

## Insights

### Website Compliance with the ADA: Is Your Company Compliant With the Latest DOJ Guidance?

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While commercial businesses are typically aware of their responsibilities under the Americans with Disability Act (the “ADA” or the “Act”) relative to the maintenance of their physical office spaces and general corporate policies, some businesses have been the recipients of demand letters alleging violations of the ADA based on a purportedly non-compliant website. Financial institutions in particular, as well as other businesses that maintain significant operations through online customer portals, have been the primary focus of these efforts.

On March 18, 2022, the U.S. Department of Justice (“DOJ” or “Department”) published new guidance on website accessibility under the ADA. Given the DOJ’s stated position that “the ADA’s requirements apply to all goods, services, privileges, or activities offered by public accommodations, including those offered on the web,”<sup>1</sup> businesses should review their websites for compliance with the Department’s new guidance.

#### **Background on 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 II of the ADA prohibits discrimination on the basis of disability in terms of access to the services, programs, and activities of state and local governments. 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 DOJ is responsible for promulgating regulations under the ADA, other than certain provisions dealing specifically with transportation.<sup>2</sup>

The DOJ’s guidance on website accessibility has been many years in the making. In 2010, the Department issued its 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” (the “2010 ANPRM”). See 75 FR 43460 (July 26, 2010). The 2010 ANPRM announced that the Department was considering revising the regulations implementing Titles II and III of the ADA to establish specific requirements for state and local governments and public accommodations to make their websites accessible to individuals with disabilities, and further sought information regarding what, if any, standards it should adopt for web accessibility. The Department also requested feedback on the anticipated costs of making websites accessible, and any available alternatives to mandating web accessibility. In 2015, after reviewing comments filed in response to the 2010 ANPRM, the DOJ announced that it intended to pursue separate rulemaking with respect to web accessibility under Title II and Title III,<sup>3</sup> and that any Title III proposal

would be delayed as a result.

### **What is the Standard for a Title III Violation under the ADA?**

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.”<sup>4</sup> 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” has been the subject of differing interpretations by the courts that have been presented with this issue.

### **Can a “Place of Public Accommodation” Be Something Other than a Physical Place?**

Many courts<sup>5</sup> that decided this issue before the DOJ released its guidance on website accessibility had held that a public accommodation must include a physical place for a Title III claim to proceed. Other courts<sup>6</sup> had looked to whether there was a “nexus” between the website in question and a physical place of public accommodation. However, many of these cases were decided before the explosion of e-commerce – particularly the e-commerce boom in a post-COVID-19 landscape. And the validity of those prior court rulings is in question given the DOJ’s new guidance on the matter.

The DOJ’s new guidance does provide “[e]xamples of businesses open to the public,” including:

- Retail stores and other sales or retail establishments;
- Banks;
- Hotels, inns, and motels;
- Hospitals and medical offices;
- Food and drink establishments; and
- Auditoriums, theaters, and sports arenas.<sup>7</sup>

Although the DOJ’s examples focus on places that typically have a physical location in addition to a website, it does not appear that the Department will necessarily insist on a physical location for a website to be deemed subject to Title III of the ADA – as some courts have done. As the DOJ observes, “[i]n recent years, a multitude of services have moved online and people rely on websites like never before for all aspects of daily living.”<sup>8</sup>

Hence, “the Department has . . . taken the position that the ADA’s requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web.”<sup>9</sup> This broader approach would be consistent with the DOJ’s filing in *National Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012), wherein the Department filed a Statement of Interest brief that websites are within the scope of Title III protection.

Even before the DOJ’s recent guidance on website accessibility, the Seventh Circuit Court of Appeals – which encompasses federal courts in Indiana – refused to interpret the word “public accommodation” literally, as only “denoting a physical site, such as a store or a hotel[.]”<sup>10</sup> In the Seventh Circuit’s view, “[a]n insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to

sell furniture to a disabled person who enters the store. . . . The site of the sale is irrelevant to Congress's goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public." Id. It would seem that the Seventh Circuit's approach to website accessibility under Title III of the ADA was ahead of its time and would be in line with the DOJ's new guidance on the subject.

