DECIPHERING THE WARN ACT AND TITLE III OF THE AMERICANS WITH DISABILITIES ACT AND THEIR IMPACT ON MANAGEMENT AGREEMENTS

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Ms. Maciel represents employers in labor and employment lawsuits arising under federal and state law, including Title VII, ADA, FMLA, FLSA, and the Department of Labor's EEO/AA regulations. Additionally, she routinely defends employers and initiates proceedings against former employees for violating trade secret or confidential and proprietary information. She concentrates on issues related to the hospitality and health care industries and has represented employers including national hotel chains, hospitality management groups, restaurants, spas, trade associations, food and dairy distributors, hospitals, and health care providers.

Ms. Maciel counsels employers on compliance with the Affordable Care Act, including the Employer Mandate for unionized and non-unionized employers. In 2013, she was appointed Chair of The Affordable Care Act and Wellness Interest Group of the HRA-NCA's Legislative Committee.

Ms. Maciel:

- Counsels and defends employers in all aspects of the employment relationship and compliance with employment laws, including discrimination, harassment, and retaliation claims; wage-hour issues; sufficiency of employee handbooks; proper implementation of policies and procedures; and preparation of employment and severance agreements in an effort to avoid litigation
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Notable recent representative experience:

- Defended hospitality owners and operators and health care providers in lawsuits alleging discrimination from accessibility barriers by guests with disabilities under Title III of the ADA
- Defended hotel chains in class actions alleging improper tip pooling and service charge distributions
- Obtained dismissal of defamation claims against online retailer and its in-house legal counsel
- Secured defense jury verdict on behalf of restaurant in race discrimination lawsuit
- Obtained default judgment against a former employee and new employer for destruction of evidence and misappropriation of company trade secrets
- Advised home health care company on classification of nurses as employees under the Fair Labor Standards Act

Ms. Maciel was recommended in the Labor-Management Relations category of *The Legal 500 United States* (2013).

In addition to speaking at events and writing articles and client advisories, Ms. Maciel regularly contributes to four blogs: the Hospitality Labor and Employment Law Blog, the Management Memo Blog, the Trade Secrets & Noncompete Blog, and the Wage & Hour Defense Blog.

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I. SCOPE OF ARTICLE

This paper provides an overview of the Worker Adjustment and Retraining Notification Act ("WARN") and Title III of the Americans with Disabilities Act ("ADA"), evaluates hotbed compliance issues for the hospitality industry, and discusses how owners and operators can address both statutes effectively in management agreements.

II. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

A. Overview

Enacted in 1988, WARN requires covered employers to provide 60 days' notice to employees, union representatives, state agencies, and localities before carrying out plant closings or mass layoffs. *See* 29 U.S.C. §§ 2101-2109 (1988). Congress intentionally devised WARN to provide affected employees adequate time to prepare for employment loss, seek and obtain alternative employment, and/or arrange for skill training or retraining to compete successfully in the job market. Likewise, states agencies and localities also receive advance notice so they can promptly provide services to displaced workers (*e.g.*, career counseling, vocational training, and job search assistance) and otherwise prepare for changes in their local labor markets. Penalties for failure to notify affected employees in advance of a plant closing or mass layoff can amount to 60 days' back pay and benefits for *each* aggrieved worker, attorneys' fees and costs, and/or civil penalties. The WARN Act's key provisions are described below.

B. Threshold Requirements

To fall under WARN, a hotel must employ at least 100 full-time employees, or employ 100 or more full-time and part-time employees who work at least 4,000 hours per week (exclusive of overtime). *See* 29 U.S.C. § 2101(a)(1); 20 C.F.R. § 639.3(a). In determining whether a hotel has the requisite number of employees, hotels must count temporary employees and individuals who are temporarily laid off or on a leave of absence but who have a reasonable expectation of recall toward the threshold number of "full-time" employees.

In contrast, part-time employees are excluded from determining if a hotel satisfies the threshold levels. For purposes of WARN, part-time employees are individuals who work on average fewer than 20 hours per week, or who have been employed fewer than six of the twelve months preceding the date on which notice is required (*e.g.*, recent hires working full-time schedules and seasonal workers). *See* 29 U.S.C. § 2101(a)(2)(8); 20 C.F.R. § 639.3(h). Also not counted toward the threshold are economic strikers, *i.e.*, employees striking over wages, hours, or other terms and conditions of employment during collective bargaining negotiations, who have been permanently replaced.

