Insights

Is Your Website Compliant with the Americans With Disabilities Act?

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While financial institutions are typically aware of their responsibilities under the Americans with Disability Act (the “ADA” or the “Act”) as they relate to the maintenance of their physical office spaces and overall general corporate policies, application of these same principles to an institution’s website is a new concept that many were unaware of until recently. As we reported in our **November 2016 post**, financial institutions have been receiving demand letters from plaintiff’s counsel alleging violations of the ADA based on the institution’s websites failing to comply with the Web Content Accessibility Guidelines 2.0 (“WCAG 2.0”).[1] WCAG 2.0 is a set of guidelines adopted by a non-governmental entity called the Accessibility Guidelines Working Group designed to promote technical best practices for the World Wide Web. While the demand letters haven’t stopped, there have been several recent developments on the issue of ADA website compliance worth noting if you become the target of a similar demand from plaintiff’s counsel.

A recap of Title III of the ADA

The Act broadly protects the rights of individuals with disabilities as to employment, access to state and local government services, places of public accommodation, transportation, and other critical activities. Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of places of public accommodation (private entities whose operations affect commerce and that fall into one of the identified covered categories) and requires newly constructed or altered places of public accommodation, as well as commercial facilities, to comply with the ADA Standards for Accessible Design. The Act provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." [2] To that end, any Title III plaintiff must show*:*

1. He or she is disabled within the meaning of the ADA.
2. The defendant is a private entity that owns, leases, or operates a place of public accommodation.
3. The plaintiff was denied access to that public accommodation by the defendant because of his or her disability, *i.e.*,
   the defendant failed to make "reasonable modifications" of policies, practices or procedures or to provide auxiliary
   aids if necessary.

While case law is well established as to what constitutes a disability under the Act, the question of what constitutes a “public accommodation” is the subject of differing interpretations by the courts that have been presented with this issue.

Recent regulatory developments

The U.S. Department of Justice (the "DOJ" or the "Department") is responsible for promulgating regulations under the ADA, other than certain provisions dealing specifically with transportation.[3] Our **November 2016 post** discussed the uncertainty created by the DOJ's on again, off again approach to rulemaking on ADA website compliance that had existed since the DOJ issued its 2010 Advanced Notice of Proposed Rulemaking on Web Accessibility entitled "Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations". *See* 75 FR 43460 (July 26, 2010). This uncertainty, at least with respect to the DOJ's rulemaking, was eliminated with the December 26, 2017 formal withdrawal of all four pending rules on Title II and Title III Website compliance. *See* 82 FR 60932 (December 26, 2017). Notably, the withdrawal of these proposed rules occurred under the Trump Administration, which has been vocal in its desire to move towards less, rather than more, regulation, especially where businesses are concerned. This development stands in contrast to the DOJ's seemingly more aggressive stance concerning ADA website compliance under the Obama Administration. Previously, the DOJ had intervened in several civil litigation matters filed on behalf of plaintiffs asserting ADA website violations,[4] and had forced several companies to enter into consent decrees requiring the payment of monetary settlements.[5] It remains to be seen how this issue plays out on the regulatory front.

Recent Case Law Developments

In the meantime, the case law on ADA website compliance continues to develop in the courts. The district court in *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017), ruled that the grocery store's website was subject to the ADA. In affirming a business's obligation to make its website ADA compliant, the district court held*: "Although Winn–Dixie argues that Gil has not been denied access to Winn–Dixie's physical store locations as a result of the inaccessibility of the website, the ADA does not merely require physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided 'full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation[.]' 42 U.S.C. § 12182(a)."* The district court's decision in *Gil* is currently up on appeal to the Eleventh Circuit Court of Appeals, and oral arguments are scheduled for May 2018.

In *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354 (D.N.H. 2017), the district court considered whether the online grocery delivery website constituted a place of public accommodation under the ADA. In denying Blue Apron's motion to dismiss, the district court rejected the argument that a website must have a nexus to a physical brick and mortar location to constitute a place of public accommodation. The district court concluded that "a website alone may amount to a public accommodation."

These recent decisions, coupled with the case law discussed in our November 2016 post, are indicative of a growing consensus among the courts that websites are indeed places of public accommodation that must adhere to the accessibility requirements of the ADA. Thus, the financial institutions industry continues to be exposed to scrutiny on this issue, irrespective of the uncertainty on the regulatory front.

Recent Settlements

In an effort to be proactive in staying ahead of the uncertainty and protecting its members on this issue, the Independent Community Bankers Association (the "ICBA") entered into a settlement agreement with Access Now in November 2017. Under the settlement agreement, the ICBA agreed to adopt a Statement of Voluntary Access Principles in exchange for the consumer group's agreement not to litigate against the ICBA's members. The ICBA's agreement with Access Now does not, however, prevent any other plaintiff from filing similar litigation against ICBA members, or any other financial institution.

Other Developments

The U.S. Architectural and Transportation Barriers Compliance Board (the "Board"), recently adopted a rule requiring federal agencies to follow the WCAG 2.0 guidelines.[6] The Board is structured to function as a coordinating body among Federal agencies and to directly represent the public, particularly people with

disabilities. Half of its members are representatives from most of the Federal departments. The other half is comprised of members of the public appointed by the President, a majority of whom must have a disability. While the Board's adoption of the WCAG 2.0 guidelines does not apply to financial institutions, their adoption provides further support for plaintiff claims that this standard is required for all websites.

Krieg DeVault is closely monitoring developments in this area of law, and is able to provide assistance in responding to demands from plaintiff's counsel in the event your financial institution is targeted.

For further information, please contact **Brett J. Ashton** or **Libby Yin Goodknight.**

[1] http://www.w3.org/WAI/WCAG20/wcag2faq

[2] 42 U.S.C. § 12182(a).

[3] 42 U.S.C. § 12134; 42 U.S.C. §12186(b).

[4] See *National Ass'n of the Deaf v. Netflix, Inc*., 869 F. Supp. 2d 196 (D. Mass. 2012); *National Federation of the Blind v. Scribd Inc.,* 97 F.Supp.3d 565 (D. Vt. 2015); *Gil v. Winn-Dixie Stores, Inc.,* 257 F.Supp.3d 1340 (S.D. Fla. June 12, 2017).

[5] See *March 6, 2014, DOJ Consent Decree with HRB Digital LLC and HRB Tax Group Inc., subsidiaries of H&R Block Inc., to remedy alleged violations of the Americans with Disabilities Act (ADA); Nov. 17, 2014, DOJ Settlement Agreement with Ahold U.S.A. Inc. and Peapod LLC, the owners and operators of www.peapod.com(link is external), to remedy alleged violations of the Americans with Disabilities Act (ADA); April 2, 2015 DOJ Settlement Agreement with edX Inc. (edX), to remedy alleged violations of the Americans with Disabilities Act (ADA).*

[6] https://www.gpo.gov/fdsys/pkg/FR-2017-01-18/pdf/2017-00395.pdf