CARLTON FIELDS

Does Your Company Website Violate the ADA?

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The Americans with Disabilities Act (ADA) is most commonly thought of as prohibiting workplace discrimination against individuals with disabilities and requiring the elimination of physical barriers to public locations. But a recent wave of litigation presents a less obvious application of the ADA that may have a far broader impact: the potential application of the ADA to websites. Before discussing the recent litigation, we briefly address two threshold questions (1) does the ADA apply to websites at all; and (2) if so, by what standards would a website's ADA compliance be gauged? **Does the ADA Apply to Websites?** Neither the ADA nor its implementing regulations expressly refer to websites or provide any standards for web accessibility. The Department of Justice (DOJ) announced it intends to adopt web accessibility regulations under the ADA. This rulemaking has been repeatedly delayed, and the Department recently announced it does not plan to issue a notice of proposed rulemaking until 2018. Absent any express statutory or regulatory requirements, there remains an open question as to whether the ADA's existing language applies to websites. The most important provision of Title III of the ADA provides "[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." 42 U.S.C. § 12182(a). The few courts to address whether websites are "public accommodations" have reached inconsistent results. The decisions fall into three general

categories:

1. Websites are not "public accommodations." *E.g. Jancik v. Redbox Automated Retail, LLC*, SACV 13-1387-DOC, 2014 WL 1920751, at *8 (C.D. Cal. 2014); *Access Now, Inc. v. Sw. Airlines, Co.,* 227 F. Supp. 2d 1312, 1317 (S.D. Fla. 2002).

2. Websites with some nexus to a physical location, such as the website for a retailer with brick-and-mortar locations, are "public accommodations." *E.g. Nat'l Fed'n of the Blind v. Target Corp.,* 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

3. Websites providing web only services with no connection to a physical location are "public accommodations." *Nat'l Ass'n of the Deaf v. Netflix, Inc.,* 869 F. Supp. 2d 196, 200 (D. Mass. 2012).

The DOJ has taken the position that the existing language in the ADA *does* apply to websites. For example, in one lawsuit, the DOJ said it "has long considered websites to be covered by title III despite the fact that there are no specific technical requirements for websites currently in the regulation or ADA Standards." Statement of Interest of the United States of America, DE 19, Case No. 1:14-cv-20574-UU (S.D. Fla. Apr. 10, 2014). Against this backdrop, there is no clear answer regarding the application of the ADA's "public accommodation" language to websites. However, note these important points: (1) the DOJ believes the general prohibition governs websites and courts are likely to afford this interpretation substantial deference; (2) to the extent a website has a nexus to a brick-and-mortar location, it is more likely to be considered a "public accommodation" and thus subject to the ADA; and (3) potential plaintiffs are able to select jurisdictions that are likely to resolve this threshold question in their favor. **Web Accessibility Standards** Assuming the ADA applies to a particular website, the next question is the standards by which the website's compliance with the ADA should be judged? As noted above, no federal statutes or regulations expressly address web accessibility for individuals with disabilities. Consequently, as with the uncertainty as to the ADA's applicability to websites in the first place, it is also unclear how compliance would be assessed. One possible candidate is a set of standards adopted by the United States Access Board, a federal agency that coordinates polices related to individuals with disabilities, with respect to websites maintained by other federal agencies. These standards are known as the Section 508 Standards based on the statute under which they were promulgated. Another option is a set of standards created by the World Wide Web Consortium, an international organization that promotes the growth and accessibility of the Internet. These standards are called the Web Content Accessibility Guidelines and are broadly thought to be most likely source of the federal regulations that the DOJ will ultimately adopt. Both the Sections 508 Standards and the Web Content Accessibility Guidelines provide detailed technical standards with which websites should comply to ensure access to individuals with disabilities. For example, one of the standards of the Web Content Accessibility Guidelines provides "[a]ll non-text content that is presented to the user has a text alternative that serves the equivalent purpose." A possible application of this standard is that a visually impaired individual may be unable to view a YouTube video embedded in a website, but if the website provides a text description of the video, the individual could use text-to-speech software to

have the text description read aloud. **Recent Litigation** While the question of the ADA's potential applicability to websites is not new, recent litigation has brought it into sharper focus. In 2014, a law firm with a history of pursuing ADA accessibility litigation, began filing lawsuits on behalf of visually impaired plaintiffs against various entities based on allegations that their websites failed to comply with the Web Content Accessibility Guidelines and thus violated the ADA. Related to these lawsuits, the law firm also sent demand letters, thought to number in the dozens or hundreds, to entities alleging that their websites violate the ADA. Most of these lawsuits were filed in the Western District of Pennsylvania and have been consolidated into one action with the case style *Jahoda v. Foot Locker*, No. 2:15-cv-01000-AJS. Almost all of the defendants in the consolidated action are large retailers, but others include banks, hotels, and restaurants. Based on a recent review of the docket, it appears that most defendants have reached settlement agreements, and it is unclear whether any defendant intends to litigate the case, which would require the court to resolve the threshold questions addressed in this article. **Suggested Guidance** While delayed, it appears near certain that the DOJ will ultimately adopt regulations governing web accessibility for disabled individuals, and it likely that the regulations will be based on, or similar to, the Sections 508 Standards or the Web Content Accessibility Guidelines. Until guidelines are formally adopted, it remains an open question whether and to what extent the ADA's general "public accommodation" applies to websites. But for both legal and public relations reasons, companies are well-advised to conform their websites to the existing standards. Additionally, the analysis in this article is likely not limited to websites and would also apply to apps and other technological platforms. A company that receives a demand similar to the one described above must decide how to proceed and evaluate whether it is worth contesting the case given potential negative press and an adverse decision. It may be better to retain a law firm to advise as to steps to take now to assure your company's website substantially complies with existing web accessibility standards and the anticipated DOJ regulations. *Adam Schwartz is a shareholder with Carlton Fields in Tampa. His practice primarily focuses on the defense and investigation of civil qui tam whistleblower claims and white collar criminal defense. Jonathan DeSantis is an associate with Carlton Fields in Tampa. His practice focuses on corporate trial practice and complex commercial litigation. Both authors advise entities on the potential applicability of the Americans with Disabilities Act to websites.*

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