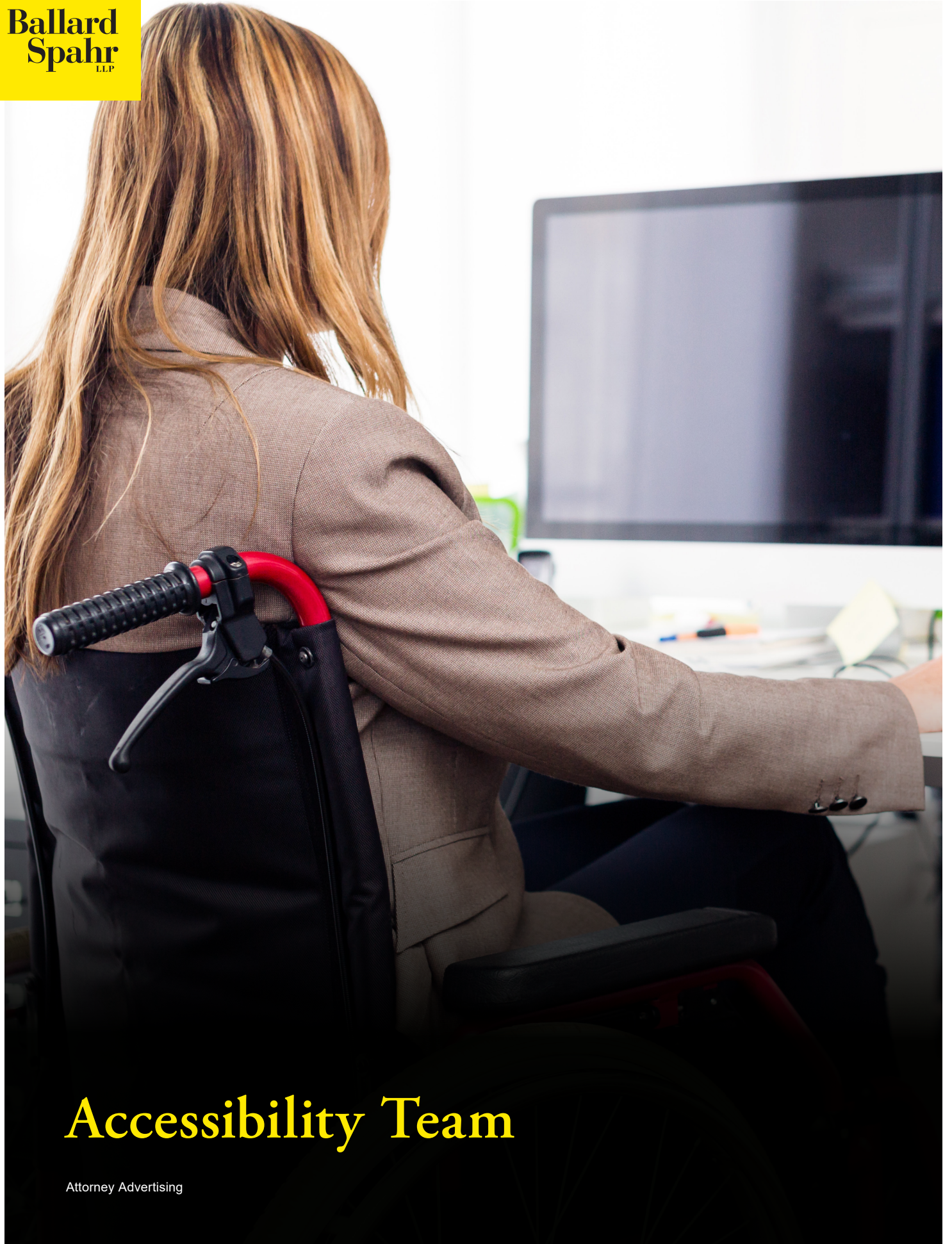



**Ballard  
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# Accessibility Team

Attorney Advertising



The Americans with Disabilities Act (ADA) prohibits discrimination and guarantees that people with disabilities have an equal chance to enjoy employment opportunities, purchase goods and services, and participate in government programs. The scope of what can be considered a disability is increasing—as are the accommodations necessary to comply with the law. The expectation that websites and mobile applications (digital platforms) will be made accessible to individuals with disabilities is also increasing.