C. Covered Employees and Content of Notices

Hotels covered by WARN must provide 60 days' notice of a qualifying termination event to each hourly and salaried employee, manager, and supervisor who may reasonably expect to experience employment losses. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.3(e). This notice

requirement applies to both full-time and part-time employees. Although temporary employees are counted for purposes of determining coverage under WARN, they are not entitled to advance notice so long as they were hired with the clear understanding that their employment was limited in duration. *See* 29 U.S.C. § 2103(1); 20 C.F.R. § 639.5(c).

The required content of written WARN notifications vary depending on whether the hotel is notifying employees, union representatives, or government entities. Nevertheless, common to all notifications are (1) a description of the termination event and a statement as to whether the event is expected to be permanent or temporary; (2) the expected date(s) when the layoffs will commence; and (3) the name and telephone number of a hotel official to contact for further information. *See* 20 C.F.R. § 639.7.

D. Triggering WARN Notice Requirements

Fundamentally, three types of termination events trigger WARN notification requirements where 50 or more full-time employees experience employment losses. Those events are:

- A plant closing that is a permanent or temporary shutdown of a "single site of employment" or one or more facilities or distinct operating units within a single site of employment that results in an employment loss during any 30-day period for 50 or more full-time employees.

- A mass layoff (exclusive of a plant closing) of at least 50 full-time employees where the employment loss consists of at least 33 percent of the full-time employees at the single site.

- A mass layoff of 500 or more full-time employees at a single site of employment, regardless of its proportion of the total employment at the site or if the employment loss is part of a plant closing.

Additionally, WARN defines "employment loss" as involuntary separations of workers exceeding six months; or a reduction in hours worked of at least 50 percent during each month for a six-month period. *See* 20 C.F.R. § 639.3(f). Any employment losses during a 30-day period are considered a single event for the purposes of the WARN Act.

Notably, even if a hotel's initial terminations during a 30-day period do not constitute a covered termination event, WARN may be retroactively applied under certain circumstances. If two or more groups of employees suffer employment losses at a single site of employment during a 90-day period and each group alone does not meet the threshold employee levels, the groups can be aggregated and treated as a single event. *See* 29 U.S.C. § 2102(d). Stated differently, when smaller layoffs that occur within 90-days collectively satisfy the WARN threshold level, each affected employee must receive 60 days' notice prior to his or her date of termination. To avoid treating group terminations as a single event, hotels must establish that (1) the employment losses are unrelated and distinct; and (2) they have not structured or phased the terminations to avoid the WARN requirements.

Additionally, if a hotel announces a non-WARN covered layoff of six-month or less but subsequently extends the layoff past six months, the hotel may have WARN notification responsibilities. *See* 29 U.S.C. § 2102(c). Unless the hotel can establish that the layoff extension was due to unforeseeable circumstances at the time of the original layoff, the matter is treated as if notice was required for the original layoff.

Finally, plant closing or mass layoff stemming from a relocation or consolidation of all or part of a hotel's business is not considered an "employment loss," if before the event (1) the hotel offers to transfer an employee to another site within a reasonable commuting distance and not more than a six-month break in employment occurs (regardless of whether the employee accepts or rejects the offer); or (2) the employee accepts a transfer to another site (regardless of distance) with no more than a six-month break in employment, within 30 days of the hotel's offer or the closing or layoff, whichever is later. *See* 29 U.S.C. § 2101(b)(2); 20 C.F.R. § 639.3(f)(4).

E. Notification Exceptions

The WARN Act specifies exceptions in which hotels may provide less than 60 days' notice to employees, state agencies, and localities affected by an employment loss. The primary exceptions are:

- *Faltering Company Exception*. Hotels can provide reduced notice for plant closings – but not mass layoffs – where they are actively seeking new capital or business to prevent the closing, have a realistic chance of obtaining sufficient funds or new business, and believe in good faith that giving notice would prevent it from obtaining the necessary capital or business to remain open. *See* 29 U.S.C. § 2102(b)(1); 20 C.F.R. § 639.9(a).

- *Unforeseeable Business Circumstances Exception.* Hotels can provide reduced notice where plant closings and mass layoffs are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required (*e.g.*, swift onset of a deep economic downturn, a non-natural disaster). *See* 29 U.S.C. § 2102(b)(2); 20 C.F.R. § 639.9(b).

- *Natural Disaster Exception*. Hotels can provide reduced notice if a natural disaster such as hurricane, flood, or earthquake directly causes a plant closing or mass layoff. Although this exception does not apply when the natural disaster indirectly causes the closing or layoff, the unforeseen business circumstances exception above might. *See* 29 U.S.C. § 2102(b)(2)(B); 20 C.F.R. § 639.9(c).

If the hotel provides less than 60 days' notice under one of the aforementioned exceptions, it must explain in the notice the reason for the reduced notice period. *See* 20 C.F.R. § 639.9.

