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# ***FAST BREAK:*** **ADA ACCOMMODATION** **COMPLIANCE**

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# ADA Title III Litigation Trends

- Litigation under Title III of ADA continues to spike.
  - Increase in complaints by 16% last year
- Main areas of litigation:
  - Accessibility of websites
  - Accessibility of technologies within facilities
  - Accessible parking and common areas
  - Accessible equipment
  - Training of staff, particularly in smaller facilities
- Claims under similar state public accommodations laws likewise are increasing.

# Lawsuits Involving Websites

- Continuing trends from the past couple of years, private litigants have filed hundreds of website accessibility lawsuits in the past year, including class actions.
- It is likely that hundreds of other companies have received demand letters threatening lawsuits over website accessibility.
- More website lawsuits were filed in New York than in any other state, followed by Florida, Pennsylvania, and Virginia.
- Last week five hospitals and health care companies were sued in New York for their websites.

# Courts Are Split on ADA Coverage for Websites Not Connected to a Physical Place

- In 2015, the Ninth Circuit in *Earll v. eBay* held that eBay.com, a website not connected to any physical place, is not a “place of public accommodation” subject to the accessibility requirements of Title III of the ADA.
- In an example of a contrary view, in 2015, in *National Federation of the Blind v. Scribd*, a District of Vermont federal judge held that the web-only business Scribd is subject to suit under Title III because its digital library subscription services are alleged not to be accessible to people with vision impairments, notwithstanding the absence of any physical place where Scribd sold its products and services.
- Other courts are split, but more seem to follow the *Scribd* decision.

# W3C Web Content Accessibility Guidelines

- The W3C's Web Content Accessibility Guidelines ("WCAG") 2.0 became an International Organization for Standardization ("ISO") standard in October 2012.
- WCAG provides three levels of compliance, in increasing order of accessibility and usability for people with disabilities: A, AA, and AAA.
- Levels A and AA are considered mandatory, while AAA covers many "nice to have" practices that enhance usability.
- For some time, the DOJ was widely expected to issue new regulations requiring websites and mobile applications to comply with the WCAG 2.0, Level AA.
- However, in July 2017, the government indefinitely postponed issuing website accessibility regulations.

# W3C Web Content Accessibility Guidelines

- Yet some courts have required defendants to comply with WCAG 2.0:
  - In *Gil v. Winn Dixie Stores, Inc.* (June 2017), the Southern District of Florida issued an injunction requiring the defendant to ensure that its website conforms to the WCAG 2.0.
  - In *Andrews v. Blick Art Materials, LLC* (Dec. 2017), the Eastern District of New York approved of a website accessibility settlement agreement and stated that it determined that WCAG 2.0, Level AA was the appropriate standard to determine compliance with the ADA's accessibility requirements.
  - In *Frazier v. E.L.I. Trading Inc.* (Jan. 2018), the Western District of Pennsylvania issued an injunction requiring the defendant to retain a consultant to make its website compliant with the WCAG 2.0, Level AA standards, conduct training, and conduct monthly testing for two years; and allowing plaintiff's counsel to monitor the website for two years and recover monitoring costs.

# Courts Continue to be Divided on the Effect of the Absence of Website Regulations

- Several litigants have argued that there is no requirement that websites comply with the ADA in the absence of any regulations on accessibility standards for websites from any agency.
- A court in California accepted the argument and dismissed a case alleging that a website was not accessible. The court held that the defendant's due process rights would be violated if its website was found to be in violation of the ADA in the absence of regulations and technical assistance from the DOJ.
- However, most courts have rejected this, including courts in Massachusetts, New York, Pennsylvania, and California, stating that the ADA requires that websites be accessible, regardless of whether there are any regulations.

# Voluntary Action Plan Recommendations

- Establish a policy that your Web pages will be accessible and create a process for implementation.
- Ensure that all new and modified Web pages and content are accessible:
  - Check the HTML of all new Web pages. Make sure that accessible elements are used, including alt tags, long descriptions, and captions, as needed.
  - If images are used, including photos, graphics, scanned images, or image maps, make sure to include alt tags and/or long descriptions for each.
  - If you use online forms and tables, make those elements accessible.
  - When posting documents on the website, always provide them in HTML or a text-based format (even if you are also providing them in another format, such as Portable Document Format (PDF)).



# Voluntary Action Plan Recommendations

- Develop a plan for making your existing Web content more accessible. Encourage input on improvements, including which pages should be given high priority for change. Consider making the more popular Web pages a priority. (This has generally been interpreted as a minimum of the 20 most-popular Web pages.)
- Ensure that in-house staff and contractors responsible for Web page and content development are properly trained. This can include IT, Patient Relations, and others.
- Provide a way for visitors to request accessible information or services by posting a telephone number, chat room, or email address on your home page. Establish procedures to ensure a quick response to users with disabilities who are trying to obtain information or services in this way.

