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VGB, ADA, ACA Explained

by Steven B. Getzoff and Seetal Tejura

While political analysts debate the extent to which business and safety related legislation and regulation have increased in the last five years, the pool and spa industry has been directly impacted by three federal acts: The Virginia Graeme Baker Pool and Spa Safety Act, the 2010 Standards for Accessible Design (ADAAG) issued by the Department of Justice under the Americans With Disabilities Act and the Affordable Health Care Act of 2010.

This article provides a brief review of these acts, their implementation efforts to date and the responsibilities they impose on pool and spa businesses.

THE VGB

The VGB was signed into law in December 2007 and required that, by December 2008:

1. All drain covers (suction fittings) comply with the ANSI/ASME A112.19.8 2007 Standard (now ANSI/APSP/ICC 16).

2. All public pools install new suction fittings that meet this standard.

3. All public pools with a single drain that is not unblockable install one or more additional devices.

This law has improved safety due to the fact that covers that meet this standard offer vastly improved fastening and durability and are subject to more stringent testing for hair and body entrapment.

The act also established and funded a public awareness program to reduce drowning and entrapment injuries (www.poolsafely.gov) and a grant program to encourage entrapment and drowning prevention laws at the state and local levels.

In the implementation phase, the one-year compliance date caused significant havoc for owners and operators of public pools, with costs often reaching five or six figures. Efforts to comply were also hindered by a large-scale drain cover recall in May 2011, which required replacement of recalled models in most single-drain pools as well as inground spas and wading pools. In addition, some pools were forced to react to a ruling from the CPSC in September 2011, which redefined an unblockable drain.

Pursuant to the APSP-16 Standard, manufacturers were required to list the life expectancy for each drain cover fitting. Many are set to expire between 2013 and 2015, meaning they'll again require replacement.

THE AMERICANS WITH DISABILITIES ACT

The ADA was adopted in 1991 and produced a series of regulations to provide increased access to public facilities. The latest rulemaking, known as the 2010 ADAAG, requires that all pools and spas in public accommodations provide "accessible means of entry." Larger pools (greater than 300 linear feet of pool wall or circumference) require at least two means of access and smaller pools require at least one means of access. The primary means must be a pool lift or sloped entry. The secondary means in a larger pool may consist of a transfer wall, transfer system or accessible pool steps.

Because of the exorbitant costs associated with adding a sloped entry, an overwhelming majority of the existing facilities have chosen the pool lift as the primary or sole means of compliance. Section 1009.2 of

the ADAAG provides extensive detail with regard to pool lifts, including water depth, seat width, foot rest, independent operation, set back distance, seat height and weight capacity. It did not distinguish between portable and fixed lifts, however, and facilities began installing portable lifts, which are less expensive and easier to install. On January 31, 2012, however, the Department of Justice issued a Technical Assistance Document on accessible pools that specified that:

1. If a pool lift is used as a primary means of access, it must be "fixed."

2. The lift must be in place at all times that the pool/spa is open.

3. Sharing a lift between two or more bodies of water is not permitted.

Following a large-scale lobbying effort by the APSP and the lodging industry, the DOJ relaxed its definition of "fixed" to merely mean "attached to the pool deck in some manner." Therefore, portable lifts can still be used, provided that they are attached in some manner. All of the leading manufacturers have developed sleeves or other kits for this purpose.

In addition, the DOJ allowed portable lifts purchased prior to March 15, 2012, to be used as originally installed.

The deadline for existing facilities expired on January 31, 2013, or when the pool opened. Lifts must still remain in place whenever the pool or spa is open, but may be stored after hours or at the close of the season. Sharing of a lift between two or more bodies of water is still prohibited.

As with all aspects of the ADA, existing facilities are only required to comply to the extent that it is readily achievable. The DOJ has stated that in making this determination, it will consider available resources of that facility and parent company, which may change from year to year. If full compliance is not readily achievable, the facility must do what it can.

Logistical and safety issues may also be considered (including the need for equipotential bonding, and other state or local requirements). However, the DOJ staff specifically stated that they do not consider the claimed risk of injury from unsupervised misuse of a lift as a legitimate safety issue.

Facilities with multiple bodies of water should consider bringing at least one or more into compliance as soon as feasible. Facilities that have not met the compliance deadline must have a "barrier removal plan," including a plan to set aside funds and take other steps to achieve compliance.

Unlike with the VGB, the DOJ does not inspect facilities for compliance for the ADA. States may choose to incorporate the federal provisions into their law or code and provide their own enforcement. The primary concern for pool operators is individual civil lawsuits (sometimes referred to as "drive-by lawsuits") against noncompliant facilities, seeking an injunction to compel compliance, attorney's fees and actual (usually nominal) damages.

THE AFFORDABLE CARE ACT

While President Obama signed the Affordable Care Act into law in March 2010, perhaps most significant changes will take effect in 2014 and 2015. This includes planned access to affordable coverage through the new health insurance marketplace starting on January 1, 2014, following an enrollment period that began October 1. This general overview of the ACA is to provide you with a brief discussion of some of the provisions of the ACA that may impact your business.

If you are self-employed, you will be required to comply with the Individual Shared Responsibility provisions of the ACA. This means that you will need to have minimum essential health coverage, qualify for an exemption, or make a payment when filing your federal income tax return. Minimum essential coverage includes, but is not limited to, employer-sponsored coverage, Medicare Part A coverage and Medicare Advantage, coverage purchased in the individual market, and most Medicaid coverage. The exemptions include, but are not limited to, having a household income that is below the minimum threshold for filing a tax return, having a certified hardship, or the inability to afford coverage because the minimum amount you must pay for the premiums is more than 8 percent of your household income.

If you are an employer with fewer than 25 full-time equivalents and you sponsor self-insured plans, you must submit reports to the IRS providing detailed and specific information for each covered individual. This is in addition to the other notifications to employees that are already required under the ACA. The potentially good news is that if you pay below $50,000 in average annual wages, contribute 50 percent or more toward employees' self-only health insurance premiums, and participate in the Small Business Health Options Program, you may qualify for a tax credit of up to 50 percent to help offset the costs of insurance. Additionally, if the insurance company does not spend at least 80 percent of premium dollars on medical care rather than administrative costs, the employer may be entitled to a refund.

If you are an employer with up to 50 full-time equivalents, you will have the same requirements and benefits as employers with fewer than 25 full-time equivalents, with the exception of the tax credit that is discussed above.

If you are an employer with 50 or more full-time equivalents and you do not offer affordable health insurance that provides minimum values, you may be required to pay an assessment beginning in 2015, pursuant to the Employer Shared Responsibility provisions. Table 1 provides an overview of whether you will need to pay assessments.

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Comments or thoughts on this article? Please e-mail editors@aquamagazine.com.

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