

Navigating Website Accessibility under Title III of the Americans with Disabilities Act

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The trend toward conducting business online has gained even stronger momentum as the economy continues to adapt to the challenges of the COVID-19 pandemic. But an increased digital presence carries the potential for increased legal risk. Witness the wave of lawsuits filed over the past decade by individuals with disabilities challenging not just physical accessibility to places of business, but also the accessibility of businesses' websites under Title III of the Americans with Disabilities Act (ADA). Some examples include a blind individual suing a business whose website content is inaccessible to screen-reading software or a deaf individual seeking redress because the audio content of the website lacks subtitles or closed captioning.

A business seeking to take a proactive approach to managing legal risk relating to its digital presence faces the additional challenge that the question of to what extent, if any, businesses must ensure their websites (or other digital platforms, such as mobile applications) are accessible under the ADA has not been definitively answered by lawmakers, regulators, or the courts.

Title III of the ADA

The ADA is a federal statute that prohibits discrimination against disabled individuals in major areas of public life, among them employment (Title I of the act), public services (Title II), and public accommodations (Title III). This article deals solely with issues relating to public accommodations as covered under Title III.

Title III 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.”[1] Actionable discrimination occurs when a public accommodation fails to take the “necessary” steps to ensure that “no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services.”[2] A public accommodation does not need to provide any particular auxiliary aid or service if doing so would fundamentally alter the nature of the goods or services being offered or result in an “undue burden” (i.e., significant difficulty or expense).[3]

Is a website a place of public accommodation under the ADA?

Neither Title III of the ADA nor its implementing regulations expressly define “public accommodation” to include websites or other intangible spaces; instead, the act and regulations list 12 different types of physical locations to illustrate the meaning of the term, including as examples of those types, restaurants, brick-and-mortar retail stores, professional services establishments, and travel services. Although the Department of Justice, the agency tasked with enforcing the ADA, has, for two decades, consistently interpreted the ADA to apply to the websites of public accommodations, the agency has declined to issue regulations reflecting that position. To further confuse matters, the federal circuit courts that have addressed the issue of whether websites are public accommodations that must be accessible under Title III are split in their interpretation of the statute.

Courts in the Third, Sixth, Ninth, and Eleventh Circuits have held that websites (and other intangible spaces) are not *per se* “public accommodations,” reasoning that the plain language of the statute and the regulations includes only physical, “brick-and-mortar” establishments in the definition of the term and that the statute protects only the “full and equal enjoyment of goods and services” offered at such physical locations.[4] Many courts within the aforementioned jurisdictions have gone so far as to conclude that a business that operates only online would not be covered by Title III.

Other federal courts, including those in the First, Second, and Seventh Circuits, have interpreted Title III to include as “public accommodations” providers of services that do not require a consumer to physically enter an actual physical location, reasoning that inclusion of such businesses as “travel services” in the statutory list of covered entities plainly suggests that legislators intended to include service providers who conduct business by telephone, correspondence, or the like. These courts opine that limiting the application of Title III to physical structures that consumers must enter to obtain goods and services would be contrary to the purposes of the ADA and Congress’ intent to ensure that individuals with disabilities fully enjoy the goods and services available to other members of the general public.

Moreover, even in some jurisdictions where a website is not deemed to be a place of public accommodation, the ADA-violation inquiry does not end there. For example, in finding that a grocery store’s website was not a covered place of accommodation, the Eleventh Circuit (*Gil v. Winn-Dixie*) noted that its determination was based, in part, on the fact that the website in question was not the point of sale but was merely one way of arranging for in-store pickup of existing prescriptions. The court drew an important distinction between the facts in *Gil* and the situation where a company’s website provides the sole or primary point for individuals to access the goods, services, or privileges on offer at a physical location. In which case, website inaccessibility would constitute an impermissible “intangible barrier” to individuals with a disability seeking to avail themselves of the business’ goods or services and, therefore, violates Title III.[5]

The takeaway?

Given the lack of clear regulatory guidance or consensus among the federal courts, lawsuits challenging website accessibility are unlikely to end any time soon. Achieving clarity on ADA obligations may ultimately require the Supreme Court to resolve the split among the federal circuits or for Congress to amend the act. Add to the mix various state and local laws that are not addressed in this article, many of which more clearly include websites as public accommodations. As a result, a business operating in multiple states will want to ensure that its website complies with the most stringent applicable law.

So, what should businesses do to protect themselves from potential liability? There is no one-size-fits-all answer; rather, each business may need to take different steps depending, among other things, on its size and financial resources, geographical location(s), the types of services it offers, and the extent access to its services is facilitated by its website. A prudent first step might be to check with your IT vendor, web developer, or other IT professional to ascertain whether your website already meets generally recognized standards for website accessibility.[6] If not, or if you have any questions or concerns about whether your website is ADA-compliant, the better course of action would be to consult with legal counsel or a qualified accessibility consultant who can provide advice that is tailored to your business and that takes into account applicable state and local law, as well as developments in ever-changing case law under the ADA.

Notes

[1] 42 U.S.C. § 12182(a).

[2] *Id.* at § 12182(b)(2)(A)(iii).

[3] 28 C.F.R. § 36.303(f).

[4] See, e.g., *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997).

[5] See, e.g., *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

[6] The Web Content Accessibility Guidelines (“WCAG”) 2.0, which was supplemented by WCAG 2.1 in June 2018, is typically touted as the general standard for website and mobile application accessibility. See *Web Content Accessibility Guidelines (WCAG) 2.0*, <https://www.w3.org/TR/WCAG20/> (last accessed September 21, 2021).

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