ADA Defense & Compliance Lawyer Alert: Hilton’s ADA Settlement with the Department of Justice: Precedent-setting agreement delivers more than removing architectural barriers

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Hotel ADA & Compliance Defense Lawyer update: We warned you about the Department of Justice (DOJ) conducting ADA “sweeps” in regions near you (Implications of the latest ADA enforcement “sweeps” against hotels in Portland and San Francisco, Is the DOJ’s ADA Compliance Survey Coming to Your City Soon? What to do when you receive the DOJ’s ADA Compliance Review questionnaire) but now we have information about the outcome of one such sweep.

Hilton Worldwide, Inc. and the DOJ came to an agreement on November 9, 2010 to make ADA changes to approximately 900 hotels internationally. Beyond the removal of architectural barriers, the changes include providing disabled guests the same room choices as other guests, guaranteeing accessible rooms will be available when they have been reserved, and making the central Internet reservation system more accessible. The agreement includes not only Hilton-owned properties, but properties where Hilton is the manager or franchisor. Click here to see the Hilton Consent Decree in US v Hilton Worldwide Inc.

Read on for a breakdown of what precedent-setting changes the Consent Decree contains and what accessibility issues you should consider before the DOJ visits your hotel.

Hilton’s ADA Settlement with the Department of Justice

Precedent-setting agreement delivers more than removing architectural barriers

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On November 9, 2010, the U.S. Department of Justice’s Civil Rights Division (DOJ) and Hilton Worldwide, Inc. (Hilton) announced that they entered into a 45-page “comprehensive precedent-setting agreement under the Americans with Disabilities Act of 1990 (ADA) that will make state-of-the-art accessibility changes to approximately 900 hotels nationwide.”

More than the usual removal of architectural barriers, the changes include providing disabled guests the same room choices as other guests, guaranteeing accessible rooms will be available when they have been reserved, and making the central Internet reservation system more accessible. The agreement includes not only Hilton-owned properties, but properties where Hilton is the manager or franchisor.

The lawsuit was filed after the DOJ completed ADA surveys of 13 Hilton-related hotels. Hilton denied all allegations, but
cooperated with DOJ investigators throughout the extended investigation and agreed to pay a $50,000 civil penalty.

**Background of lawsuit**
The Court-approved Consent Decree and Final Judgment resolved the lawsuit United States of America v. Hilton Worldwide, Inc., filed in the United States District Court for the District of Columbia. The lawsuit alleges that Hilton, Conrad Hotels and Resorts, Doubletree, Embassy Suites, Hampton Inn, Hampton Garden Inn, Hilton Grand Vacations, Homewood Suites, the Waldorf Astoria, the Waldorf Astoria Collection and Home2Suites by Hilton have policies, practices and procedures which discriminate against individuals with disabilities.

The lawsuit also alleges that Hilton either owns, manages, or enters into franchise license agreements with the owners of hotels that failed to design and construct facilities built after January 26, 1993, (the date the ADA was fully effective), that were in compliance with the “new construction standards” of the ADA. The DOJ focused on hotels built after the 1993 date because those properties were required to be constructed without any access barriers. This strategy enabled the DOJ to avoid the more complex litigation issues involved in “readily achievable barrier removal” that is required of properties built prior to 1993.

The Complaint alleged that hotels were designed and built without the federally mandated number of accessible guestrooms dispersed among the different categories of available accommodations (suites, deluxe rooms, view rooms, etc.).

**Complaints, sweeps, and system-wide investigations**
Typically, a DOJ hotel investigation begins with a guest complaint at a particular hotel which is ignored or poorly handled by the owner or operator. Matters commonly escalate if the guest files a formal ADA complaint with the DOJ’s Civil Rights Division. All complaints are investigated.

The DOJ may also institute geographical “sweeps” such as the New York Times Square/Theater District investigations that took place several years ago. This comprehensive ADA investigation of 60 Times Square hotels — including boutique hotels and international flag properties — was initiated after a single guest’s complaint. A similar sweep of apartment complexes took place in Louisville, Kentucky.

The DOJ has also initiated a number of system-wide investigations against the nation’s leading hotels and retailers. Over the years, the DOJ has litigated or otherwise negotiated Consent Decrees with such prominent hotel flags as Ramada Ltd. (2010), Days Inns of America, Inc. (1999), Marriott International, Inc., Courtyard Management Corporation (1996), Motel 6 Operating LP (2004 and 2007) and Bass Hotels and Resorts (1998).

