

U.S. Department of Justice Further Delays ADA Title III Rulemaking on Website Accessibility

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On Nov. 19, the federal government released its Fall Semiannual Regulatory Agenda. The U.S. **Department of Justice (DOJ)** has moved its anticipated rulemaking regarding website accessibility under **Title III** of the **Americans with Disabilities Act (ADA)**, which pertains to places of public accommodation, to the “long-term action” list. Meanwhile, DOJ also announced that it expects to issue its title II Notice of Proposed Rulemaking (NPRM) on website accessibility in January 2016. In the accompanying Statements of Agency Priorities, DOJ states that it “believes that the title II web site accessibility rule will facilitate the creation of an important infrastructure for web accessibility that will be very important in [DOJ’s] preparation of the title III web site accessibility NPRM.” DOJ further indicated that it expects to publish the title III website accessibility NPRM during fiscal year 2018. (In its Spring Semiannual Regulatory Agenda, DOJ had delayed its title III NPRM from June 2015 until April 2016.)

Notwithstanding this further delay of DOJ’s title III web accessibility NRPM, the agency continues to enforce requirements for web site accessibility on entities subject to title III, as well as those subject to title II. It has entered into settlement agreements with a wide variety of entities requiring those entities to make both their websites and their mobile applications accessible. These settlements typically also impose requirements for ongoing testing and reporting to DOJ, retention of an independent accessibility consultant to assist in making the websites and mobile applications accessible, adoption of an accessibility policy specifically addressing website and mobile application accessibility, designation of a website accessibility coordinator, and annual training of website content personnel. Sometimes, the settlements also require payment of compensation to complainants, as well as civil penalties. Currently, DOJ may impose a civil penalty up to \$75,000 for a

first violation, and up to \$150,000 for a subsequent violation.

Additionally, in June 2015, DOJ filed statements of interest in lawsuits filed by the National Association of the Deaf against Harvard University, 3:15-cv-30023 (D. Mass.), and the Massachusetts Institute of Technology, 3:15-cv-30024 (D. Mass.), regarding those entities' online programming, in which it opposed those entities' motions for the court to either stay or dismiss the litigation pending DOJ's completion of its web accessibility rulemakings. Specifically, DOJ contended that the court need not await completion of the rulemakings, as existing law (the obligation to provide effective communication) already requires such content to be accessible. Decisions in the both cases are still pending.

Federal courts that have previously addressed the issue of whether title III of the ADA applies to websites have differed with respect to whether title III applies just to physical places of public accommodation, extends only to those websites that have "some nexus" to a physical place of public accommodation, or encompasses websites of entities operating solely online that otherwise fall within one of the twelve enumerated categories of places of public accommodation. Despite this split case law, claims by private parties challenging the accessibility of websites are increasing.

Accordingly, entities subject to either title II or title III of the ADA are well-advised to proactively address the accessibility of their websites.

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