

NFIB Meeting with OMB on Final ADA Standards

July 14, 2010

1) Problems with current situation

Ambiguity and Confusion

- The ADA was enacted “to provide clear, strong, consistent, and enforceable standards.” Unfortunately, the current regulatory regime does not fulfill the objective of the law.
- Barrier removal is both difficult and expensive, due to DOJ’s broad view of what constitutes a barrier and the lack of useful guidance on what kind of barrier removal is readily achievable.
- The ADA Standards and the Revised ADA Guidelines are clearly written by and for ADA technicians and lawyers, not for the business people who must follow them.
- The confusion is compounded by additional and/or conflicting standards imposed by state and local building codes.

Exposure to Lawsuits

- Because the ADA’s regulatory and statutory framework is so unclear about what constitutes “readily achievable” barrier removal, many small businesses have become the targets of frivolous lawsuits designed to generate quick settlements and/or the award of attorneys’ fees.
- The slightest deviation from ADA guidelines can prove disastrous for a small business that is targeted by a trial lawyer. Even worse, a small business could spend tens of thousands of dollars defending a lawsuit even though it has complied with the ADA.
- For the upcoming rules, small business owners will be more likely to commit resources to making their public accommodations accessible if they can be assured that this investment will in fact put them in compliance with the law and reduce litigation exposure.

2) Two of the Three Safe Harbors in the 2008 NPRM Would Help Small Businesses

Element-by-Element Safe Harbor

- The element-by-element safe harbor would codify that “[e]lements in existing facilities that are not altered after the effective date of this rule, and that comply with the 1991 Standards, are not required to be modified in order to comply with the proposed standards.”
- NFIB strongly supports this proposal as written in the 2008 NPRM. It should not be altered for the final rule.
- If DOJ does not provide a safe harbor for facilities in compliance with existing ADA Standards, then new architectural barriers will arise with every revision to the ADA Guidelines. In essence, barrier removal obligations will become a moving target.

Path-of-Travel Safe Harbor

- NPRM: “If a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to proposed standards solely because of an alteration to a primary function area served by that path of travel.”
- NFIB supports this proposed safe harbor as written in the 2008 NPRM. It will serve to lessen the possible burden on small firms while affording sufficient disabled access to those who need it.

Safe Harbor for Qualified Small Businesses Regarding What is Readily Achievable

- NPRM: “if such a business, in the present year, spends an amount equal one percent of its annual gross revenue from the prior year on barrier removal, it has met its requirement for readily achievable barrier removal for the present year.”

- NFIB believes a safe harbor should relate to a business's net revenue, not gross. We do not believe it is appropriate to expect a business that is losing money to invest in modifications to their business.
- We propose that this safe harbor offer a qualified small business the benefit of choosing one of two potential options.
- First, if a business spends .5 percent of its gross revenue on ADA compliance in the prior year, it should be exempt from the barrier removal requirement.
- Second, if the business chooses, it would be exempt from barrier removal if it spends 2.5 percent of its net revenue on ADA compliance.

3) Regulatory Impact Assessment Issues with NPRM

- Despite improvements over the ANPRM, NFIB believes that DOJ still is not correctly foreseeing all of the costs associated with ADA compliance.
- Cost of legal fees/settlements in the event of a frivolous lawsuit. Settlements range from \$5,000 to \$10,000.
- Cost of ADA consultants. Using these consultants is expensive, even prohibitive, for small businesses.
- Time and expense developing workplace policies to comply. These policies not only take time to create, but take time to train employees on proper procedures, and should be approved by an attorney before implementation. These costs are not reflected in the analysis.

4) Other Concerns

- Small business compliance assistance needs to be robust. It is imperative that small firms have easily accessible, clear guidance regarding the kinds of records they would have to keep to successfully prove that they had spent the amount requisite to claim safe harbor.
- The Revised ADA Guidelines will be come the new legal standard for what is a barrier, even in facilities unchanged since ADA enactment. NFIB believes that Congress was clear when it adopted the ADA in 1990 that the technical requirements adopted as the standards would only apply facilities under new construction or making alterations.
- In the notice, DOJ proposes to implement the new regulations six months after final publication. NFIB believes that DOJ must not apply any revised ADA Standards to facilities until 18 months after publication.
 - The current ADA Standards had the same implementation period.
 - Moreover, although this is not a new law, implementation of the revised ADA Standards will nevertheless be a time-consuming and potentially expensive undertaking for many facilities.
- DOJ's proposal for triggering alterations of a facility with regard to a safe harbor is troublesome.
 - NFIB is concerned with DOJ's position that if part of an element covered under the element-by-element safe harbor is replaced (not redesigned or reconfigured), it triggers the alteration requirement under the Revised ADA Guidelines.
 - NFIB recommends that DOJ include language in the final rule that allows for public accommodations to replace currently-compliant fixtures and equipment without triggering the alteration requirement, when replacing said fixtures and equipment does not alter the basic plumbing, wiring, design or configuration of the area in question.