Ballard Spahr’s Accessibility Team is fully versed in all areas of the ADA and other laws designed to protect the rights of people with disabilities. We help clients nationwide to assess their rights and responsibilities under the law, and we design programs that keep them in compliance. We also defend them against claims under these laws.

## **Digital Accessibility**

We regularly advise commercial, governmental, educational and nonprofit entities, as well as banks and the financial services industry, on online and mobile accessibility matters, from program assessment and design, policy development and implementation, to regulatory inquiries, enforcement activities, and structured settlements.

The ADA was enacted in 1990, before online and mobile commerce ecosystems were created. In the past 25 years, online and mobile technologies have become increasingly important to all aspects of public life, including access to education, employment, government services, and commercial activities.

In 2010, the U.S. Department of Justice (DOJ) issued an advance notice of proposed rulemaking (ANPRM) on the subject of establishing requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the internet accessible to individuals with disabilities. The ANPRM also included possible revisions to establish requirements for making the services, programs, or activities offered by state and local governments accessible to the public via the internet. The DOJ issued a Supplemental ANPRM in 2013, stating that it would address website accessibility rulemakings under Titles II and III of the ADA separately, beginning with regulations for Title II, which applies to governmental entities.

After President Trump took office and issued executive orders calling for federal agencies to reduce regulatory burden, the DOJ responded by placing the Title II and III proposed regulations on the “inactive” list of regulations in 2017. It is unclear when DOJ will remove the Title II and III rulemakings from the inactive list and resume the notice and comment process, and, since 2017, the DOJ has continued to refuse requests to issue any ADA guidance. Since there will be no DOJ regulations concerning accessibility of public accommodations or state/local government websites for the foreseeable future, this means the courts will continue to fill the void with decisions that often conflict with one another and create an uncertain legal landscape.

Although DOJ enforcement actions have declined since 2016, the threat of DOJ enforcement action looms in the future. In addition, private plaintiffs and disability advocacy groups continue to vigorously pursue legal actions and private negotiations leading to “structured settlements” intended to improve digital accessibility. Recent actions include:

- The DOJ entered into settlement agreements with an online grocery store, a national tax preparer, a provider of massive open online courses, and large museums regarding the accessibility of online and/or mobile content.
- A national advocacy group settled a lawsuit focused on website accessibility against an online-only business.
- A plaintiffs’ firm recently filed a civil action against a national hotel chain, alleging that the hotel’s website is inaccessible to people who are blind.

Given this litigious environment and the threat of future DOJ enforcement actions, we generally advise clients to take a proactive approach by developing policies and procedures that incorporate a reasonable operational approach. We also recommend creating an actionable roadmap under privilege for compliance with WCAG 2.1, the universally accepted technical standards created by the World Wide Web Consortium, and we provide access to trusted vendor relationships to handle such technical compliance matters as needed. Our approach is designed to mitigate the risk and reputational impact of private litigation and enforcement actions, while being mindful of client business strategy, confidentiality and cost containment.

## General Physical Accessibility

The ADA provides rights to disabled people to enjoy equal access to a wide range of services, goods, and places to live, work, and obtain services. The law is typically viewed as providing access to the physical premises for people with disabilities and reasonably accommodating requests for additional ways to have access, but the requirements under the ADA are much broader and are expanding constantly. These are some of the other accessibility requirements under ADA Title III:

