

Americans with Disabilities Act (ADA) Lift Requirements

Analysis of May 24 DOJ Guidance Documents

On May 24, 2012, the Department of Justice (DOJ) issued two new guidance documents related to its interpretation of the requirements for pool and spa accessibility in the 2010 Standards for Accessible Design. These documents follow up the May 17 announcement by DOJ extending the compliance deadline for pool and spa entry to January 31, 2013.

These documents provide some helpful clarifications but also restatement of previous positions stated by DOJ. AH&LA members are urged to review this document and their ADA compliance to ensure you are not in violation of the ADA. AH&LA continue to fight for common sense solutions to ADA compliance.

The first, a document entitled “*Accessible Pools: Means of Entry and Exit*,” available at http://www.ada.gov/pools_2010.htm, is a revision of a virtually identical document issued on January 31, 2012. In the original January 31 guidance, DOJ articulated for the first time its position that it is interpreting the 2010 Standards as requiring, unless it is not readily achievable, that each pool or spa has its own fixed lift that is positioned on the deck ready for use at all times when the facilities are open. It has been the position of the AH&LA that those requirements appear nowhere in the 2010 Standards and constitute an illegal rulemaking by DOJ. The revised guidance has not backed away from the positions expressed by DOJ in the January 31 guidance, except to note that DOJ has, as a matter of prosecutorial discretion, decided that it will not enforce the requirement that the lifts be fixed for any property that purchased a non-fixed lift before March 15, 2012. The guidance notes that any portable lift must nonetheless be poolside in the proper position for use and operational at all times the pool is open to guests. Because this exception is merely one of “prosecutorial discretion,” however, its impact on the ability of private parties to sue owners of hotels with pre-March 15, 2012 portable lifts is unclear.

The second document, entitled “*Questions and Answers: Accessibility Requirements for Existing Swimming Pools at Hotels and Other Public Accommodations*” (the “Q&A”), available at http://www.ada.gov/qa_existingpools_titleIII.htm, purports to clarify questions property owners have raised about DOJ’s interpretation of the pool lift requirements. The Q&A contains a number of positive developments for AH&LA members:

1. The Q&A reiterates that DOJ will not pursue enforcement of the fixed lift requirements against those who have purchased otherwise-compliant portable lifts **before March 15, 2012** as long as they are kept in position for use at the pool and operational during all times that the pool is open to guests. Property owners who purchased a portable lift before March 15, 2012 appear to be exempt from the requirement to conduct an ongoing analysis regarding whether a fixed lift is readily achievable. *See* Question No. 9.
2. DOJ seems to have adopted a slightly more reasonable standard for what constitutes a “fixed” lift than the position it has previously with AH&LA: The lift simply must be attached to the pool deck or apron “in some way.” *See* Question No. 7. DOJ

stated that a portable lift that is attached to a pool deck or apron is a “fixed” lift. DOJ also mentioned that the some manufacturers have developed kits to attach portable lifts to pool decks.

3. DOJ made clear in the Q&A that a franchisee conducting a readily achievable analysis generally need not consider the franchisor’s resources in making its determination. *See* Question No. 8.
4. DOJ clarified that businesses that have purchased a lift that is on back order do not have to close their pools until the lift arrives. *See* Question No. 11.
5. A business that has a pool and a spa but can only afford to buy one fixed lift does not have to close the facility that does not have an accessible entry. However, a fixed lift will have to be provided when it becomes readily achievable for the business.
6. In response to concerns that fixed lifts that remain poolside may pose a safety hazard, DOJ stated that the readily achievable analysis can take into account “legitimate safety requirements” but said they could not be based on “speculation.” This seems to leave open the possibility that a hotel might be able to demonstrate that having a lift out at an unattended pool is not readily achievable if the hotel has actual evidence of potentially dangerous activity occurring at the lift. *See* Question No. 16.
7. The Q&A directs property owners to resources about available tax credits and deductions that might defray the costs of installing a fixed lift. *See* Question No. 5.

These guidelines from DOJ, along with the January 31, 2013 compliance deadline extension, show the positive results of AH&LA’s efforts to combat DOJ’s issuance of new substantive requirements on these issues without going through the proper rulemaking process. Except as discussed above, DOJ continues to stand by these new requirements:

1. DOJ is still requiring lifts to be fixed (unless not readily achievable). *See* Questions No. 4 & 7.
2. DOJ is still requiring all lifts be poolside at all times when a pool is open. *See* Questions No. 14 & 15.
3. DOJ is still not permitting sharing of lifts between pools and spas or multiple pools. *See* Question No. 12.
4. There is still no meaningful guidance on what how to apply the readily achievable analysis because DOJ has not given any concrete examples.
5. Businesses are not permitted to consider limitations on insurance coverage or increases in insurance rates when assessing whether a lift is readily achievable. *See* Question No. 16.
6. DOJ has made clear that one element of compliance involves additional training of hotel staff in maintaining and assisting with use of the lifts. *See* Question No. 17.

7. As noted above, property owners who purchased a portable lift before March 15, 2012 could still potentially face risk of private litigation even if DOJ decides to not enforce the requirement.

One other important point from the Q&A is that property owners who determine that it is not currently readily achievable to provide a fixed lift, or even a non-fixed lift, must nevertheless make a plan to achieve compliance with the pool lift requirements once it would be readily achievable to do so. *See* Questions No. 6 & 10.

DOJ stated that it will continue to educate the public on pool and spa requirements. We will continue to keep you apprised of developments.