

DOJ Delays ADA Regulations For Accessibility Of Private Websites To 2018

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As litigation continues to surge, private businesses await clarity on whether access to people with disabilities under **Title III** is required for websites.

Claims that websites are inaccessible to persons with hearing and visual impairments date back over a decade. These claims used to be few in number, and most were resolved prior to litigation with little publicity. But starting in 2014, such claims surged dramatically, and the pace has only increased in 2015.

Clients in the retail, e-commerce, financial services, technology, and other industries are now, with increasing frequency, receiving threats of class action litigation over allegedly inaccessible websites from disability rights advocacy groups, plaintiffs' lawyers, and the **US Department of Justice (DOJ)**. In some cases there is not even a threat, just the reality of a federal court complaint. Indeed, in the past six months, more than a dozen Title III class actions have been filed across the country alleging website inaccessibility and, in many cases, related claims of breach of privacy.

Companies welcomed the anticipated clarity of proposed regulations that DOJ promised it would issue in Spring 2016 (in the **Americans with Disabilities Act (ADA)**, Congress authorized DOJ to issue regulations interpreting Titles II and III). But now, just months prior to that target date, DOJ has announced that it will not finalize regulations to explain what constitutes accessible website content for public accommodations in the private/non-government sector until fiscal year 2018 at the earliest. DOJ's decision to delay for two more years comes at a time when businesses in all industries, along with their engineers, website designers, and other IT professionals and vendors could benefit from

concrete guidance and a reasonable time frame for compliance.

DOJ's view is that Title III of the ADA, which applies to "places of public accommodation," requires all private businesses to make their Internet websites accessible to consumers with disabilities, regardless of whether the business operates an actual, physical "place" open to the public. DOJ initiated rulemaking concerning website accessibility in 2010 with an Advanced Notice of Proposed Rulemaking. Since then, however, DOJ has repeatedly set (and pushed back) release dates for the final Notice of Proposed Rulemaking (NPRM) concerning this issue.

DOJ did not explain its previous delays. This time, however, it provided a reason: DOJ wants to issue its web accessibility NPRM applicable to entities subject to Title II of the ADA (government agencies and contractors) before it moves forward on private businesses under Title III. DOJ believes that the Title II rulemaking "will facilitate the creation of an important infrastructure for web accessibility that will be very important" for the Title III web accessibility rulemaking. The Title II NPRM is expected in early 2016.

Meanwhile, DOJ has made it increasingly clear over the last five years that it considers a website "accessible" if it complies with the Level AA standards of the Web Content Accessibility Guidelines (WCAG) 2.0. Notwithstanding its stalled regulations, DOJ has actively enforced that view through investigations, settlements and consent decrees, and court filings. DOJ has also been involved in private litigation over the applicability of WCAG 2.0 Level AA guidelines. In June 2015, for example, DOJ filed statements of interest in two lawsuits alleging that two private universities are required under Title III of the ADA to make online programming accessible to students with disabilities. Thus, there is no indication that DOJ will scale back these efforts between now and 2018.

Nor are advocacy groups or the plaintiffs' bar retreating from litigation. While there is no binding law from any federal Court of Appeals that supports these claims, DOJ's delay could encourage these groups to resort to litigation to establish that Title III applies to all websites, and that WCAG 2.0 Level AA is the law, despite DOJ explicitly stating that it will issue standards at a later date.

Advocacy groups like the National Federation of the Blind have had some limited success on this issue,^[1] while other courts, including the Ninth Circuit Court of Appeals, have held that a website that is unconnected to any physical place is not subject to Title III.^[2] Given all the current litigation and the uncertainty regarding whether there will be standards or guidelines issued by DOJ, it will likely be up to the Supreme Court or Congress to ultimately resolve the dispute.

Meanwhile, businesses and other organizations should consider assessing their websites to determine whether they meet WCAG 2.0 Level AA standards and comply with relevant privacy laws, and should consult with counsel if they receive a demand letter or complaint.

[1] See, e.g., *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (holding the website of a web-only business is subject to Title III)

[2] See, e.g., *Earll v. eBay, Inc.*, 599 Fed. App'x 695 (9th Cir. 2015). See also our April 2015 LawFlash "Ninth Circuit Holds That ADA is Applicable Only to 'Actual, Physical Place.'"

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