- All commercial establishments and places where services or goods are provided must provide effective communication. This means that sign language or video remote interpreting services must be easily procured as needed. Health care facilities have been a substantial focus of this emphasis through the Barrier Free Health Care Initiative of the U.S. Department of Justice (DOJ).
- The ADA mandates the way that sports venues, stadiums, theaters, and other places of entertainment handle reservations, accessible seating, and ticket sales. These venues usually must have hearing-assistance devices readily available.
- A wide range of recreational facilities now have ADA physical requirements, including those for amusement rides, boating facilities, golf courses, fishing piers, and similar places. Swimming pools, both for public use and at hotels and resorts, now must have built-in lifts and walk-in entrances constantly available to swimmers with disabilities.
- Nursing homes and commercial establishments must permit a variety of mobility devices, like Segways and more complicated wheelchairs.
- ATMs and fare machines must meet ADA accessibility requirements.
- Telecommunications systems must have TTY or other accessible means of use.

Increasingly, claims are being brought for all of these compliance issues. We have in recent years:

- Defended a claim that live theater must offer closed-captioning services in addition to providing hearing-assist devices.
- Advised a client about seating, escort help, and accommodation responsibility in a crowded conference venue.
- Advised clients on theater and resort reservation systems and compliance with ADA.
- Assisted a sports and music venue management company with seating and ticketing compliance issues.

We also have seen lawsuits being brought for issues such as:

- A federal court case against the Washington Redskins of the National Football League for not providing closed-captioning services at its stadium.
- DOJ claims and settlements against mental health centers, skilled nursing facilities, and other medical providers for the failure to provide auxiliary aids and services for effective communication.

## Workplace Accessibility

All employers with 15 or more employees are subject to Title I of the ADA. If they are places of public accommodation, they also may be subject to additional physical accessibility requirements under Title III. Even small employers often are subject to state and local laws modeled after the ADA. Therefore, all employers should be cognizant of two important responsibilities. They must refrain from making employment decisions on the basis of an employee or applicant's disability, history of a disability, or being regarded as disabled. They also must provide employees with disabilities with reasonable accommodations that allow them to do their jobs.

While simple on their face, these responsibilities can pose difficulties for the unwary. Complications often include employee requests for non-traditional accommodations, the interplay between the ADA and other employment and labor laws, and the need for protection against potential discrimination or harassment. In addition, under the ADA Amendments Act in 2008, the scope of protected disabilities expanded. It now includes many conditions not previously thought to be covered, including certain temporary conditions, impairment of major bodily functions, and impairments controlled through medication or other means. In recent years, the U.S. Equal Employment Opportunity Commission (EEOC), the agency charged with interpreting and enforcing Title I of the ADA, has been vigilant in investigating and pursuing claims of ADA discrimination, often leading to lengthy and expensive litigation.

The EEOC's recent activities, and related court decisions, demonstrate a focus on the following issues:

- The EEOC considers inflexible, mandatory leave policies a violation of the ADA.
- Employers must be willing to consider non-traditional accommodations, such as telecommuting arrangements, if they are reasonable under the circumstances. Both the EEOC and federal courts have been more willing of late to disagree with employer assessments of what is and is not "reasonable."
- Even entities subject to other provisions of the ADA must not overlook their Title I responsibilities. In June, the DOJ announced a settlement with the University of Michigan regarding the school's unwillingness to transfer disabled employees into vacant positions for which they were qualified.
- While pregnancy is not considered a disability under the ADA, the EEOC has published Enforcement Guidance highlighting ways in which employers must accommodate employees for conditions related to pregnancy and childbirth. In addition, a recent U.S. Supreme Court decision has raised awareness of employers' affirmative obligation to accommodate non-disabled pregnant workers, or risk claims of sex discrimination.



## Retail Accessibility: Landlord-Tenant Disputes

For commercial properties, physical accessibility continues to be the most obvious area of required compliance for two primary reasons:

- Long, detailed ADA Standards for Accessible Design
- Requirements for additional accessibility in renovations and continued removal of barriers while commercial properties are managed or operated

ADA Title III claims against owners and landlords for the failure to design, construct, and manage the physical accessibility elements have risen 63 percent in the last two years. Plaintiffs' lawyers increasingly are finding cooperative testers to be clients in multiple states and filing more and more federal suits. They capitalize on the lack of notification requirements in current legislation and bring claims for money damages and costly corrective work far beyond the states where these actions traditionally were brought.