Moreover, hotels that initiate a plant closing or mass layoff due to a strike or lockout related to collective bargaining negotiations are exempt from the notice requirement, provided hotels do not lockout employees to evade WARN. *See* 29 U.S.C. § 2103(2); 20 C.F.R. § 639.5(d).

F. Who Must Give Notice in Shutdown: Owner or Operator?

Although hotel owners more often decide to shut down operations permanently rather than the managing entities that operate the hotels, the managing entity bears the primary responsibility for giving WARN notices. *See Local 217, Hotel and Restaurant Employees Union v. MHM, Inc.*, 976 F.2d 805 (2d Cir. 1992) (finding the hotel's management company to be liable under WARN for firing its staff in the wake of the hotel's closing, even though the hotel owner ordered the shutdown). Accordingly, in negotiating management agreements, prudent hotel managers should secure protection from the owner against WARN liability for a permanent shutdown. That protection may be requiring the employer to notify the manager of a shutdown with sufficient time for the manager to comply with the WARN Act and securing indemnification against WARN liability if the owner gives insufficient notice to allow for WARN compliance.

G. Sale of Hotels

The general rule under WARN is that the responsibility to notify affected employees of a mass layoff or plant closing shifts at the time of sale. In this regard, when part or all of a business is sold and WARN's threshold requirements are satisfied, the seller is responsible for providing notices to affected employees for any closing or layoff, up to and including the effective date of the sale. *See* 29 U.S.C. § 2101. After the effective date of the sale, however, the buyer is responsible for providing notice for any such event. *See id.*

Under WARN, however, employees who are merely transferred from the seller to buyer as part of the sale are not deemed to have suffered an employment loss. *See Wiltz v. MG Transport Servs.*, 128 F.3d 957 (6th Cir. 1997) (holding that the actual sale was not a WARN event and that employees who the buyer retained did not fall under WARN). In other words, the obligation to notify affected employees of a mass layoff is not triggered by the actual sale but by the employment loss.

The U.S. Department of Labor's corresponding regulations further provide that employees who remain the sellers' employees until the effective date of the sale and then are terminated, even if on account of the sale, will be treated as if they are employed by the buyer thereafter. *See* 20 C.F.R. §§ 639.1 *et seq.* Thus, as the seller's employees are treated as employed by the buyer after the sale, the seller will have no WARN responsibilities in connection with the post-sale termination of employees incident to the sale. The buyer will be responsible for WARN compliance if it elects not to retain those employees. *See Local 54, Hotel Employees Int'l Union v. Elsinore Shore Assocs.*, 724 F. Supp. 333 (D.N.J. 1989) (holding that whoever is the employer at the time of the plant closing or mass layoff is responsible for notifying the employees 60 days in advance).

If the seller has knowledge that a significant number of employees might be terminated within the first 60 days after the sale is consummated and the seller can identify those affected employees, the seller, although not required to do so, *may* send WARN notices to the affected employees as the agent of the buyer. The WARN regulations specifically address this issue:

> If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

29 C.F.R. § 639.4(1). The regulations also encourage the parties to discuss and arrange who will bear the WARN obligations and included the specifics in the purchase agreement with appropriate indemnity language. *See* 29 C.F.R. § 639.4(2). Notwithstanding, the statute and regulations require employers to err on the side of giving notice, regardless of whether they are legally required to do so. *See* 29 U.S.C. § 2106; 20 C.F.R. § 639.1(e)

For the seller to avoid WARN obligations and liabilities, the seller should, to the extent possible, postpone any terminations incident to the sale until after the effective date of the transaction. In addition, a seller should notify employees who are laid off prior to completion of the transaction if their layoffs are temporary, (*i.e.*, expected to be for less than six months), and that the buyer expects to hire some or all of them. Under these circumstances, short-term layoffs incident to the sale do not constitute an employment loss under WARN and do not trigger WARN notice requirements. The notice obligations would only arise if the buyer fails to rehire a sufficient number of the seller's employees. In this case, however, the buyer is solely responsible for giving any WARN notices. It would therefore be prudent for the seller to obtain a provision in the purchase agreement that indemnified the seller and obligates the buyer to comply with WARN under such circumstances. If, of course, the seller assumes WARN obligations, then it must also comply with WARN's specific notice requirements.

H. Enforcement and Penalties

Federal courts enforce WARN, as the Department of Labor lacks investigative and enforcement authority for the Act. As such, workers, union representatives, or units of local government must commence civil actions in federal district court for alleged WARN violations. Since district court lack injunctive authority to stop a plant closing or mass layoff, plaintiff's remedies are limited to statutory damages, attorneys' fees and costs, and/or civil penalties.

