

Myths vs. Facts on New Pool Lift Regulations under the ADA

Myth: The *Carter-Nunnellee-Flake Amendment* to the DJS Appropriations Bill on ADA Pool Lift Regulations rolls back the protections of the ADA.

Fact: The amendment repeals no section of the ADA nor does it repeal the requirement for accessible pool and spa entries for public accommodations. The business community supports the goal of meeting reasonable entry requirements that will balance the needs of Americans with disabilities and keeping children safe. This amendment in no way affects a public accommodation's obligation to provide a pool lift in a timely way to guests who request it. This amendment will only prevent the DOJ from requiring that a pool lift be *attached* to the pool deck and kept at the pool or spa when no one needs it. This condition would be dangerous for children who will play and jump off of the lift. It would be irresponsible to ignore this risk.

Myth: The pool lift requirement has been around for 20 years — the business community waited until the last minute to protest.

Fact: There was no requirement under the ADA to provide accessible entries into pools and spas until the DOJ published the *2010 ADA Title III Regulations* in September 2010. However, those regulations did not require fixed lifts. Thus, businesses could use portable lifts that could be promptly brought out upon request. On Jan. 31, 2012, less than two months from the compliance deadline, the DOJ issued a guidance stating that fixed lifts were the option types of lift that are acceptable, unless it is not readily achievable to install a fixed lift. This was a last-minute radical change in the regulations and the business community promptly objected to it.

Myth: Fixed pool lifts present no additional risks.

Fact: A fixed pool lift presents several significant risks that a portable lift does not — particularly at unattended pools. Children and adolescents will use them as jumping or diving platforms into the shallow end of the pool; swimmers may become trapped under the seat when the seat is in the water; if a fixed lift fails during use no one will know that the lift is being used; lifts are not manufactured to endure environmental conditions which will have a greater adverse impact if the lifts are required to be fixed to an outside pool deck at all hours. According to one study published in the *American Journal of Pediatrics* in 2008, 111,341 children were injured in diving-related accidents at swimming pools from 1990 to 2006. Pool lifts are similar to diving boards in that they provide an elevated platform from which to dive into the pool. The fact that pool lifts must be placed at the shallow end of the pool or at shallow spas makes them potentially even more dangerous.

Myth: Fixed lifts are easily purchased and installed.

Fact: Not enough fixed lifts can be produced to equip the number of pools and spas in the United States that need them, and the installation of fixed lifts is considerably more complicated than the purchase of a portable lift that can be used immediately. According to the Association of Pool and Spa Professionals (APSP), there are 85,284 swimming pools at lodging facilities, 55,311 community pools and 26,883 pools

run by parks and recreation departments in the United States. The APSP further estimates that a third of the number of hotels with pools also have a spa (*i.e.*, 28,333), which means that there are more than 200,000 pools and spas that must be outfitted with pool lifts. The DOJ has stated that there are at least 100,000 pools and spas that require pool lifts. The APSP reported to the DOJ that the top three pool lift manufacturers can only produce anywhere from 2,500 to 5,000 lifts per month, or 15,000 to 30,000 in six months. While it is possible that at some point in the future these companies might be able to open new plants to increase production capacity, this is purely speculative at this time. *Thus, in the absolute best case scenario and using the DOJ's numbers, there will only be enough lifts made to supply 30% of covered pools and spas by Sept. 17, 2012.*

Unlike portable lifts, fixed lifts must be attached to the pool deck. Installing a fixed lift requires a contractor, permits, partial demolition of the pool deck, electrical bonding and deck reconstruction.

We disagree with the AH&LA position, as we believe they have overstated the facts.

Myth: Portable lifts will force guests into lengthy delays before they can have access to pools and spas.

Fact: A study conducted by the federal U.S. Access Board found that individuals with disabilities reported having to wait only an average of 6.1 minutes for the pool lift to be brought out, and there was no requirement for any lifts at all when the study was conducted. Now that pool lifts are a legal requirement, businesses will be much more informed about pool lifts and have procedures in place to ensure that lifts are brought out promptly.