### **What Are Some Examples of Website Accessibility Barriers?**

In its new guidance, the DOJ offers several examples of website accessibility barriers that are problematic under the ADA. Some of those examples include:

- **Poor color contrast in text**, which can make it difficult for people with limited vision or color blindness to read (e.g., light gray text on a light-colored background).
- **Use of color alone to give information**, which people who are color-blind cannot read or ascertain (e.g., using red text alone to show which fields are required on a form).
- **Lack of text alternatives ("alt text") on images**, such that people who are blind cannot understand the content and purpose of pictures, illustrations, and charts.
- **No captions on videos**, which people with hearing disabilities may not be able to understand.
- **Inaccessible online forms**, which people with disabilities may not be able to understand if they do not convey clear instructions or error indicators telling the user a form field is missing or incorrect.<sup>11</sup>

### **How Do Businesses Ensure Their Websites Are Accessible under the ADA?**

Despite its new guidance, the DOJ has not promulgated any regulations setting out detailed standards for website accessibility as it has for other aspects of accessibility under Title III of the ADA. Thus, businesses have some flexibility as to how they will ensure that the programs, services, and goods they provide online are accessible to people with disabilities. The Department has identified a number of existing technical standards adopted by other bodies that may assist in ensuring the accessibility of website features. Those standards include the **Web Content Accessibility Guidelines (WCAG)** and the **Section 508 Standards**. The WCAG are a set of highly technical guidelines published by the Web Accessibility Initiative of the World Wide Web Consortium. The Section 508 Standards are a set of highly technical standards published by the U.S. Access Board addressing access to information and communication technology under Section 508 of the Rehabilitation Act of 1973. Although businesses have flexibility in how they comply with the ADA's general prohibition against discrimination in the presentation of their websites, the DOJ has made it clear that such businesses "must ensure that the programs, services, and goods that they provide to the public – including those provided online – are accessible to people with disabilities."<sup>12</sup> Thus, businesses would be well advised to review their websites and take any necessary precautions to bring their websites into compliance with the Department's new guidance.

Unfortunately, there are many areas that the DOJ's new guidance does not address, leaving open questions that may make it difficult for businesses to navigate these website accessibility compliance issues. For example, the WCAG has adopted several versions of its technical compliance standards. The DOJ does not specify which standards will make a website "compliant" under Title III of the ADA. Moreover, Title III of the ADA allows departure from a requirement that would cause an "undue burden" – i.e., a significant difficulty or expense if carried out. Absent guidance from the DOJ, what constitutes an "undue burden" in the context of website accessibility will likely be litigated in the courts. Similarly, as noted above, a business can make "reasonable modifications" of policies, practices or procedures or provide auxiliary aids and still be compliance with Title III of the ADA. The DOJ's new guidance does not say, for example, whether providing an alternative toll-free number is permissible in lieu of an accessible website. Again, what constitutes "reasonable

modifications” in the context of website accessibility will likely be litigated in the courts as well.

Krieg DeVault is closely monitoring developments in this area of law, and is able to assist with any questions you may have on this issue.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] U.S. Department of Justice, Guidance on Web Accessibility and the ADA, March 18, 2022. <https://beta.ada.gov/web-guidance/>.

[2] 42 U.S.C. § 12134; 42 U.S.C. § 12186(b).

[3] See Department of Justice – Fall 2015 Statement of Regulatory Priorities, available by clicking here.

[4] 42 U.S.C. § 12182(a).

[5] See, e.g., Janick v. Redbox Automated Retail, LLC, 2014 WL 1920751 (C.D. Cal. 2014); Access Now, Inc. v. Southwest Airlines, Co., 227 F.2d 1312 (S.D. Fla. 2002); Ouellette v. Viacom, 2011 WL 1882780 (D. Mont. 2011); Ford v. Schering-Plough Corp., 145 F.3d 601 (3d Cir. 1998); Parker v. Metro Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997); Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 1999).

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[7] U.S. Department of Justice, Guidance on Web Accessibility and the ADA, March 18, 2022. <https://beta.ada.gov/web-guidance/>.

[8] U.S. Department of Justice, Guidance on Web Accessibility and the ADA, March 18, 2022. <https://beta.ada.gov/web-guidance/>.

[9] U.S. Department of Justice, Guidance on Web Accessibility and the ADA, March 18, 2022. <https://beta.ada.gov/web-guidance/> (emphases added).

[10] See Morgan v. Joint Admin. Bd., Retirement Plan of Pillsbury Co., 268 F.3d 456, 459 (7th Cir. 2001).

[11] U.S. Department of Justice, Guidance on Web Accessibility and the ADA, March 18, 2022. <https://beta.ada.gov/web-guidance/>.

[12] U.S. Department of Justice, Guidance on Web Accessibility and the ADA, March 18, 2022. <https://beta.ada.gov/web-guidance/>.