Specifically, hotels who violate the WARN Act are liable to each aggrieved employee for back pay and benefits (*e.g.*, the cost of medical expenses that would have been covered had the employment loss not occurred). *See* 29 U.S.C. § 2104(a)(1)(A) and (B). The penalty is calculated for each working day that the hotel neglected to provide the requisite notice up to a maximum of 60 days. *See id.* Maximum liability may be less than 60 days for those employees who had worked for the hotel for less than 120 days. *See id.* Also, district courts, in their discretion, may award the prevailing party attorney's fees. *See* 29 U.S.C. § 2104(a)(5)-(6). In addition, hotels found to have violated WARN may be subject to a $500 civil fine for each day under 60 days that they failed to notify affected employees. A hotel need not pay this civil penalty if it pays each aggrieved employee the full amount for which it is liable within three weeks from the date of the closing or layoff. *See id.* at § 2104(a)(3).

III. AMERICANS WITH DISABILITIES ACT

A. Introduction

Enacted in 1990, Title III of the ADA prohibits discrimination against individuals "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Pursuant to this law, hotels are required to make goods and services available to and usable by individuals with disabilities on an equal basis with members of the general public. In so doing, hotels must comply with specific requirements set out in the United States Department of Justice ("DOJ") regulations, which include detailed architectural requirements known as the ADA Standards for Accessible Design ("ADA Standards"). *See* 28 C.F.R. Part 36, Appendix "A."

The DOJ is the government agency responsible for enforcing the ADA at hotels and other lodging facilities. As part of ADA enforcement efforts, the DOJ, among other things, conducts onsite investigations of hotels. Furthermore, in recent years, there has been a proliferation of lawsuits brought by private plaintiffs against hotels alleging violations of Title III of the ADA. Often, these lawsuits are brought by "professional," "serial," or "drive-by" plaintiffs who have filed dozens if not hundreds of similar actions against other properties. These cases often result in settlements or judgments in the range of six to seven figures. Additionally, these cases typically include injunctive relief, which may require hotels to make substantial changes to their operations and physical structure to make them accessible for individuals with disabilities.

B. 2010 ADA Standards

In 2010, the DOJ revised the regulations implementing the ADA. *See* 28 C.F.R. § 36.104 (2010). The revised regulations contain new requirements and impose additional obligations on owners and operators of hotels and, therefore, require modification of business policies and procedures when necessary to serve customers with disabilities. These new obligations relate to, among other things, service animals, mobility devices, room reservations and effective communication with individuals with disabilities.

In addition, the revised regulations contain the 2010 Standards for Accessible Design (the "2010 Standards"), which revise the standards originally promulgated by the DOJ in 1991 (the "1991 Standards"). Effective March 15, 2012, the 2010 Standards set new minimum requirements for newly designed and constructed places of public accommodations to be readily accessible to and usable by individuals with disabilities. The 2010 Standards require that hotels and other places of public accommodation remove physical barriers for individuals with disabilities to the extent that it is readily achievable to do so.[1] Notably, pursuant to the ADA's "safe harbor" exemption, elements of existing facilities that comply with the 1991 Standards are not required to comply with the 2010 Standards until such facilities are subject to future alterations.[2] All future

[1] Readily achievable means "easily accomplishable without much difficulty or expense." This requirement is based on the size and resources of a business.

[2] An alteration is defined as remodeling, renovating, rehabilitating, reconstructing, changing or rearranging structural parts or elements, changing or rearranging plan configuration of walls and full-height partitions, or making

renovations and alterations that begin on or after March 15, 2012, must be done in accordance with the 2010 Standards, to the extent it is readily achievable to do so.

The 2010 Standards also contain new requirements for elements in existing facilities that were not addressed in the original 1991 Standards. These include recreation facilities such as swimming pools, saunas and steam rooms, play areas, exercise machines and golf facilities. Because these elements were not included in the 1991 Standards, they are not subject to the "safe harbor" exemption. Therefore, for all such facilities, hotels must comply with the 2010 Standards and remove physical barriers when it is readily achievable to do so. For example, a hotel must determine whether it is readily achievable to make its swimming pool accessible to people with mobility disabilities by installing a lift or a ramp as specified in the 2010 Standards. The hotel could face liability of doing so is readily achievable, but the hotel fails to take the necessary steps to make the pool accessible.

C. Key Policy and Procedure Revisions for Hotels

1. Service Animals

Hotels must modify any "no pets" policies to permit the use of service animals by persons with disabilities and update all documents and websites that contain such a policy regarding pets. Regardless of whether a hotel currently maintains a "no pets" policy, it must allow access to a customer using a service animal. Under the ADA's revised regulations, the definition of "service animal" is limited to a dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. In situations where it is not apparent that the dog is a service animal, there are only two permissible inquiries that may be made: (1) is the animal required because of a disability; and (2) what work or task has the animal been trained to perform.

