



Franchisor Liability for Failure by Franchisees to Comply with the Americans with Disabilities Act

Compliance Drafting Issues

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Under many circumstances franchisors must be concerned about liability under the Americans with Disabilities Act (ADA)¹ at facilities owned, leased, leased to, or operated by franchisees.² This article provides some drafting tips designed to reduce potential franchisor liability for ADA violations at franchised outlets.³



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The principal thrust of several of the Department of Justice (DOJ) cases against Days Inns of America, Inc. (DIA)⁴ was an effort to shift the burden of ADA compliance from the franchisee-owner of the hotel to the franchisor.⁵ Although the DOJ's arguments have not always succeeded in court, the various rulings in the DIA cases and recent DOJ settlements⁶ provide several lessons for franchisors on reducing their potential ADA exposure:

- Franchisors should establish clearly the franchisor's and the franchisee's respective responsibilities for ADA compliance at a franchisee-owned and -operated facility.
- Franchisors should describe clearly the nature and degree of their control (or lack thereof) over the operation of the franchisee's facility and business.
- To the extent practicable, franchisors should reduce, in the contract and in practice, the indicia of "control" that they may exert over the design and construction process, particularly as it relates to ADA compliance.
- Franchisors should utilize ADA certification forms to shift the burden of determining compliance with the ADA to the franchisee and its architect and/or contrac-

tor. This also may reduce the likelihood that a franchisor will be deemed to have "actual knowledge" of ADA violations by franchisees.

Franchise systems are not identical and franchisor control over franchisee operations and franchisor assistance to franchisees vary from system to system. Therefore, although one contract provision will not apply to all situations, franchisors should consider franchise agreement provisions that address various ADA compliance issues. Here are a few suggestions:

Limitations on Franchisor's Assistance

The franchise agreement should describe accurately the limitations on the franchisor's assistance with respect to developing and providing to franchisees plans, specifications, and prototypical designs. The agreement also should describe any limitation on the franchisor's approval of the franchisee's plans and drawings. For example, a franchise agreement provision concerning franchisor assistance may read:

Franchisor shall provide to Franchisee standard prototypical plans and specifications for the design of a [brand] franchised outlet, including exterior and interior design and layout, fixtures, furnishings, equipment, and signs. Such prototypical plans shall not contain the requirements of any federal, state, or local law, code, or regulation, including those concerning the ADA or similar rules governing public accommodations for persons with disabilities, nor shall such plans contain the requirements of, or be used for, construction drawings or other documentation necessary to obtain permits or authorizations to build a specific [brand] franchised outlet.

To the extent that a franchisor provides to its franchisees detailed design specifications (as some franchise systems do) and those specifications include features subject to the DOJ's Standards for Accessible Design⁷ (also known as the ADA Accessibility Guidelines or ADAAG), the franchisor should try to provide ADA-compliant specifications—despite the contract disclaimer. The franchisor

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Exhibit 1: Sample Franchisee Certification Form

ADA CERTIFICATION

Franchisor and Franchisee are parties to a franchise agreement dated _____ for the development and operation of a [brand] outlet at _____ (the "Franchised Business"). In accordance with Section [XX] of the Franchise Agreement, Franchisee certifies to Franchisor that the Franchised Business complies with all applicable federal, state, and local laws, statutes, codes, rules, regulations and standards, including but not limited to the Americans with Disabilities Act. Franchisee acknowledges that it is an independent contractor and the requirement of this certification by Franchisor does not constitute ownership, control, leasing or operation of the Franchised Business. Franchisee acknowledges that Franchisor has relied on the information contained in this certification.

Franchisee
By:
Title:
Date:

may wish to obtain a certification from its architects or design engineers that the prototypical designs and specifications comply with the ADAAG.

Further, the contract language regarding the franchisor's approval of the franchisee's plans may include this provision:

Franchisee shall not proceed with construction of the Franchised Business until Franchisor has provided written approval of Franchisee's plans, specifications and drawings. Franchisor's approval shall be limited to review of such plans to assess compliance with Franchisor's design standards for [brand] outlets, including such items as trade dress, presentation of trademarks, and the provision to the potential customer of certain products and services that are central to the functioning of [brand] outlets. Such review is not designed to assess compliance with federal, state or local laws and regulations, including the ADA, as compliance with such laws is the sole responsibility of Franchisee.