Shopping center, outlet mall, and other large commercial property owners should stay ahead of these potential issues by understanding and identifying the non-compliance that often leads to "drive by" lawsuits. They should develop and execute plans to correct non-compliant features, particularly through the process of regular maintenance plans when cost can be minimized.

Even large tenants are not immune to these lawsuits. They should understand what responsibility and liability fall on them. Both landlords and tenants should carefully consider their leasing language relating to ADA compliance and responsibility, agreeing on strategies for compliance that minimizes the risk of claims against both. They should consider cooperative strategies when ADA claims are asserted to lessen the eventual impact of any settlement.

We regularly work with clients throughout the country to develop these strategies to minimize risk while proactively planning appropriate compliance measures, and to defend and resolve the ADA physical accessibility cases when they are brought. Our matters have included defending a department store in litigation involving claims of non-accessibility due to aisle configuration and product placement as well as advising a shopping center on accessible route, parking, signage, and related compliance issues.

## Service and Assistance Animals

Business entities, state and local governments, nonprofit organizations, and educational institutions are subject to variety of federal, state, and local requirements governing the use of service and assistance animals by individuals with disabilities. Applicable laws include the ADA, the Fair Housing Act (FHA), and Section 504 of the Rehabilitation Act, which, together with state and local laws, impose specific and overlapping guidelines for interactions with individuals who use service or assistance animals.

The DOJ has interpreted the ADA to provide broad access for service animals in all areas where members of the public are permitted. It limits inquiries that covered entities may make of people with disabilities, both orally and through documentation, registration, and identification requirements. The DOJ defines service animals narrowly to include service dogs and certain miniature horses that work and perform tasks for the benefit of people with disabilities. Other laws, such as the FHA, take a broader approach to covered animals, and include assistance animals, such as those that provide emotional support to people with disabilities.

The federal government has become increasingly active in enforcing laws regarding service and assistance animals, including through the following actions:

- The DOJ's Civil Rights Division recently issued guidance about service animals that underscores its interpretation of the ADA to permit very few restrictions on the ability of service animals to access areas open to the general public.
- The DOJ recently settled a civil suit filed against an educational institution under the FHA involving access to student housing for assistance animals. The settlement included monetary relief for affected students, required changes to the institution's policies, and mandated training for relevant personnel.
- The DOJ settled a lawsuit against a hotel regarding its "no pets" policy and a veteran's ability to stay in the hotel with his family and service dog. The settlement requires a monetary settlement, changes in signage at the hotel, and training for employees.
- The DOJ recently filed a civil suit against a school district involving restrictions placed on a student's ability to bring a service dog to school.

In addition to governmental action, advocacy groups and individuals also file complaints and bring civil actions against covered entities:

- An advocacy group recently filed an ADA complaint against a business regarding access for service animals to a car transportation service.
- A restaurant settled a civil action brought by a customer in a wheelchair regarding access of a service animal to dining facilities.

Ballard Spahr attorneys regularly advise clients faced with accessibility matters under the ADA, FHA, Section 504, and other laws. We are experienced in drafting service animal policies, providing training and counseling on accessibility requirements, responding to regulatory inquiries and investigations, and defense of litigation involving these issues.

## Testing Administration

Organizations that administer tests are subject to specific regulations under Title III of the ADA. These rules, enforced by the DOJ, cover any private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes. Common examples of such tests include the SAT, LSAT, MCAT, and GRE, as well as testing for professional certifications.

The ADA regulations state that a test must be administered so as to "best ensure" that the results for a person with a disability accurately reflect that individual's aptitude or achievement level rather than reflecting his or her impairment. Frequently, testing accessibility involves complex issues related to learning or intellectual disabilities or sensory processing disorders. With the passage of the ADA Amendments Act, the scope of protected disabilities has expanded and less documented evidence is necessary to demonstrate that a person is disabled. This can present issues for testing organizations that strive to offer a level playing field for their exams.