No other inquiries about an individual's disability or the dog are permitted. A hotel cannot require proof of certification or medical documentation as a condition for entry. Nor is a hotel permitted to require individuals with disabilities to pay a surcharge for their service animal or any other cleaning fee, even if individuals without disabilities are required to pay for their pets to visit.

Hotels, however, may require that the dog be harnessed, leashed, or tethered, unless such devices interfere with the service animal's work or the individual's disability prevents him from using these devices. Individuals who cannot use such devices must maintain control of the animal through voice, signal, or other effective controls. Hotels or restaurants may exclude service animals only if the dog is out of control and the handler cannot or does not regain control, or the dog is not housebroken. If a service animal is excluded, the individual must be allowed to enter the hotel without the service animal.

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other changes that affect (or could affect) the usability of the facility. Examples include restriping a parking lot, moving walls, moving a fixed ATM to another location, installing a new sales counter or display shelves, changing a doorway entrance, replacing fixtures, flooring or carpeting. Normal maintenance, such as reroofing, painting, or wallpapering, is not an alteration.

2. Mobility Devices

In addition to permitting the use of manually powered devices intended for use by individuals with disabilities (*e.g.*, wheelchairs and similar devises), hotels must make reasonable modifications in policies, practices or procedures for the use of "other power driven mobility devices," unless the hotel can demonstrate that the mobility device in question cannot be operated in accordance with legitimate safety requirements.[3]

Hotels may ask individuals using an "other power-driven mobility device" for a credible assurance that the device is required because of a disability. An assurance may include, but does not require, a valid State disability parking placard or other Federal or State-issued proof of disability. A verbal assurance from the individual with a disability that is not contradicted by your observation is also considered a credible assurance. It is not permissible, however, to ask individuals about their disabilities.

Legitimate safety requirements, such as speed limits, may be imposed or even be a basis to deny such use, but such safety requirements must be based on actual risks and not on mere speculation, stereotypes or generalizations about a particular class of devices or how they will be operated by individuals using them. Hotels should consider the following factors in determining whether reasonable modifications can be made to permit "other power-driven mobility devices" on their premises:

- The type, size, weight or speed of the device;
- The hotel's volume of pedestrian traffic;
- The hotel's design and operational characteristics;
- Whether the use of the devise creates a substantial risk of serious harm to the environment.

Using these assessment factors, a hotel can decide that it can allow the use of a Segway, but not the use of a golf cart. Or, a hotel may decide to permit the use of any "other power-driven mobility device," but exclude certain of these devices during its busiest hours or on particular days when pedestrian traffic is particularly dense. Hotels, therefore, should develop written policies specifying when "other power-driven mobility devices" will be permitted on their premises and to communicate those policies to the public.

3. Reservations for Accessible Rooms at Hotels

As of March 15, 2012, reservation systems must (1) ensure that disabled individuals can make reservations for accessible guest rooms during the same hours and in the same manner as non-disabled individuals; (2) ensure that accessible guest rooms are held for use by individuals with disabilities until all other guest rooms of that type have been rented and the accessible room requested is the only remaining room of that type; (3) remove reserved accessible rooms from all

[3] The term "other power-driven mobility device" refers to any mobility device powered by batteries, fuel, or other engines, whether or not they are designed primarily for use by individuals with mobility disabilities (*e.g.* golf carts or Segways).

reservation systems; and (4) guarantee that the specific accessible guest room reserved through its reservation system is held for the reserving guest.

Furthermore, hotel reservation staff must be able to identify and describe accessible features of the hotel and guest rooms offered through its reservation system in enough detail to reasonably permit individuals with disabilities to assess independently whether a particular hotel or guest room meets his/her accessibility needs. Reservations systems for newer (or renovated) hotels built in compliance with the 1991 or 2010 Standards must, at a minimum, state that the facility is accessible and provide the following information:

- Accessible room type (*e.g.*, deluxe executive suite, deluxe king, etc.);
- Number and size of beds for accessible rooms (*e.g.*, two queen beds);
- Available communications features (*e.g.*, visual alarms and notification devices); and
- Type of accessible bathing facility (*e.g.*, bathtub with grab bars, transfer shower, or roll-in shower).