The DIA settlement and several other DOJ settlements with companies involved in franchising⁸ include, to varying degrees, commitments that the franchisor will provide information to its franchisees regarding the franchisor's compliance with the ADA, as well as advice to enable a franchisee to comply with the ADA. Consequently, although a franchisor may want to shift the compliance burden to its franchisees, that shifting of responsibility may be more palatable to the DOJ if the franchisor also educates its franchisees concerning ADA requirements.⁹

Establish the Franchisee's Responsibility for ADA Compliance

The franchise agreement should make clear that ADA compliance is the franchisee's—not the franchisor's—responsibility. Following is an example of such a franchise agreement provision (in addition to, and not in lieu of, a general commitment by the franchisee to comply with all laws, typically found in many, if not all, franchise agreements):

Franchisee shall comply with all federal, state and local laws, codes and regulations, including the applicable provisions of the ADA regarding the construction, design and operation of the Franchised Business. Prior to seeking Franchisor's approval of Franchisee's or Franchisee's architects' preliminary plans and designs for the Franchised Business, Franchisee shall certify to Franchisor, in accordance with the ADA certification in the form attached to this Franchise Agreement, as Exhibit [X], that the preliminary plans comply with the ADA. Franchisee shall provide a similar certification to Franchisor following the construction, build-out, and pre-opening operation of the Franchised Business, that the plans, specifications, construction, and build-out of the Franchised Business have complied and will comply with the ADA and all applicable federal, state, and local specifications. In the event Franchisee receives any complaint, claim, other notice alleging a failure to comply with the ADA, Franchisee shall provide Franchisor with a copy of such notice within five days after receipt thereof.

Create and Mandate the Use of ADA Certifications

Franchisors may wish to obtain certifications from the franchisee and its architect, design engineer, or contractor that the facility is ADA compliant. Two examples appear in the sidebars on this page [*see Exhibits 1 and 2*].

To the extent that specific ADA standards have been established for a particular industry or business, either as part of a settlement or in the ADAAG, the franchisor may

Exhibit 2: Sample Architect, Engineer, or Contractor Certification Form (for use following construction)¹⁰

ADA CERTIFICATION FOR CONSTRUCTION [OF FACILITY]

To: [Franchisor Name]
Re: [Franchised Business Name and Location]

The undersigned acknowledges that Franchisor requires that an ADA certification be provided for all new construction projects including the proposed plans and actual construction. This requirement states: [*recite the requirement from the franchise agreement and/or any design manuals of the franchisor*].

Further, the undersigned acknowledges that Franchisee is required to obtain execution of the following certification from its architect, design engineer or contractor. Franchisor will not begin the final review of or approve any plans, specifications or construction documents without an ADA certification.

Therefore, in connection with the project identified as follows: [*include franchised outlet name and address*],

I/we represent, warrant and certify to Franchisor that I/we have used professionally reasonable efforts to assure that the facility has been constructed in conformance to and in compliance with, and that the facility conforms to and complies with, the foregoing requirements and the ADA, the technical requirements of the ADA Accessibility Guidelines (ADAAG) and all other related or similar state or local laws, regulations and other requirements in effect at the time this representation is made.

[Architect, Engineer, or Contractor firm]
Signed:
Name:
Date:

also wish to require that the franchisee or its licensed professional certify that the facility complies with a standardized “checklist” of applicable ADA standards.¹¹

Given the DOJ’s series of cases against DIA, as well as DOJ actions and private lawsuits against other franchisors, it is likely that franchisors—and particularly large, national chain franchisors—will continue to be targets of claims arising out of their franchisees’ alleged failures to comply with the ADA. Franchisors can no longer deflect all attacks with the argument that any noncompliance at a franchisee’s outlet occurs at a facility that is not operated or controlled by the franchisor. Nor can most franchisors evade all scrutiny by claiming that they have no input over design and construction decisions, or knowledge of any violations. Therefore, to reduce the potential exposure to ADA claims, franchisors should (1) educate their franchisees regarding the need for ADA compliance and should provide franchisees with ADA compliance information, (2) impose strict contractual obligations on the franchisees to comply with the ADA, (3) limit the franchisor’s control over certain design and construction functions or decisions, in both the franchise agreement and in practice, and (4) obtain certifications of ADA compliance from franchisees and their licensed professionals. Although they are not a perfect solution, these measures attempt to apportion responsibility between the franchisor and the franchisee in a manner that the DOJ has found acceptable in at least one settlement and, under current jurisprudence, may be acceptable in many jurisdictions.

