



## ADA and FHA Compliance: What You Don't Know Can Hurt You

*Do you know your responsibilities under federal accessibility laws? Don't join the ranks of design professionals who don't study the laws until it's too late.*



If you're unclear about your obligations under the Fair Housing Act (FHA) and Americans with Disabilities Act (ADA), you have plenty of company. "I think a lot of design professionals still aren't aware of their duties under these laws," says an attorney who spends a lot of time these days defending A/Es against accessibility-related claims.

### THE AMERICANS

#### WITH DISABILITIES ACT (ADA)

2005 marked the 15<sup>th</sup> anniversary of enactment of the ADA, the federal legislation aimed at providing Americans with disabilities full and equal access to employment, and to goods and services in commercial and public facilities.

The ADA is not simply another set of building codes. It is civil rights legislation that carries with it the full support of the United States Department of Justice. Anyone who believes he or she has been discriminated against can file a complaint with an appropriate federal agency or file a civil lawsuit against the party who owns, leases or operates a facility. Federal courts can levy stiff penalties against a building owner or operator and can order the facilities be made accessible. (Under most state laws, an aggrieved person with disabilities is entitled to damages.)

Title III of the ADA mandated the removal by January 1992 of architectural and communications barriers in all existing public accommodations, including facilities that are privately owned and operated but serve the public. For example, restaurants, theaters, sports arenas, stores, professional offices, other service establishments, galleries, lodging and places of recreation are all considered public accommodations. The ADA does not apply to single or multifamily housing.

The question of design professional liability under the ADA has not been fully settled, as courts in different jurisdictions have arrived at conflicting opinions. Thus the question of whether a designer could be directly sued for ADA discrimination has depended on where the lawsuit occurs. However, three circuit courts have now held that an individual with disabilities may not sue a design professional directly. Before you breathe a sigh of relief, though, remember that even if you cannot be directly named in a claim, your client can be named and likely would seek a defense and indemnity from you.

#### THE FAIR HOUSING ACT (FHA)

The FHA is intended to prohibit discrimination in the sale, rental and financing of multifamily dwellings based on race, color, religion, sex or national origin. These protections were expanded in 1988 to include individuals with disabilities, and set forth requirements for designers and builders for accessibility, enforceable by the Department of Housing and Urban Development as well as the Department of Justice.

Note the phrase "designers and builders." That means that you can be sued directly, not only by

*– Continued*

someone who believes he or she has been discriminated against, but by the US Attorney General. Worse, according to our legal consultants, FHA claims can be very difficult to defend. In an FHA case, if the design does not comply, the A/E has no defense to the claim, period. The professional standard of care does not come into play. The only issue is whether the design complies with the FHA. If it does not, the A/E is liable. What's more, the penalties can be staggering.

The FHA applies to new multifamily housing of four or more units, designed for first occupancy after March 13, 1991. This includes both new construction and additions to existing buildings. All units in elevator-equipped buildings and all ground-floor units in non-elevator-equipped buildings must comply with the FHA. Dormitories, timeshares and even homeless shelters are included.

### CODE CONFUSION

If you think these federal laws don't apply to your project, keep reading.

"One problem is that A/Es are used to thinking about state law, not federal accessibility regulations," defense attorneys say. "And there's a lot of confusion between all the codes and regulations, and about which accessibility standards apply to which projects. A design professional has to be a bit of an attorney to determine if the ADA or FHA applies, but they apply more often than you'd think."

For many projects, more than one rule or standard of accessibility may come into play. For example, although the ADA does not generally apply to residential housing, ADA issues arise regarding the accessibility of common use areas in residential developments if the facilities are open to persons other than owners, residents and their guests. FHA codes may also apply in mixed retail and residential developments.

Sometimes these two federal access acts conflict with one another. To make matters worse, they sometimes conflict with local building codes. Two examples: In some jurisdictions, state accessibility requirements may only apply to 5% of the units in a development; the FHA, on the other hand, may apply to all of the units. In California, built-up ramps are fine under state law, but illegal under the ADA.

Unfortunately, there's little clear direction available to A/Es. Local building officials aren't responsible for interpreting or

enforcing the ADA, FHA or other federal accessibility requirements; their building departments and inspectors only enforce state and local accessibility codes or laws. The fact that a local building official has approved your plans is not a defense to an ADA or FHA complaint.