For older facilities that are not technically or completely in compliance with either the 1991 or 2010 Standards, the hotel must disclose to the general public information about (1) the facility's accessible entrance(s); (2) accessible paths of travel to guest check-in and other essential services, such as restaurants; and (3) information about important features of the facility that do not comply with the 1991 or 2010 Standards, such as doorways to and within accessible guest rooms that are too narrow or non-accessible check-in counters (if this is the case, the facility should provide information about how or where guests with disabilities can check-in).

Accordingly, hotels update their hard copy and Internet descriptions of their hotels, all on-line reservation systems, and all other reservation systems, including telephonic and automatic reservations systems. They should also ensure that all hotel reservation staff is trained on these issues, so that they properly convey the information required by the ADA.

4. Effective Communication to Individuals with Disabilities

The revised regulations require places of public accommodation to take steps necessary to communicate effectively with guests with vision, hearing and speech disabilities. The regulations include video remote interpreting ("VRI") services as a type of auxiliary aid that may be used to provide effective communication. VRI is an interpreting service that uses video conference technology over dedicated lines or wireless technology offering a high-speed, wide-bandwidth video connection that delivers high-quality video images. To ensure that VRI is effective, the DOJ has established certain performance standards for VRI and requires training for users of the technology and other individuals involved with its use so that they may quickly and efficiently set up and operate the VRI system.

Examples of common auxiliary aids and services include sign language interpreters (in person or through VRI services); note takers, computer aided transcription services, exchange of written notes, telephone handset amplifiers; assistive listening devices and systems; telephones compatible with hearing aids, closed caption decoders, and video-based telecommunications

products and systems, including text telephones (TTYs), videophones, and captioned telephones or equally effective telecommunications devices.[4]

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length and complexity of the communication involved, and the context in which the communication is taking place. To be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability. The hotel will be financially responsible for the cost of the auxiliary aid or service provided unless it can demonstrate that it would be an undue financial burden. The hotel cannot impose a surcharge to cover the cost of the auxiliary aid or service provided. Regardless if a particular auxiliary aid or service is an undue financial burden, hotel must still provide effective communication utilizing a different auxiliary aid or service.

D. Title III Accessibility Requirements

The DOJ or a private plaintiff could assert a claim for disability discrimination under either of the following categories of accessibility requirements of Title III of the ADA: (1) the readily achievable provisions, which apply to unaltered portions of buildings constructed before January 26, 1992 (the effective date of the ADA); and (2) the new construction/alteration provisions, which apply to public accommodations constructed or "altered" after January 26, 1992.

1. Readily Achievable Standard

The ADA does not require existing buildings built prior to January 26, 1992, to meet its stringent standards for newly constructed/altered facilities. Rather, such buildings are required to take certain limited steps to improve access to individuals with disabilities, including the obligation to remove architectural barriers when it is readily achievable to do so; in other words, when barrier removal is "easily accomplishable and able to be carried out without much difficulty or expense." The decision of what is readily achievable is made considering the size, type, and overall finances of the hotel and the nature and cost of the access improvements needed. Barrier removal that is presently difficult may be readily achievable in the future as finances change.

Many building features that are common in older facilities such as narrow doors, a step or a round door knob at an entrance door, or a high guest check-in counter are barriers to access by people with disabilities. Removing barriers by either ramping a curb, widening an entrance door, installing visual alarms, or designating a lower counter for guest check-in is often essential to ensure equal opportunity for people with disabilities. Because removing these and other common barriers can be simple and inexpensive in some cases and difficult and costly in others, the regulations for the ADA provide a flexible approach to compliance. This practical approach requires that barriers be removed in existing facilities only when it is readily achievable to do so.

[4] Since hotels use voicemail messaging systems for receiving and directing incoming telephone calls, they should provide effective real-time communication with customers who are deaf or who have speech disabilities.

2. New Construction/Alteration Standard

However, any "alterations" made to hotels since 1992 must be made in full compliance with the ADA Standards, to the maximum extent feasible. *See* 28 C.F.R. Part 36, Appendix "A." The ADA does not expressly define the term "alteration"; however, the DOJ's implementing regulations define "alteration" to mean any change to an existing building or facility that affects or could affect the usability of a facility or any part thereof. *See* 28 C.F.R. § 36.402(b). Alteration includes remodeling, renovation, rearrangements in structural parts, and changes or rearrangements of walls and full-height partitions or making other changes that affect (or could affect) the usability of the facility. The ADA does not consider normal maintenance, reroofing, painting, wallpapering, asbestos removal or changes to electrical and mechanical systems to be alterations unless they affect usability of the building or facility.

The phrase "to the maximum extent feasible," applies only to the occasional case where the nature of an existing facility makes it virtually impossible to comply fully with applicable ADA Standards through a planned alteration. In all other cases, the alterations that can be made accessible must be made accessible.

