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The 'Other' ADA Claim - Website Accessibility Under Title III

Employers are undoubtedly familiar with Title I of the Americans with Disabilities Act (ADA), which prohibits discrimination in employment. However, they may not be as familiar with Title III of the ADA, which prohibits discrimination in places of "public accommodation." While claims under Title III were traditionally brought against hotels, restaurants, retailers and other public-facing businesses based on the physical inaccessibility of a brick-and-mortar location, plaintiffs' attorneys are now filing overwhelming numbers of website accessibility lawsuits under the theory that websites are places of public accommodation and that businesses violate Title III when their websites are not accessible by individuals with disabilities. As a result, any business that operates a website or mobile application can be a target for this type of claim.

What Is a Title III Web Accessibility Claim?

Due to Title III's historical focus on the accessibility of physical premises, the most common targets of web accessibility claims are websites or mobile applications that are "heavily integrated" with or have a "nexus" to a public-facing, physical location (e.g., allowing users to place orders online and pick up in-store)—as these are more likely to be considered places of public accommodation. Typically, plaintiffs are persons with vision or hearing impairments who claim to be unable to effectively navigate a business's website or mobile application because, inter alia, the website's coding is incompatible with assistive screen reader software that reads the screen content aloud to the user, contains visual content with no text alternative (e.g., an embedded text description that the screen reader software reads aloud as "picture of girl with ball"), contains audio content without captions or transcripts, or lacks keyboard navigation functionality to allow mobility challenged users to navigate through interactive elements such as links, buttons or input fields without the use of a mouse. These are only a few of the 78 success criteria set forth in published guidelines known as the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG) 2.1. Title III plaintiffs cannot obtain damages under the ADA, but instead seek injunctive relief, attorney fees, costs and other litigation expenses. In the face of this booming trend of litigation, many businesses are left to wonder: Does Title III apply to our website? And, if so, how do we make our website accessible?

Does Title III Apply to Our Website?

As to the first question, the Federal Courts of Appeals are split as to whether the term "public accommodation," as used in the ADA, refers only to an actual physical location or whether it can be applied to websites and mobile applications.

- Courts within the **First Circuit** have found that a stand-alone website or application *can* be a place of public accommodation regardless of any connection to a public-facing, physical operation (e.g., Netflix's streaming service is covered by the ADA).
- The **Second Circuit** has not decided the issue, and district courts within the circuit are split, with the most recent decisions out of the Eastern District of New York concluding that web-only businesses are *not* covered by the ADA absent some nexus to a public-facing, physical place where goods or services are sold.
- The **Third Circuit** has not specifically decided the issue of web accessibility; however, it has held that public accommodations covered by the ADA are limited to physical places, and thus would likely conclude that web-only businesses are *not* covered absent some nexus to a physical location.
- The **Ninth Circuit** has concluded that web-only businesses are *not* covered absent some nexus to a physical location (e.g., placing orders through Domino's website or mobile application for pickup at a physical restaurant). Notably, the

companion Unruh Civil Rights Act under California state law has no such nexus requirement and has become a favored alternative for plaintiffs (e.g., plaintiff permitted to proceed with Unruh claims against Square, Inc., an exclusively internet-based electronic payment service without a physical location).

- Last year, the **Eleventh Circuit** vacated as moot its seminal decision in *Gil v. Winn-Dixie Stores, Inc.* which found that websites were *not* places of public accommodation, declined to adopt the nexus standard, and signaled instead that a much higher standard of actual exclusion or denial of services altogether would be required—effectively wiping out all circuit precedent on both sides of the argument and leaving more questions than answers in the circuit.

One day, the U.S. Supreme Court will weigh in on the issue, or Congress will clarify its "public accommodation" language. In the meantime, while the uncertainty of the law and the circuit splits may seem daunting, one thing is certain: **Taking measures now to mitigate the risk and to make websites and mobile applications accessible is always a good idea**. Websites and mobile applications can be accessed from just about anywhere, and businesses are subject to suit in any jurisdiction where their website or mobile application is accessed. Plaintiffs' attorneys are far more likely to file suit in jurisdictions that have found that stand-alone websites or mobile applications are places of public accommodation. Accordingly, web accessibility should be a priority for all businesses everywhere. In addition to reducing legal risk, creating an accessible website or mobile application can be good for business by ensuring accessibility to the widest possible audience. Website and mobile application accessibility initiatives can contribute to an organization's focus on diversity, equity and inclusion. This all leads to the second question.

How Do We Make Our Website Accessible?

At present, web "accessibility" is a somewhat mythical term. In its most recent guidance issued on March 18, the Department of Justice reaffirmed that it has *not* adopted any official standard for online accessibility. However, in the same guidance it provided a link to the WCAG as an accessibility resource—thus reinforcing that the WCAG remain broadly adopted "guidelines," but not law. While an argument could be made that a website is "accessible" as long as a user with a disability is able to reasonably navigate, perceive and operate the website in a manner similar to a person who does not have a disability, for now the WCAG provides the best guidance in that regard. To start, businesses looking to make accessibility a priority as part of their diversity, equity and inclusion initiatives, and, at the same time, to limit the risk of these increasingly prevalent lawsuits, should:

- Get your website tested in order to understand your risk profile.
- Prioritize the accessibility of your legally significant pages (privacy, terms of use, purchase policy, return policy) and your most visited pages (home pages, shopping carts, customer service pages and employment application pages).
- Engage a consultant. Do not go at this alone, no matter how many times your IT department tells you they can deliver a WCAG-conforming site without outside help. A consultant who is well-versed in the WCAG can audit your site, answer WCAG questions, walk you through remediation and continually monitor your site during the remediation (because sometimes fixing one problem causes another).
- Make accessibility a priority when building a new website or mobile application or when redesigning existing websites or mobile applications. It is generally more cost-efficient to design and build an accessible site from inception than to remediate one later. Consider contractual language that requires your web developer or designer to deliver a WCAG-conforming site.
- Provide reasonable accommodation in the form of a 24/7 accessibility assistance telephone number with a trained representative who can help users with disabilities gain access in real time so they can enjoy the same access as other users accessing your site outside of business hours. These reasonable accommodation measures can be particularly helpful for those sites that have not yet achieved full accessibility.
- Never assume the work is done. Even for businesses that have made reasonable efforts to achieve accessibility, your website is a constantly evolving platform (think sales, promotions, new products, event updates, etc.) and requires periodic testing to ensure continued accessibility.

In addition to their external-facing web-based platforms, employers should not overlook the accessibility of their internal workplace technologies. These include the employment application process, completion of new-hire paperwork, online training, time-off requests and everyday communications and software usage. Indeed, since many employee tasks are completed electronically, attention should be paid to the accessibility of these systems and processes for applicants and/or employees. Finally, businesses and employers should confer with legal counsel experienced in counseling clients on ADA website accessibility issues including engaging vendors, assisting in website accessibility audits and remediation efforts, pre-litigation dispute resolution, and website accessibility litigation.

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