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Municipal Newsletter

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Amendments to the Americans with Disabilities Act

Amendments to Titles II and III to the Americans with Disabilities Act ("ADA") became effective on March 15, 2011. We will focus our examination on the more notable notifications to Title II, which is most relevant to municipalities.

Municipalities are permitted to implement "safety requirements necessary for the safe operation of its services, programs or activities" under Title II, Section 35.130(h). However, the safety requirements must be "based on actual risks, not on mere speculation, stereotypes or generalizations about individuals with disabilities." This amendment was added to Title II to make it more consistent with Title III, which contained similar language in the 1991 version.

Another section of Title II to which significant amendments were made was Section 35.136 regarding the permissibility of service animals in public entities. Public entities are required to modify their "policies, practices or procedures to permit the use of a service animal by an individual with a disability," however, some exceptions do exist. The public entity is permitted to exclude a service animal for a number of reasons, but most often, animals are excluded if the handler is unable to control the animal or if the animal is not housebroken. Once an animal has been excluded under the exceptions provided, the handler/owner must be given the opportunity to enter the public entity, or participate in the service, program or activity, without the animal. Additionally, public entities are not responsible for the care or supervision of the service animal. The public entity is entitled to determine if the animal presented qualifies as a service animal. An interesting addi-

tion to this Section provides public entities may not impose a surcharge for the presence of service animals, even if the public entity requires surcharges for pets in general.

A major addition to Title II falls under Section 35.137 which requires public entities "permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, wheelchairs, canes, braces or other similar devices designed for use by individuals with mobility disabilities in areas open to pedestrian use." However, the modification comes with regard to "other power-driven mobility devices." "Other power-driven mobility devices" refers to devices not necessarily designed for persons with mobility impairments, but are often used by such individuals as their mobility device of choice. Under the modification to this Section, public entities also must permit "other power-driven mobility devices" to be used unless the covered entity can demonstrate "such use would fundamentally alter its programs, services, or activities, create a direct threat, or create a safety hazard.

Section 35.139 was also added to Title II under the Final Rule amendments. This Section provides public entities with the authority to refuse an individual to participate in, or benefit from services, programs or activities if the public entity believes the individual poses a "direct threat" to the health and safety of others. The public entity "must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence" in determining an individual's threat relative to nature,

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duration and severity. The entity must also consider the likelihood of the threat being realized and whether the enactment of any rules, procedures, policies, etc. may decrease the threat.

Additions were also made to Sections 35.160 relative to the furnishing of auxiliary aids and services and prohibitions on communication requirements. Section 35.161 received the addition of Subsection (c) which provides prerequisites that should be met prior to a public entity responding to a telecommunications relay service established under Title IV of the ADA.

Please note, modifications relative to the 2010 ADA Standards for Accessible Design will go into effect next year. As of March 15, 2012, covered entities that would have been required to comply with the 1991 Standards during any new construction or alteration of facilities or elements, will be required to comply with the 2010 Standards.

As always, the purpose of this newsletter is to merely inform and not advise. Because every case is different in varying aspects, an attorney should be consulted. The attorneys of Leventry, Haschak & Rodkey, LLC are ready to assist you relative to this issue or any matter.