Furthermore, when a hotel undertakes an alteration that affects or could affect the usability of or access to a "primary function area," an accessible path of travel to the altered area must be made accessible to and usable by individuals with disabilities to the extent that the added accessibility costs are not disproportionate to the overall cost of the original alteration.[5] Pursuant to the ADA, the added accessibility costs will be considered disproportionate if they exceed 20 percent of the original alteration.

Accordingly, for future contemplated renovations that could be considered "alterations" under the ADA, hotels must make such alterations so as to ensure that, to the maximum extent feasible, the altered portions of the hotels are readily accessible to and usable by individuals with disabilities. Furthermore, when these alterations affect the usability of a "primary function area," hotels must ensure that it provides an accessible path of travel to the altered area (to the extent that the added accessibility costs are not disproportionate to the overall cost of the original alteration).

E. Key Revisions to Architectural Requirements

In addition to the key policy and procedure revisions described above, the ADA has promulgated the 2010 Standards, effective March 15, 2012, which set new minimum requirements for newly designed and constructed places of public accommodations to be readily accessible to and usable by individuals with disabilities. As explained above, all recreation facilities that were not included in the 1991 Standards (*e.g.*, swimming pools, saunas, steam rooms, fitness equipment, and golf facilities) must comply with the 2010 Standards if readily achievable. Pursuant to the ADA's "safe harbor" exemption, however, all other hotel facilities that comply with the 1991

[5] Any area where people carry out one or more the major activities for which a facility is used is considered to be a "primary function area" under the ADA. For example, guest rooms would be a primary function area of a hotel. Hallways, restrooms, mechanical rooms, boiler rooms, janitorial closets, employee lounges, locker rooms, and supply storage rooms typically are not primary function areas.

Standards are not required to comply with the 2010 Standards until alterations or renovations take place (even if they are readily achievable). Thus, all future renovations and alterations must be done in accordance with the 2010 Standards to the extent it is readily achievable to do so. The key requirements contained in the 2010 Standards are explained below:

1. Accessible Entrances

Understanding how guests arrive at and move through hotels is the best way to identify any existing barriers (and vulnerabilities for potential "drive by" plaintiffs) and set priorities for their removal. The 2010 Standards provide the following priorities for barrier removal:

- Providing access to the hotel from public sidewalks, parking areas, and public transportation;
- Providing access to the hotel's services (*e.g.*, restaurants and spas);
- Providing access to public restrooms; and
- Removing barriers to other amenities offered to guests (*e.g.*, drinking fountains, elevators and ATM's).

Consequently, efforts should be made by hotel owners and operators to ensure the following: (1) that there is an obvious accessible path from the street sidewalk to the entry of the hotel; (2) that a portion of the check-in counter in the main lobby of the hotel is appropriate for use by an individual who uses a wheelchair; (3) that lobby restaurants and bars have accessible pathways and accessible seating; (4) that conference/meeting room entrances are wide enough for wheelchair passage; and (5) that the main lobby has at least one fully accessible restroom.

In particular, if the main entrance of a hotel cannot be made accessible, alternate accessible entrances can be used. If a hotel has several entrances and only one is accessible, a sign should be posted at the inaccessible entrances directing individuals to the accessible entrance. This entrance must be open whenever other public entrances are open. The 2010 Standards require that sixty-percent of all public entrances be accessible.

Furthermore, the path a person with a disability takes to enter and move through a hotel must remain accessible and not be blocked by items such as vending or ice machines, newspaper dispensers, furniture, filing cabinets, display racks, or potted plants. Similarly, accessible toilet stalls, dressing rooms, or counters at a cash register should not be cluttered with merchandise or supplies. These efforts should significantly reduce the risk of a drive-by plaintiff filing a lawsuit against the hotel.

2. Swimming Pools, Wading Pools, Spas, Saunas, and Steam Rooms

Accessible means of entry/exit are required for swimming pools. In particular, the 2010 Standards require at least two accessible means for entry for larger pools (300 or more liner feet) and at least one accessible entry for smaller pools. At least one entry must be a sloped entry or pool lift; the other could be a sloped entry, pool lift, a transfer wall or a transfer system.

Wading pools must provide a sloped entry into the deepest part of each wading pool. If a property has one spa, it must be accessible. Thus, it must provide a pool lift, transfer wall, or transfer system. If there is more than one spa, five percent of the total must be accessible. Further, at a resort property, for example, if there is more than one cluster of whirlpools, five percent of each cluster must be accessible.

Wave action pools, lazy rivers, and sand bottom pools where user access is limited to one area are required to provide one accessible means of entry, which can be either a pool lift, sloped entry, or a transfer system.

