rule.



Resources Review – *Accessibility Building Standards*

- California Access Compliance Advisory Reference Manual
[https://www.documents.dgs.ca.gov/dsa/pubs/2016CBC Advisory Manual.pdf](https://www.documents.dgs.ca.gov/dsa/pubs/2016CBC_Advisory_Manual.pdf)
- Go-to document for facilities accessibility issues
- ADA standards set baseline but California has hundreds of individual requirements which exceed the minimum federal levels.
- Full text of building standards but with added editorial and explanatory remarks helpful in determining objectives and intent of the standard.
- Downloadable and free from California DSA website.



Resources Review – *Accessibility Building Standards*

- A Program Manager's Guide to Accessible School Parking Areas and Entrances
 - Comprehensive educational tool and reference guide for accessibility in school parking and entrances.
 - Developed by SIA specifically for school district staff responsible for planning and scoping, design oversight and construction and construction monitoring.
 - Currently available at:
http://www.nationaledonline.org/SIA-Project_Managers_Guide/index.html



Resources Review – Accessibility Building Standards

- U.S. Access Board – Guide to the ADA Standards
<https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/guide-to-the-ada-standards>
- Excellent resource for understanding accessibility principle requirements with detailed drawings, diagrams and animation to demonstrate standards.
- Common Questions section under each Chapter answers between-the-lines gray area type issues.
- Note: Do not use this for specific dimensions or building requirements, refer to California Accessibility Advisory Manual.

The BoardGuidelines & StandardsTrainingEnforcementResearch

Home > Guidelines and Standards > Buildings & Sites > About the ADA Standards > Guide to the ADA Standards

Guide to the ADA Standards

About this GuideSingle File Version

Chapter 1: Application and Administration

- Using the ADA Standards

Chapter 2: Scoping Requirements

- New Construction
- Alterations and Additions

Chapter 3: Building Blocks

- Floor and Ground Surfaces
- Clear Floor or Ground Space and Turning Space
- Operable Parts
- Protruding Objects

Chapter 4: Accessible Routes

- Accessible Routes
- Entrances, Doors, and Gates
- Ramps and Curb Ramps
- Elevators and Platform Lifts
- Accessible Means of Egress



Chapter 5: General Site and Building Elements

- Parking Spaces
- Passenger Loading Zones
- Stairways

See also guides on recreation facilities.

[UPCOMING: Guides covering Chapters 6 - 10]

Animations



Guidance on the International Symbol of Accessibility NEW

About the ADA Standards

ADA Standards

Guide to the Standards

About this Guide

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Chapter 2: New Construction

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Chapter 3: Clear Floor or Ground Space and Turning Space

Chapter 3: Operable Parts

Chapter 3: Protruding Objects

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Chapter 4: Ramps and Curb Ramps

Chapter 4: Elevators and Platform Lifts

Chapter 4: Accessible Means of Egress

Chapter 5: Parking Spaces



Signs NEW



Resources Review – *Overview of ADA Title II Administrative Requirements*

- ADA Title II Technical Assistance Manual Covering State and Local Government Programs and Services (U.S. DOJ, Civil Rights Division, 1993)
<https://www.ada.gov/taman2.html>
- ADA Best Practices Tool Kit for State and Local Government (U.S. DOJ, 2006-2007)
<https://www.ada.gov/pcatoolkit/toolkitmain.htm>
 - Overview of ADA Coordinator, public notice and grievance procedure (Chapters 1 and 2 on core requirements, Chapter 5 no longer current, avoid Chapter 6 on curb ramps)
- ADA Update: A Primer for State and Local Governments (U.S. DOJ, June 2015)
https://www.ada.gov/regs2010/titleII_2010/title_ii_primer.html
 - Overview of public entity non-discrimination requirements including select General Nondiscrimination Requirements, Facility Accessibility and ADA Planning including Transition plans and Self-evaluation.



Resources Review – Overview of ADA Title II Administrative Requirements

- Revised Title II Action Guide for Self-Evaluation and Transition planning (New England ADA Center)

