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Newsletter/Bulletin

August 30, 2019

Title III of the ADA, enacted in 1990, prohibits discrimination against disabled individuals in "places of public accommodation"—defined broadly to include private entities that offer commercial services to the public. 42 U.S.C. § 12181(7). Under the ADA, disabled individuals are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, and accommodations offered by a place of public accommodation. *Id*. § 12182 (a). To comply with the law, places of public accommodation must take steps to "ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals." *Id*. § 12182(b)(2)(A)(iii).

In the years immediately following the enactment of the ADA, the majority of lawsuits alleging violations of Title III arose as a result of barriers that prevented disabled individuals from accessing brick-and-mortar businesses (i.e., a lack of wheelchair ramps or accessible parking spaces). However, the use of the Internet to transact business has become virtually ubiquitous since the ADA's passage almost 30 years ago. As a result, lawsuits under Title III have proliferated in recent years against private businesses whose web sites are inaccessible to individuals with disabilities. Indeed, the plaintiffs' bar has formed something of a cottage industry in recent years, with numerous firms devoted to issuing pre-litigation demands to a large number of small to mid-sized businesses, alleging that the businesses' web sites are not ADA-accessible. The primary purpose of this often-effective strategy is to swiftly obtain a large volume of monetary settlements without incurring the costs of initiating litigation.

Yet despite this upsurge in web site accessibility lawsuits—actual and threatened—courts have not yet reached a consensus on whether the ADA even applies to web sites. As discussed above, Title III of the ADA applies to "places of public accommodation." A public

accommodation is a private entity that offers commercial services to the public. 42 U.S.C. § 12181(7). The First, Second, and Seventh Circuit Courts of Appeals have held that web sites can be a "place of public accommodation" without any connection to a brick-and-mortar store.[1] However, the Third, Sixth, Ninth, and Eleventh Circuit Courts of Appeals have suggested that Title III applies only if there is a "nexus" between the goods or services offered to the public and a brick-and-mortar location.[2] In other words, in the latter group of Circuits, a business that operates solely through the Internet and has no customer-facing physical location may be under no obligation to make its web site accessible to users with disabilities.

To make matters even less certain, neither Congress nor the Supreme Court has established a uniform set of standards for maintaining an accessible web site. The Department of Justice (DOJ) has, for years, signaled its intent to publish specific guidance regarding uniform standards for web site accessibility under the ADA. However, to date, the DOJ has not published such guidance and, given the agency's present priorities, it is unlikely that it will issue such guidance in the near future. Accordingly, courts around the country have been called on to address whether specific web sites provide sufficient access to disabled users. In determining the standards for ADA compliance, several courts have cited to the Web Content Accessibility Guidelines (WCAG) 2.1, Level AA (or its predecessor, WCAG 2.0), a series of web accessibility guidelines published by World Wide Web Consortium, a nonprofit organization formed to develop uniform international standards across the Internet. While not law, the WCAG simply contain recommended guidelines for businesses regarding how their web sites can be developed to be accessible to users with disabilities. In the absence of legal requirements, however, businesses lack clarity on what, exactly, is required to comply with the ADA.

Nevertheless, given the proliferation of lawsuits in this area, businesses that sell goods or services through their web sites or have locations across multiple jurisdictions should take concrete steps to audit their web sites and address any existing accessibility barriers.

Several online tools exist which allow users to conduct free, instantaneous audits of any URL, such as those offered at https://tenon.io/ and https://wave.webaim.org/. However, companies should be aware that the reports generated by such tools can be under-inclusive in that they may not address every accessibility benchmark in WCAG 2.1. The reports also can be over-inclusive and identify potential accessibility issues that would not prevent disabled users from fully accessing and using a site. Accordingly, companies seeking to determine their potential exposure under Title III should engage experienced third-party auditors to conduct individualized assessments of their web sites. Effective

audits typically involve an individual tester attempting to use assistive technology, such as screen readers, to view and interact with the target site. Businesses also should regularly re-audit their web sites, as web accessibility allegations often arise in connection with web sites which may have been built originally to be ADA-compliant, but have fallen out of compliance due to content additions or updates.

Companies building new web sites, updating existing sites, or creating remediation plans should consider working with web developers familiar and able to comply with the WCAG 2.1 criteria. While no federal court has held that compliance with WCAG 2.1 is mandatory under Title III, several have recognized the guidelines as establishing a sufficient level of accessibility for disabled users.[3] Businesses engaging new web developers to design or revamp their sites should ask specific questions regarding the developers' understanding of and ability to comply with WCAG 2.1 in the site's development, and should memorialize any agreements regarding specific accessibility benchmarks with the web developer in writing.

If you have any questions regarding the topics discussed in this article, please contact **Meg Inomata** at +1 (202) 312-3374, **Harrison Thorne** +1 (424) 204-7704 or any other Vedder Price attorney with whom you have worked.

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1 *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) ("By including 'travel service' among the list of services considered 'public accommodations,' Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure."); *Andrews v. Blick Art Materials, LLC,* 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

2 *See Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 183 (3d Cir. 2010) ("Our court is among those that have taken the position that the term is limited to physical accommodations") (citation omitted); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Haynes v. Dunkin' Donuts LLC,* 741 F. App'x 752, 754 (11th Cir. 2018) ("It appears that the website is a service that facilitates the use of Dunkin' Donuts' shops, which are places of public accommodation.").

3 *See, e.g. Robles v. Domino's Pizza, LLC,* 913 F.3d 898, 907 (9th Cir. 2019) (holding that failure to comply with WCAG is not a *per se* violation of the ADA, but that trial courts "can order compliance with WCAG 2.0 as an equitable remedy if, after discovery, the website and app fail to satisfy the ADA.").

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