**Accessible reservation systems and policies**
While the alleged architectural barriers are commonplace in ADA hotel litigation, the inclusion of online and telephonic reservations systems in is one reason the agreement is viewed as “precedent-setting.” The Consent Order requires Hilton’s on-line reservations system to become accessible and its website to provide timely information about the accessible elements in its hotels.

The DOJ accused Hilton of failing “to provide individuals with disabilities the same opportunity to reserve accessible guestrooms using its on-line and telephonic reservations systems that are available for reserving other Hilton Hotel
rooms.” Specifically, the DOJ alleged that guests with disabilities are unable to reserve specific types of accessible sleeping accommodations through the Hilton Reservations and Customer Care system, in violation of the ADA. It also alleged that Hilton’s central reservations system does not ensure that disabled guests receive the accessible accommodations they reserve — that upon arrival, disabled guests may not be provided with the accessible sleeping accommodations they reserved, such as a particular room type, a room with a tub or roll-in shower, or a visual alarm for deaf or hard-of-hearing individuals.

Guests will soon be able to reserve and be assured of booking specific types of accessible guestrooms with specific features. Hilton must offer disabled guests free upgrades in a more expensive room class, if available, if the reserved accessible guestroom is unavailable at registration. Hilton will revamp its website to provide access to guests who are blind or of low vision

**Franchisor liability for ADA compliance**

Another groundbreaking aspect of the case is that the Consent Order is the first time Main Justice has compelled a franchisor to require all franchisees and all properties under Hilton’s management and control, to survey their facilities for ADA compliance and to either certify that each property is ADA compliant, or bring them into compliance. Historically, franchisors which merely license their brands, products and know-how — but do not actually build or operate the facilities — have not been held liable under the ADA for the acts or omissions of their franchisees.

The DOJ alleged that, as franchisor, Hilton was substantially involved in the design and construction of its owned, managed and franchised hotels and that these properties are not readily accessible to and usable by individuals with disabilities, as required by Title III of the ADA.

At a high level, the Consent Decree requires Hilton and its franchisees to survey their properties within 12 months after the Consent Decree is effective and bring them into ADA compliance. When Hilton enters into new franchise or management agreements, renews or extends old ones, the owners will be required to survey their facilities, and if necessary, bring them into ADA compliance. They must offer a variety of accessible room types (including at least one suite), provide premium views, assure the required number of guestrooms are available (including those with roll-in showers and permanent or removable tub seats), and provide accessible guestrooms for deaf and hard-of-hearing patrons.

The generally accepted legal standard has been that a franchisor cannot be held liable under Section 303 of the ADA unless it owns, leases or operates the franchised hotels or retail stores. The two leading cases involved Days Inns of America, Inc. and American Dairy Queen Corporation, and those courts held that a franchisor’s right under a franchise agreement to set operating and brand standards for building, equipment or quality control does not make it an “operator.” All that may be changing, in light of Hilton’s Consent Order.

**Ongoing ADA compliance and training**

Consistent with many chain-wide Consent Orders, Hilton must hire a national ADA Compliance Coordinator to carry out the mandates of the Consent Order. Each property is required to train a point-person to resolve accessibility complaints. Hilton is also to select an “ADA Inspector” to verify compliance.

ADA training will be mandatory for all staff, whose essential jobs require them to interact with guests. Front desk employees, general managers and chief building engineers will undergo additional training regarding assignment of accessible guestrooms, emergency procedures, policy changes, maintenance of accessible features, use of all accessible
Moving forward
The U.S. Department of Justice’s Civil Rights Division is aggressively enforcing the Americans with Disabilities Act of 1990. The DOJ has focused particularly on national and regional hotel chains, individual hotels, national retailers, apartment complexes and transportation facilities. Unlike some private plaintiff’s lawyers that we regularly encounter, DOJ lawyers are dedicated, skillful and committed to just one aim: to provide full and equal access to public accommodations, nationally.

Although the DOJ is authorized by statute to file litigation to enforce the ADA and to seek money damages, its lawyers are primarily motivated to obtain barrier removal. Seeking money damages is secondary, if an issue at all.

The DOJ has obtained Consent Orders against such prominent hotels as New York New-York Hotel and Casino, LLC (2001), the Ocean Palms Beach Resort (2009), Sheraton Grand Sacramento Hotel (2010), Crown Plaza Times Hotel (2010) and Norwegian Cruise Line (2010). Consent Orders have also been obtained against such prominent retailers and restaurants such as AMC Entertainment, Inc. (2010), Blockbuster, Inc. (2010), Wal-Mart Stores, Inc. (2009), Sylvan Learning Centers, L.L.C. (2007), Shoney’s LLC (2006), Sunoco, Inc. (2005), and Safeway, Inc. (2004).