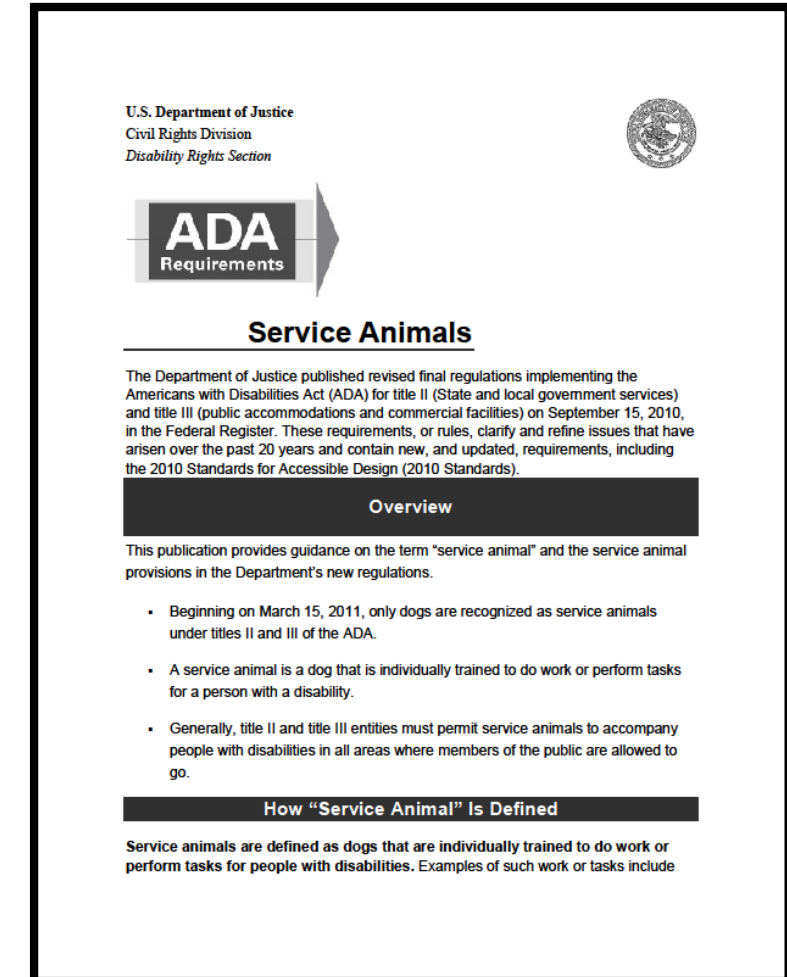
<http://www.adaactionguide.org/>

- Publicly available web-based resource to assist public entities with programmatic self-evaluation
- Well organized, easy to understand, sample fillable Word documents provided to facilitate Self-evaluation process



Resources Review – *Specific ADA Title II Administrative Requirements*

- ADA Requirements series (U.S. DOJ – 2011 to 2014)-
<https://www.ada.gov/ta-pubs-pg2.htm>
 - Service Animals
 - Effective Communications
 - Accessible Pools – Means of Entry and Exit
 - Ticket Sales
 - Other Power-Driven Mobility Devices
- Frequently Asked Questions with more extensive between-the-lines information
 - Service Animals
 - Effective Communications



Resources Review – *Specific ADA Title II Administrative Requirements*

■ U.S. Department of Education Office of Civil Rights

- “Dear Colleague” letters

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html#2015>

Effective Communications for students with hearing, vision or speech disabilities in public elementary and secondary schools (November 12, 2014)

Extracurricular Activities – Schools’ Obligations to Provide Equal Opportunity to Students with Disabilities to Participate in Extracurricular Activities. (January 25, 2013)

Electronic Book Readers in College and University Educational programs (June 29, 2010)

- OCR Resolution Letters and Agreements database

<https://www.ed.gov/ocr-search-resolutions-letters-and-agreements>



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Resources Review – *Emergency Planning for Persons With Access and Functional Needs (Schools)*

- Integrating Students with Special Needs and Disabilities into Emergency Response and Crisis Management Planning (U.S. Dept. of Education ERCM Express newsletter, 2006)
http://rems.ed.gov/docs/disability_newsletter211.pdf
- Emergency Plan for Students with Special Needs (Marin County Office of Education, April 2010)
<http://www.marinschools.org/SafeSchools/Documents/EmergencyServices/MCOESpecialNeeds.pdf>
- Emergency Evacuation Planning Guide for People with Disabilities with Personal Emergency Evacuation Planning Checklist (National Fire Protection Association, June 2016) <http://www.nfpa.org/disabilities>
- Integrating the Needs of Students and Staff with Disabilities and other Access and Functional Needs Training package with Powerpoint and Resource Guide (Readiness and Emergency Management for Schools [REMS], September 2014)
<http://rems.ed.gov/TrainingPackage.aspx>



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Resources Review – *Emergency Planning for Persons With Access and Functional Needs* (Cities/Counties)

- California Governor's Office of Emergency Services (Cal OES) – Access and Functional Needs Division <http://www.caloes.ca.gov/Cal-OES-Divisions/Access-Functional-Needs>
- Guidance on Planning for Integration of Functional Needs Support Services In General Population Shelters (U.S. FEMA, November 2010)
https://www.fema.gov/pdf/about/odc/fnss_guidance.pdf



Resources Review – *Website Accessibility*

- Section 508 Refresh Update article - <http://www.deque.com/blog/section-508-refresh-news-ict-final-rule-update/>

Description: Good one-page synopsis on update or “refresh” of the Rehabilitation Act Section 508 rules for Information and Communications Technology.

- Update on Section 508 Standards/Section 255 Guidelines Refresh (U.S. Access Board - January 18, 2017) <https://www.access-board.gov/news/1889-access-board-updates-requirements-for-information-and-communication-technology>

Description: Overview of the Section 508 Refresh with links to overview documents and full text of the Final Rule.



Resources Review – Website Accessibility

- World Wide Web Consortium (W3C) Web Accessibility Initiative: Web Content Accessibility Guidelines (WCAG) Overview - <http://www.w3.org/WAI/intro/wcag>

Description: W3C is the non-governmental organization who developed the accessibility guidelines which are now Section 508 standards. Technical support documents aimed at web developer and IT professionals.

- Great Lakes ADA Center Accessibility Online: Accessible Technology webinar series - <https://www.accessibilityonline.org/ao/>

Description: National ADA Center with multiple webinar series including one dedicated to Accessible Technology. Over 50 webinars since 2010 in archives and available for viewing.

- “WebAIM - Introduction to Web Accessibility <http://webaim.org/intro/>

Description: Non-profit organization based out of Utah State University. Reliable source of web access information for web-developer and non-tech staff.



QUESTIONS?



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