We are seeing an increase—in both interest and in enforcement activities—centering on testing issues, including the following recent developments:

- In 2016, DOJ emphasized the broad definition of disability it applies in new, final regulations covering Title III entities.
- In 2015, the DOJ's Civil Rights Division released Testing Accommodations guidance, which emphasized its view that extensive analysis into the existence of a testing applicant's disability should occur only rarely.

- The DOJ endorsed a report produced by a “Best Practices Panel” that resulted from litigation in which DOJ was involved. The report covers the role of experts in reviewing accessibility decisions, documentation requirements, qualifications and training of reviewers, criteria for denying requests, and the timeliness of determinations and appeals.
- The DOJ had been actively seeking other opportunities to intervene in lawsuits filed by private parties. If successful, the agency can demand that the organization make extensive policy changes.
- As of yet, it is unclear what testing entities covered by Title III should expect from new leadership at the DOJ, but should federal oversight wane, state and local governments and private plaintiffs are likely to become more active in pursuing administrative investigations and litigation.
- In the past, Congress has also shown a keen interest in ADA-related testing issues, and likely will again. For example, in 2012, the Congressional Dyslexia Caucus, consisting of 35 members of Congress, solicited extensive information from testing organizations about their ADA compliance, likely prompting some of the DOJ's most recent efforts in this area.

Educational institutions that rely on testing for admission, which can be the subject of enforcement activities, also may be interested in these developments. In addition, most educational institutions are subject to accessibility requirements related to testing under Section 504 of the Rehabilitation Act.

Ballard Spahr’s Accessibility Team works closely with testing organizations that address and resolve these issues on a regular basis. For example, we are counsel to a medical board testing organization for physicians. Our services include advice and counsel on policy development, responding to requests for modification or accommodation, responding to regulatory and congressional inquiries, and defense of litigation.

## **State and Local Laws**

Employers of all sizes are subject to state and local laws modeled after the ADA. Like the ADA, these laws impose physical accessibility and nondiscrimination obligations on employers and businesses open to the public. And they often go further. Some states and municipalities have increased accommodation requirements or the protections in their disability-rights statutes by expanding the scope of protected characteristics (for example, to include pregnancy) not considered disabilities under the ADA. We help clients understand jurisdiction-specific requirements and defend them against violation allegations by employees and patrons.

## **Housing Accessibility**

We represent housing authorities, developers, builders, owners, and managers of multifamily and affordable housing on complying with accessibility requirements under the FHA, Section 504, the ADA, the Architectural Barriers Act, and other federal laws, as well as comparable state and local laws and codes.

We advise on design and construction accessibility requirements, reasonable accommodation policies and procedures, and equal housing opportunity mandates. Our attorneys provide day-to-day advice and representation on accommodation requests, appeals, litigation, and threatened litigation. We draft correspondence to requestors, review and analyze medical documentation relating to requests and appeals, and work with medical professionals and other consultants to address accommodation issues. Our attorneys regularly appear on behalf of clients in courts and before administrative agencies across the country to defend housing and disability discrimination claims brought by the DOJ and national advocacy groups, among other plaintiffs. We frequently represent clients in HUD fair housing and accessibility investigations. We also advise on construction contracts and other agreements to ensure compliance with applicable housing accessibility standards.

We represent affordable housing clients whose use of federal subsidies trigger the requirement to comply with Section 504 in construction and operations. Typical triggering subsidies include public housing funding, Section 8, or other HUD funds such as CDBG or HOME. One Section 504 requirement is that five percent of public housing units must be accessible in accordance with 504 standards. In HUD's world, there are no construction tolerances. HUD has not yet fully adopted the ADA standards used by other federal agencies, but new or substantially rehabilitated housing can now comply with the ADA standards as modified by HUD to apply UFAS when it is more stringent.