Saunas and steam rooms also must be accessible, having appropriate turning space (a minimum of 60 inches in diameter), doors that do not swing into the clear floor space, and, where provided, an accessible bench. A readily removable bench is permitted to obstruct the turning space and the clear floor space.

3. Parking

Pursuant to the 2010 Standards, hotels must provide parking spaces for cars and vans if it is readily achievable to do so. The chart below indicates the number of accessible spaces required by the 2010 Standards. One of every six spaces must be van accessible.

Total Number of Parking Spaces Provided in Parking Facility	**Minimum number of Required Accessible Parking Spaces**
1 to 25	1
26 to 50	2
51 to 75	3
76 to 100	4
101 to 150	5
151 to 200	6
201 to 300	7
301 to 400	8
401 to 500	9
501 to 1000	2 percent of total
1001 and over	10, plus 1 for each 100, or fraction thereof, over 1000

An accessible parking space must have an access aisle, which allows a person using a wheelchair or other mobility device to get in and out of the vehicle.

4. Exercise Rooms

The 2010 Standards dictate that at least one of each type of exercise equipment must provide 30 by 48 inches of clear floor space positioned for transfer by someone using a wheelchair and be on a 36-inch wide accessible route. For machines on which individuals have to stand up, the clear floor space can be in the accessible pathway route. Thus, once satisfied that a hotel's fitness center is in compliance with the ADA, trainers and other fitness room staff must be

instructed not to move exercise equipment, as such rearrangements could impede an individual's access and result in non-compliance with the ADA.

5. ATM's

The 2010 Standards contain new requirements concerning height, reach and accessible floor space for ATM's. In particular, to meet the 2010 ADA Standards, (1) the top of the ATM cannot exceed 48 inches in height or be lower than 15 inches above the ground; (2) operable parts must be placed within the reach ranges; and (3) one full unobstructed side of the clear floor or ground space (30 by 48 inches minimum) must adjoin an accessible route or adjoin another clear floor or ground space. Such requirements are considered "structural elements," and, as such, are entitled to the "safe harbor" protection. Therefore, compliance with the 1991 Standards is sufficient until any new alterations made to existing ATM's (*e.g.*, moving an ATM to a new location in the hotel).

F. Steps Managers Can Take to Comply with ADA

Since hotel owners and operators are jointly and severally liable for non-compliance with Title III of the ADA, they should proactively and cooperatively work together to ensure that their hotels are legally compliant to minimize vulnerability to "drive by" lawsuits and DOJ investigations. To do so, hotels must modify their policies, practices, and procedures to ensure that disabled guests have equal opportunities to enjoy the hotel's accommodations and services.

In addition, at the direction of legal counsel, and thus under the protection of the attorney-client privilege, hotel owners and operators should conduct regular inspections of their properties. Special care should be made to areas that the general public easily sees, utilizes, and accesses such as parking lot, entrance, lobby, service counters, dining and bar areas, and public bathrooms. Hotel owners and operators should promptly correct any findings from the inspections.

Finally, a critical and often overlooked component of ensuring success is comprehensive and ongoing staff training about the ADA's requirements. Although established good policies are a necessary first step, problems can still arise if front line staff members are not aware of them. Thus, hotels should ensure that their staffs understand the requirements on communicating with and assisting customers are trained in handling accessibility-related requests. All too often, lawsuits are commenced because of an employee's lack of knowledge and/or lack of courtesy in handling a request for an accommodation.

In short, the most effective way to limit potential exposure under Title III of the ADA is to evaluate access, train staff on the ADA's requirements, and consider the requirements of the ADA when planning an alteration or construction of a new facility.

IV. CONCLUSION

Navigating the WARN Act and the ADA requires careful consideration and advanced planning; therefore, prudent hotel owners and operators must work together to chart an effective compliant

course when drafting management agreements to ensure legal compliance. Particularly, even before signing a management agreement, a manager should conduct due diligence of the property early in the process that includes (1) an on-site survey of the hotel; (2) review of any operational policies and procedures, construction history, prior ADA surveyor reviews, and history status of the properties; and (3) determining if the hotel has been or is likely to be in the crosshairs of "drive-by" plaintiffs and government enforcement agencies. Prudent managers should also ensure indemnification provisions are included in the agreements for any WARN and/or ADA non-compliance issues. Likewise, the agreement must clearly set forth each party's defense and remediation responsibilities with respect to the ADA (*e.g.*, the manager has duty to defend lawsuits and investigate allegations of non-compliance and the owner must pay for remediation and costs of construction). In short, because failure to comply with the WARN Act and the ADA can cost significant monetary sums, hotel owners and operators should not overlook and/or discount their statutory obligations at any point in their business relationship.