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Careful, Your Website is Showing! Retailers Should Start Preparing for Website Accessibility Class Actions

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Retailers have been the predominant targets of a recent wave of demand letters claiming that their websites and mobile applications unlawfully discriminate against disabled customers. These demands come on the heels of the Department of Justice's (DOJ) confirmation that, in 2018, it will propose accessibility standards for private businesses, based on the accessibility standards it has already proposed for public entities. Even with two months left in the year, 2016 has already seen more single-plaintiff and class action lawsuits actually filed against retailers on this issue than ever before. In the face of an increasingly active plaintiffs' bar, any retailer with a commercial website or mobile application—especially those operating in California, New York, or Pennsylvania, where the majority of these suits have been filed—should take notice and prepare accordingly.

Title III of the Americans With Disabilities Act (ADA)

Title III of the ADA prohibits discrimination against persons with disabilities in "places of public accommodation"—a term originally construed to mean brick and mortar establishments like stores, restaurants, movie theaters, hospitals, and schools open to the general public. As the Internet has grown increasingly important to everyday life and commerce, however, plaintiffs have insisted that websites count among covered "places of public accommodation" as well.

Courts have varied in their approach to handling this influx of litigation. In the Ninth Circuit (which includes California), websites are not considered places of public accommodation unless there is a sufficient nexus between the online goods and services and a qualifying brick and mortar location. For example, the Northern District of California

has held that Target's website is a place of public accommodation because the same goods are sold online and in its physical stores, *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 954 (N.D.Cal.2006), while Facebook, which does not provide any of its services out of a physical location open to the public, is not. *Young v. Facebook, Inc.*, 790 F.Supp.2d 1110, 1114–16 (N.D.Cal.2011). The Third, Sixth, and Eleventh Circuits (which include states such as Pennsylvania, New Jersey, Michigan, and Florida) have similarly required at least a nexus to a physical location open to the public to qualify an enterprise as a place of public accommodation. Meanwhile, the First, Second, and Seventh Circuits (which include states like New York and Illinois, among others) have concluded that non-physical enterprises, including websites, may be places of public accommodation without this limitation.

The Department of Justice's Anticipated 2018 Regulations

The DOJ has taken the position—which courts may consider but are not yet required to adopt—that commercial websites are generally subject to Title III, regardless of a nexus to a physical place of public accommodation. Consistent with this position, the DOJ issued an Advanced Notice of Proposed Rulemaking in 2010 announcing plans to issue proposed regulations to Title III setting standards of accessibility for public accommodations' websites. Those proposed regulations are widely expected to be consistent with the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG 2.0 AA), which advocacy organizations have described as the minimum standards for how a website or mobile application should be coded and arranged to ensure it is accessible to the disabled, including primarily the visually and hearing

impaired. Indeed, subject to potential exceptions for smaller entities or particular types of content, the DOJ indicated this summer that it plans to adopt the WCAG 2.0 AA standards wholesale in the Title II regulations that will soon govern public entities, and which the DOJ has confirmed will form the framework of its proposed regulations for Title III. The WCAG 2.0 AA standards are too numerous and complex to exhaust here, but include, for example:

- Alternative text for images compatible with screen-reading software
- The ability to navigate the website using a keyboard instead of only a mouse
- Logical and consistent use of headings for ease of navigation
- Closed captioning and sign language interpretation for audio features
- Alternative audio description for video features
- Not using color as the only visual means of conveying information, indicating an action, or prompting a response
- Text that generally has a contrast ratio of at least 4.5:1
- Limitations on flashing content which may cause seizures

Although the DOJ's proposed Title III regulations have been delayed until 2018, this has not prevented plaintiffs from pursuing litigation in the meantime. To the contrary, plaintiffs' attorneys appear to be leveraging the current uncertainty of this landscape to seek expedited settlements, including not only injunctive relief but also damages and attorneys' fees.

What is the Potential Exposure for Non-Compliance?

Businesses sued for website inaccessibility face significant exposure. Plaintiffs who prevail in a Title III suit are entitled to injunctive relief and attorneys' fees. ADA suits are often also accompanied by claims under applicable state law counterparts, such as California's Unruh Act and Disabled Persons Act that impose significant statutory damages for every violation (\$4,000 per violation or actual damages in California).

Because approximately half of the lawsuits being filed on this issue are class actions, these numbers—to say nothing of defense costs—can add up quickly. The seminal 2006 case of *National Federation of the Blind v. Target Corp.*, for example, was the first to certify a class action to enforce Title III and related state laws against an online merchant. In 2008, the court approved a class settlement for \$6 million and awarded over \$3.7 million in attorneys' fees.

Recommended Action Steps

It may be tempting to wait for the DOJ's regulations before working to perfect website compliance. Getting a website up to speed can be time-consuming, however, and may require working with an attorney and a web-design consultant. Online retailers and service providers should get a head start now.

While expensive, many businesses may find that improving their website's accessibility early will not only mitigate exposure, but will make good business sense, as well. Indeed, experts estimate that nearly 220 million Americans will regularly shop and do other business online in the coming year. Statistically, around 20 million of those shoppers will have at least some visual or hearing impairment. With coding that makes their online storefronts more accessible, retailers may ensure that their goods and services offered online are not out of these customers' reach.

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