You can't rely on the building codes contained in local municipal ordinances or on the existence of a building permit and certificate of occupancy as protection from an FHA claim. Building codes and interpretations by local building officials are not binding for ADA purposes unless the code has been "certified" by the Department of Justice; buildings designed and constructed in compliance with state codes could still be found in violation of the ADA. Thus far, only four states' building codes have been certified under the ADA.

Because there are no ADA or FHA inspectors and there is no such thing as ADA plan review or prior FHA approval, designers and owners have no place to turn for clarification or binding interpretation. A design is always subject to later challenge by someone who feels he or she has been denied adequate accessibility. More than one frustrated design professional has been tempted to send his or her drawings to the United States Attorney General or Secretary of Housing and Urban Development for review.

### EXPENSIVE CLAIMS

According to regional claims managers, accessibility-related claims can be expensive—not only to defend but also to fix the noncompliant components. "Often it involves tear-out of finishes, cabinetry and so forth," they say, "which can really add up if you have a large-scale project."

XL Insurance agrees, adding that suits are often brought by advocate groups as a way to police the building of projects in order to benefit their constituencies. These are big lawsuits that are hard to fight. All the sympathy is for the folks who are attempting to help a group of needy people.

Our legal consultants believe that, in general, civil engineers and landscape architects are not as aware of accessibility issues as other design professionals are. This lack of

– Continued

awareness can translate into hefty damages. “If a civil isn’t paying attention to sidewalks and grades, it can be a huge expense to remedy,” they say. “We’ve heard of entire parking lots that needed to be regraded.”

### CAN YOU AVOID A CLAIM?

Fortunately, there are some measures you can take to lessen the likelihood of an accessibility-related claim:

**Get informed.** As a start, familiarize yourself with the provisions of the ADA and FHA, as well as guidelines for accessibility. Many state and national professional organizations offer seminars on design compliance.

Just as important, you’ll need to stay informed. As the body of published interpretations, regulations and case law evolves, your obligations and the extent of your liability may vary. “It’s almost as though design professionals need to keep up with case law,” attorneys say.

**Educate your client.** Make certain your client understands its responsibilities; both of you are required to uphold the law, but it is the owner who has ultimate control over the design and use of the project. You need to explain to your client why you cannot certify or guarantee that your design is in compliance. Since compliance is determined on a case-by-case basis, you cannot know whether your design or recommended modifications are in compliance.

**Get help.** Don’t assume your project is not affected. Talk to an attorney who is knowledgeable about construction claims and accessibility-related issues and, if necessary, suggest that the owner retain an access consultant to review the design.

**Protect yourself.** Always address the ADA and FHA in your contract with language that sets forth the client’s responsibilities and the possibility for contradictory interpretations. (Be sure to coordinate such a clause with other provisions concerning codes and standard

compliance.) You’ll find sample provisions that you and your attorney can adapt in the ADA chapter of *The XL Insurance Contract Guide for Design Professionals*.

Furthermore, you should delete any client-written contract language that requires you to strictly comply with “all laws, codes, standards and regulations.” Finally, delete any provision that requires you to provide a certification, guarantee or warranty that a building is in full compliance with the ADA or FHA.

**Document.** Your goal is to be able to demonstrate that you made a reasonable, professional effort to comply with applicable state and federal laws. At a minimum, carefully document your research and design decisions.

If the client or a local building official wants things done a certain way and you don’t agree, put your objections in writing to your client or the official. If you are overruled, protect yourself by having this confirmed in writing, too.

As with any important aspect of your job, you not only need to educate yourself about your legal obligations under federal accessibility codes, you also need to stay informed. Things change, and when they do, your lack of awareness of new developments can come back to hurt you. No matter how these codes and their interpretations evolve however, a good-faith compliance effort by you and your client, along with a well-documented compliance plan, will probably be looked upon favorably by the courts in the event of legal action.

*The information contained herein is intended for informational purposes only and does not constitute legal advice. For legal advice, seek the services of a competent attorney. Any descriptions of insurance provisions are general overviews only.*

*"XL Insurance" is the global brand used by XL Group plc's (NYSE: XL) insurance companies. Coverages underwritten by Greenwich Insurance Company, Indian Harbor Insurance Company, XL Specialty Insurance Company, and XL Insurance Company Limited—Canadian Branch. Coverages not available in all jurisdictions.*

© 2010, X.L. America, Inc. All rights reserved.



30 Ragsdale Drive  
Suite 201  
Monterey CA 93940  
800-227-8533 ext. 2102508  
[www.xldp.com](http://www.xldp.com)