We also disagree, except we can accomplish the same task for thousands of dollars less.

Myth: Americans with disabilities should not have to ask for any accommodation.

Fact: The ADA is a law that seeks to balance legitimate business and safety concerns with the goal of providing equal access. In some cases, immediate access can be provided without compromising any countervailing concerns. In a pool lift situation, leaving a pool lift out next to the pool or spa at all times when these facilities are open increases the risk that children will injure themselves while using it as a jumping or diving platform, particularly at pools that do not have lifeguards. A portable lift that is promptly brought out upon request minimizes this risk, while at the same time providing access to the pool.

It is important to keep in mind that the ADA contemplates many instances where individuals with disabilities must request specific accommodations needed for access. For example, not all guest rooms must be accessible. Individuals with disabilities must request an accessible guest room. Individuals who are deaf must ask for a sign language interpreter. Blind individuals must ask for Braille or large print menus in restaurants, or Braille or large print statements from a bank. There are many instances under the ADA where a person with a disability must request an item needed for access.

Myth: The cost for pool lifts are nominal and a one-time expense.

Fact: A fixed pool lift can cost upwards of \$9,000, including installation. In contrast, the cost of a portable lift is not likely to exceed \$6,300. This is not a one-time expense. A business will have to expend resources on maintaining the lift on a daily basis (charging and changing out the battery), training employees on the lift, monitoring the lift's condition to make sure it is functioning properly and repairing the lift. In addition, if an accident does take place on a lift, a business will pay higher insurance

premiums. A business may also lose revenue from having to close the pool and spa during the installation process.

We disagree with the AH&LA. The association's stated cost of \$6,300 is understated. A true portable lift is an expensive high-maintenance lift which can cost up to \$10,000 delivered to the location. Our portable lift, at \$2,179.00 delivered, makes economic sense. LifeGuard Lift can be assembled [or disassembled] within 2 minutes. Replacement parts are inexpensive. For example, a battery costs \$46.

Myth Because businesses only have to install a lift if it is readily achievable, businesses that do not have the resources to install a fixed lift will not have to do so

Fact: Because the Justice Department has announced that fixed lifts must be installed unless they are not readily achievable, plaintiffs looking to file lawsuits will assume that there is a violation if no fixed lift is present and file a lawsuit. The business will then have to hire an attorney to defend the lawsuit and pay legal fees which would exceed the cost of the lift itself, at a minimum. Because determining whether an action is "readily achievable" is a difficult case-by-case analysis involving multiple factors, no business will be certain as to whether it really qualifies for this exemption. If a business wins the lawsuit it will have paid its own attorneys' fees. If it loses it will pay its own fees, the plaintiff's attorneys' fees and the cost of installing a fixed lift. Thus, the idea that the "readily achievable" provision removes the burden from businesses is a fallacy.

To make matters worse, the DOJ has repeatedly told businesses that if they cannot purchase and install a fixed lift at this time, their obligation to install a fixed lift at a future date remains when it does become readily achievable. DOJ expects all businesses to install lifts at some future date.

Not Now! LifeGuard Lift's pool lift is affordable and readily achievable!

Myth: Regulated property owners had the advanced notice required by law regarding the permanent pool lift requirements.

Fact: The Justice Department has circumvented the "notice and comment" rulemaking process required by the *Administrative Procedure Act* (APA), as amplified by executive orders issued by both Presidents Obama and Clinton for open and transparent regulations. For the first time, the Justice Department told the regulated community that it expected ADA compliance by installing fixed pool and spa lifts through a Jan. 31, 2012, technical "guidance" document. Never before had the DOJ expressed a requirement for fixed pool lifts to the exclusion of all other options unless a business could demonstrate that a fixed pool lift is not readily achievable. By failing to ask regulated stakeholders to comment on the requirement for fixed pool lifts, the Justice Department has ignored the notice and comment requirements of the APA that must attend any rulemaking – and, as a result, the DOJ has also avoided analyzing the economic impacts on small businesses otherwise required by the *Regulatory Flexibility Act*.