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Could an ATM be the Reason for a Lawsuit?

BY E. ANDREW KEENEY

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On Sept. 15, 2011, the U.S. Department of Justice published the final regulations revising the Americans With Disabilities Act regulations, including its ADA Standards for Accessible Design.

These final rules took effect March 15, 2011. However, under a safe harbor clause, compliance with the new 2010 Standards for Accessible Design is not required for new construction and alterations until March 15, 2012, if implementing the upgrades would result in an undue financial burden.

The following helps to explain the timing of compliance for newly installed or altered ATMs:

Compliance Dates for New Construction and Alterations

On or after Jan. 26, 1993 and before Sept. 15, 2010

1991 Standards

On or after Sept. 15, 2010, and before March 15, 2012

1991 Standards or 2010 Standards

On or after March 15, 2012

2010 Standards

The term “undue burden” means “significant difficulty or expense”. In determining whether an action would result in an “undue burden”, factors to be considered include:

1. The nature and cost of the action needed under this part; and
2. The overall financial resources of the credit union; the number of people employed by the credit union; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the ATM site.

A credit union should first consult with its ATM vendor to determine if its existing ATMs comply with the new communication-related specifications of the 2010 ADA Standards. If the existing ATMs do not comply, a credit union may be able to make the argument that upgrading an ATM would constitute an “undue burden”.

An “undue burden” is subjective and will be determined on a case-by-case basis. If it would prove to be extremely difficult and expensive for a credit union to upgrade its existing ATMs, then a credit union in arguing “undue burden” will need to establish a budget, a strategic plan and a schedule for achieving the upgrades in the future.

The credit union’s strategic plan should be documented in the event of a lawsuit regarding the ADA. A credit union’s strategic plan may be subject to change depending

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on the credit union's financial situation. In summary, if a credit union determines that it would be an "undue burden" to comply with the new 2010 Standards, the ADA states that a strategic plan for future compliance should be in place.

Some of the required standards for ATMs to be "accessible to and independently usable by persons with visual impairments" include the following technical specifications:

1. Voice guidance – All ATMs must be speech enabled to service visually impaired consumers.
2. Height and reach – To ensure consumers can easily access input controls, an ATM's reach must not be greater than 48 inches.
3. Input device – Input device controls must be tactually discernible, which means key surfaces must be raised above surrounding surfaces to serve visually impaired consumers.
4. Numeric keypads – The ATM's keypad must be arranged in a 12-key ascending layout, such as telephone keys, or descending, such as a computer number pad layout.
5. Function keys – Function keys must be designed to contrast visually from their background.
6. Display screen – For visibility from a point located 40 inches above the center of the floor in front of the ATM, characters on the screen must be in sans serif font, a minimum of 3/16 high, and contrast with their background.
7. Braille instructions – Braille instructions to initiate the voice guidance feature must also be provided.

The ADA Standards for Accessible Design include, for the first time, detailed requirements for features to make ATMs truly accessible to blind customers, such as the standards found in Section 707 (New Talking ATM Technical Section) and Section 220 (New Scoping Section for Talking ATMs).

In addition to the ADA requirements and compliance, updates to Regulation E will impact credit unions.

The Regulation E disclosures for ATMs requires credit unions to provide notice that a fee will be imposed for providing electronic fund transfer or a balance inquire and to disclose the amount of the fee. To meet the notice requirement, credit unions must post in a prominent and conspicuous location on or at the ATM and also provide the notice on the actual ATM screen or provide it to the consumer on paper before he/she is committed to paying a fee.

Credit unions should be aware that there are a growing number of lawsuits being filed, accusing credit unions of violating this particular provision of Regulation E. Not complying with ATM posting requirements is a significant risk concern for credit unions.

Credit unions are not only being sued for failure to provide notice, but also for allegedly posting notices that give incorrect information about the access fees being charged. Some plaintiffs have been accused of removing the notice and then suing the credit union for a breach of Regulation E. Documentation is the key. Photograph the notice on the ATM and each time it is serviced confirm that the notice is in place.

The law affords consumers up to \$1,000 in damages for each violation. Keep in mind that some of these claims in the aggregate include tens of thousands of individuals. Violations of Regulation E can also expose credit unions to a fine of up to \$500,000 plus plaintiff's costs and attorney fees.

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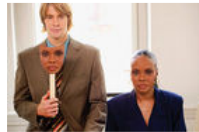
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