The Hilton case highlights the fact that the DOJ is not only laser focused on architectural barriers in hotels, but it is equally focused on the new ADA frontier – “cyberaccessibility”. The case also suggests that it’s a whole new ballgame when it comes to franchisor liability for ADA compliance, and companies with franchised properties will need to rethink their exposure in this area and develop strategies to ensure ADA compliance.

We at JMBM are experienced in representing hotels in DOJ investigations. Our experience with DOJ attorneys is that they are very straightforward and fair-minded in their approach, and very serious in their relentless pursuit of achieving full and equal access for the disabled.

The DOJ wants to assure — system wide and nationwide — when individuals with disabilities check into a hotel, they will receive the accessible features they need to enjoy a good night’s sleep. Our job as ADA lawyers is to make sure our clients enjoy a good night’s sleep, too, by achieving a high level of compliance with the ADA, and working successfully with the DOJ to make that happen, when necessary.

Other ADA defense and compliance resources
You can access the full library of ADA materials on Hotel Law Blog by going to the home page, selecting the tab at the top that says “HOTEL LAW TOPICS”, and then clicking on “ADA Defense & Compliance” in the drop down menu . . . or by clicking here.

Below is a partial listing of articles by JMBM’s ADA Defense Lawyer team:

The ADA Compliance and Defense Guide — Free Download
ADA Defense Lawyer: New ADA standards for website accessibility

FAQs on “service animal” requirements of the ADA. What every hotelier needs to know. Why Uber was sued over service animals.

Starwood Hotels and The Phoenician get an expensive (and unnecessary) lesson in ADA compliance.

DOJ sues 3 of NYC’s top Zagat-rated restaurants for ADA violations

Charles Schwab settles claim over website accessibility

A blast against frivolous, serial ADA lawsuits in striking the right balance

New ADA compliance standards for golf courses. What do they mean to you?

How to handle an ADA lawsuit . . . and How not to do it

How a recent ADA case affects all hotels but particularly conference centers and meeting hotels

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When disabled hotel guests’ needs go beyond the norm for typical guests, what do hotel owners and managers have to do?

ADA Sweeps by U.S. Department of Justice — Coming to a theater district or Hotel near you soon? How to get ready before it’s too late.

Defending ADA lawsuits. How your hotel website can make you a target for ADA lawsuits

Martin H. Orlick is one of the top ADA defense lawyers in the country. He has helped hotel, restaurant, retail and other commercial property owners defend more than 500 ADA cases. In addition to defending lawsuits and governmental investigations, Marty’s team of ADA specialists focuses on enterprise-wide ADA compliance and litigation prevention, including facilities, website and operational compliance. He is also a senior member of the law firm’s Global Hospitality Group®, a partner in the real estate department, and a member of the American College of Real Estate Lawyers (ACREL). For more information about ADA compliance and defense, contact Marty Orlick at 415.984.9667 or morlick@jmbm.com.
Jim Butler is a founding partner of JMBM, and the founder and chairman of JMBM’s Global Hospitality Group® and Chinese Investment Group™. He is recognized as one of the top hotel lawyers in the world and has authored or co-authored The HMA & Franchise Agreement Handbook, How to Buy a Hotel Handbook, The ADA Compliance and Defense Guide, and The Lenders Handbook. Jim has led the Global Hospitality Group® in more than $87 billion of hotel transactional experience, involving more than 3,900 hotel properties located around the globe. Jim’s team has worked on more than 60 EB-5 projects over the past three years. 310.201-3526 or jbutler@jmbm.com

This is Jim Butler, author of www.HotelLawBlog.com and hotel lawyer, signing off. We’ve done more than $87 billion of hotel transactions and have developed innovative solutions to unlock value from hotels. Who’s your hotel lawyer?

Our Perspective. We represent hotel owners, developers and investors. We have helped our clients find business and legal solutions for more than $87 billion of hotel transactions, involving more than 3,900 properties all over the world. For more information, please contact Jim Butler at jbutler@jmbm.com or +1 (310) 201-3526.

Jim Butler is a founding partner of JMBM, and Chairman of its Global Hospitality Group® and Chinese Investment Group™. Jim is one of the top hospitality attorneys in the world. GOOGLE “hotel lawyer” and you will see why. Jim and his team are more than “just” great hotel lawyers. They are also hospitality consultants and business advisors. They are deal makers. They can help find the right operator or capital provider. They know who to call and how to reach them.