We also advise on areas where Section 504 differs from the FHA concerning obligations placed on housing operators. In addition to differing design and construction standards, for example, providers of housing units subject to 504 must pay for reasonable modifications, whereas, under the FHA, the landlord can make the tenant pay.

Our attorneys keep close tabs on developments in housing accessibility laws and regulations to ensure that our clients are advised of changes that do or could affect them.

## **Representative Experience**

### ***Digital Accessibility***

- Defending a bank headquartered in Delaware against a demand letter regarding the accessibility of its website.
- Defending a nonprofit financing organization in litigation filed by a plaintiffs' firm alleging that the nonprofit's website is not accessible under the ADA
- Representing a national retailer in responding to an ADA website accessibility demand letter and providing compliance advice on accessibility and effective communications with individuals with disabilities.
- Advising a major hospitality and entertainment company in responding to an ADA website accessibility demand letter.
- Representing an international food and beverage company in potential ADA litigation and providing ongoing advice on digital accessibility standards and program development.
- Advising several digital-only consumer financial services companies on ADA website and mobile accessibility standards and program development.
- For a national insurance company, handled a class action alleging website accessibility violations for an American insurance company and have defended that same company in three other cases involving litigation by a plaintiff's firm alleging that the company's website is not accessible under the ADA.
- Represented a digital business connections platform in responding to a demand letter related to accessibility issues of vision impaired individuals having difficulty accessing their mobile applications. Settled quickly and favorably for the client.





### **General Physical Accessibility**

- Represented a national gaming operator in opposing an administrative charge by a restaurant customer claiming he and his disabled sister were denied access to the casino buffet
- Advised large operators of film festivals and educational conferences on how to comply with ADA physical accessibility requirements and respond to a variety of complex reasonable accommodation requests

### **Retail Accessibility: Landlord-Tenant Disputes**

- Represented a commercial landlord and defended it against ADA Title III claims related to common area parking and tenant aisle access, which was settled early and economically.
- Represented a shopping center in defending accessibility claims related to tenant bathroom access and ADA-compliance.

### **Service and Assistance Animals**

- Represented a New Jersey-based health care network in a matter involving service animals

### **Testing Administration**

- Represented testing organization in connection with ADA Title III accommodation issues, including defense of litigation and advice regarding modifications to examination processes
- Represented testing organization in connection with congressional inquiry around accommodations for Dyslexia

### **Housing**

- Represented a client in a HUD Section 504 review to determine overall compliance of housing, administrative offices, and other non-dwelling spaces, as well as programs, and policies, with the physical and programmatic requirements of Section 504
- Negotiated a settlement of a Section 504 matter with HUD and then worked closely with the client and accessibility experts to comply with the settlement agreement, including developing new policies and systems, creating hundreds of 504-compliant units, and demonstrating the compliance with HUD requirements and the settlement agreement
- Advised clients on and negotiated Voluntary Compliance Agreements with HUD to resolve Section 504, Civil Rights Act, Fair Housing Act, and Rental Assistance Demonstration issues
- Successfully appealing various Section 504 findings by HUD, including achieving dismissals of the findings
- Advised clients on policies to comply with Section 504 requirements for admissions and occupancy of public housing and the housing choice voucher program

### **General**

- Represented a private Pennsylvania university in an ADA compliance matter.
- Serving as ADA counsel to a national bank and advising on the full range of accessibility matters, including point-of-sale devices, telephone communications, reasonable accommodations for consumers, policies, procedures, and websites



## Our Team

Ballard Spahr's Accessibility Team works closely with organizations of all sizes in litigation, investigations, and counseling related to ADA responsibilities. Many of our employer clients also are Title III entities or state and local governments. We help them navigate the various provisions of the statute and the complicated regulatory structure. Our services include advice and counsel on policy development; responding to requests for modification or accommodation; responding to inquiries by the EEOC, DOJ, and state and local administrative agencies; and defense of litigation.

If you would like assistance with any of the accessibility issues discussed here, please contact a member of the team.

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