Endnotes

1. 42 U.S.C. §§ 12101 *et seq.*

2. To the extent franchisors own, lease, lease to, or operate a place of public accommodation or a commercial facility, franchisors will be liable for ADA noncompliance at such facilities. This article addresses the situations in which franchisors do not own, lease, or operate a franchisee’s outlet, but may be considered liable for a franchisee’s failure to comply with the ADA due to the franchisor’s “control” over the design and construction of nonconforming structures owned by franchisees. As Killion and Merz point out, *see* note 3, below, this issue arises in new construction projects and major alterations of existing facilities.

3. This article appeared as a companion to the ABA Franchise Law Journal article written by William L. Killion and Gregory R. Mertz, entitled, *Franchisor Liability for Failure by Franchisees to Comply with the Americans With Disabilities Act: Uncertain State of the Law*, 19 FRANCHISE L.J. 143 (2000).

4. *United States v. Days Inns of America, Inc.*, 151 F.3d 822 (8th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999); *United States v. Days Inns of America, Inc.*, 997 F. Supp. 1080 (C.D. Ill. 1998); *United States v. Days Inns of America, Inc.*, 22 F. Supp. 2d 612, 1998 U.S. Dist. LEXIS 15772 (E.D. Ky. 1998); and *United States v. Days Inns of America, Inc.*, 1998 U.S. Dist. LEXIS 21945 (E.D. Cal. Jan. 12, 1998).

5. The DOJ argued that a franchisor should be liable for ADA noncompliance at a franchisee’s hotel if the franchisor exercised significant control over the design and construction of the noncompliant facility.

6. Settlement Agreement under the ADA between the United States of America and Days Inns of America, Inc. and Cendant Corp. re: new construction under the ADA, in *United States v.*

Days Inns of America, Inc., Case No. 96–26 (E.D. Ky. Dec. 2, 1999), <www.usdoj.gov/crt/ada/daysinn.htm> (Days Inns Settlement); Settlement Agreement between the United States of America and Avis Rent A Car, Inc. re: shuttle bus services at airports, DOJ Complaint No. 202–37–60, May 27, 1999, <www.usdoj.gov/crt/ada/avis99.htm> (Avis Settlement); Settlement Agreement Regarding Access for Individuals with Disabilities to Wendy’s Restaurants, August 27, 1998, <www.usdoj.gov/crt/ada/wendys.htm> (Wendy’s Settlement).

7. 28 C.F.R. pt. 36, App. A.

8. *See supra* note 6.

9. The DOJ has published various rules, regulations, and guidelines concerning nondiscrimination on the basis of disability by public accommodations and in commercial facilities. *See* 28 C.F.R. pt. 36, § 101–608, including App. A, the ADA Accessibility Guidelines. Franchisors and others may wish to consult the DOJ’s ADA Website for specific industry-related guidelines, as well as rules and regulations implementing the ADA. *See* Americans with Disabilities Act Information on the Web <www.usdoj.gov/crt/ada>. Also, for hotels, for example, the DOJ has published “Common ADA Problems at Newly Constructed Lodging Facilities,” “ADA Checklist for New Lodging Facilities,” and “Five Steps to Make New Lodging Facilities Comply with the ADA.” The DOJ has also issued specific guidelines for “Assistance at Self-Serve Gas Stations.” These industry-specific guidelines are available on the DOJ Web site.

10. A similar certification addressing the building plans and designs may be required of the franchisee’s architect prior to starting construction.

11. *See supra* note 9 for several examples. The ADAAG standards are applicable not only to building and design but to many facets of a business’s operations and its interactions with disabled individuals. For example, compliance with the ADA may require providing shuttle vehicles that are accessible to individuals who use wheelchairs (particularly relevant to car rental companies) or providing effective communications for individuals who are deaf or hard of hearing (relevant to restaurants with “drive-through” service). To the extent that the DOJ or the ADAAG provides industry-specific guidelines, rules, or regulations for ADA compliance that are applicable to a specific franchise business, franchisors should include a reference to those rules and guidelines in Item 1 of their Uniform Franchise Offering Circulars. Laws or regulations that generally apply to all businesses need not be included in Item 1.

For More Information

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