# Challenges to Technology Within Facilities

- As new technologies emerge, plaintiffs are challenging the accessibility of that technology and trying to extend the ADA to cover it.
- Many of the challenges are from blind or visually impaired individuals or advocacy groups.
- Affected technologies include:
  - Touch screen kiosks and iPads, such as ordering screens at a hospital cafe
  - POS devices, such as at a hospital gift shop
  - Vending machines, including Coca-Cola Freestyle machines

# DOJ ADA Title II and III Activity 2017-2018

- Recent Title II and III activity by the DOJ includes investigations (and related settlements) of architectural barriers; policies, practices and procedures to ensure equal access for customers with service animals; accessible audio and written communications to customers; and wheelchair accessible transportation services.
  - In 2017, the DOJ entered into a settlement and compliance agreement with a health care system in Illinois over allegations of discrimination against a patient with HIV.
  - In 2017, the DOJ brought a complaint against and settled a case against a health care system for failing to provide sign language interpreters for deaf patients.

# Priority Areas for ADA Accessibility

- Parking lots and garages
- Accessible approaches and entrances
- Access to goods and services
- Access to restrooms

# Barrier Removal for Parking Lots and Garages

- Checklist for parking compliance includes:
  - Adequate number of accessible parking spaces
  - Proper dimensions of accessible spaces and access aisles
  - Proper slope of accessible spaces and access aisles
  - Proper signage
  - Designation of appropriate number of van accessible spaces

# Special Parking Requirements for Health Care Facilities

- 10% of patient and visitor parking spaces provided to serve hospital outpatient facilities shall be accessible
- 20% of patient and visitor parking spaces provided to serve rehabilitation facilities specializing in treating conditions that affect mobility and outpatient physical therapy facilities shall be accessible

# Developments in Accessible Parking Cases

- Lawsuits alleging accessible parking violations under the ADA and state laws continue to be filed for both single-location claims and class action claims following a class action ruling that favored plaintiffs, including against large health care organizations.
- In *Heinzl v. Cracker Barrel Old Country Store, Inc.* (W.D. Pa. 2016), the court certified a class of all persons with mobility disabilities who encountered barriers in Cracker Barrel's parking areas and paths of travel at stores throughout the United States. The decision found that Cracker Barrel's alleged lack of a companywide ADA compliance policy that effectively finds and remedies ADA violations was a classwide violation warranting certification of the class under Rule 23.
  - This followed a decision rejecting class certification out of the same court in *Mielo v. Bob Evans Farms, Inc.* (W.D. Pa. 2015), primarily because the differences in parking conditions from one store to another across the country failed to meet Rule 23 requirements.

# Other ADA Requirements for Health Care Facilities

- Both Title II and III of the ADA and Section 504 of the Rehabilitation Act require that medical care providers provide individuals with disabilities:
  - Full and equal access to their health care services and facilities; and
  - Reasonable modifications to policies, practices and procedures when necessary to make health care services fully available to individuals with disabilities, unless the modifications would fundamentally alter the nature of the services.



# Access to Medical Care for Individuals with Mobility Disabilities

- Examination rooms must be accessible
  - Key elements include wide entry doors; door hardware that does not require tight twisting, pinching or grasping; and clear floor and turning space inside the rooms
- Medical equipment must be accessible
  - Exam tables and chairs should be able to be lowered and be able to stabilize and support a person during transfer
  - Transfer techniques, whether requiring staff assistance and/or patient lifts, may depend on the individual patient
  - Staff should be trained

# Increased Scrutiny of “Emotional Support Animals”

- Title III of the ADA requires public accommodations to permit the use of service animals—*i.e.*, dogs and miniature horses trained to do work or perform tasks for the benefit of individuals with disabilities.
- Title III does not consider “emotional support animals” to be service animals.
- Companies have increased its vetting of purported emotional support animals, requiring customers to show proof of the animal’s health or vaccinations, present a doctor’s statement declaring a mental health disability, and sign a form attesting that the animal can behave.

# State Laws

- Many states have enacted accessibility laws, some of which allow for civil penalties and the recovery of monetary damages by plaintiffs.
- Example: California's Unruh Act provides for a minimum of \$4,000 in damages per access violation, plus costs and fees (Cal. Civ. Code § 52). California's Disabled Persons Act authorizes minimum damages of \$1,000 per violation (Cal. Civ. Code § 54.3).
- Also broader language in California's statute increases the risk of website accessibility being included in the statute.
- Other states with similar laws authorizing individual damages include Colorado, Hawaii, Massachusetts, New York, South Carolina, and Texas.

# Florida's Accessibility of Places of Public Accommodation Act ("APPAA") (Fla. Stat. § 553.5141)

- Pursuant to a law that went into effect in Florida in July 2017, a business that hires a "qualified expert" to inspect its premises to either verify conformity with ADA accessibility requirements, or to develop a compliance plan, can have that information considered in Florida state court if the certification of conformity or remediation plan has been filed with the Department of Business and Professional Regulation.
- The court "must consider" any such remediation plan or certification of conformity when the court "determines if the plaintiff's complaint was filed in good faith and if the plaintiff is entitled to attorney fees and costs."
- California has similar legislation.

# Is Help On the Way?

## ADA Education and Reform Act of 2017

- The U.S. House of Representatives passed a bill on February 15, 2018, that may limit the proliferation of potentially abusive lawsuits alleging failure to remove architectural barriers to access in violation of Title III.
- It must still be considered by the Senate.
- Proposed changes:
  - Institutes notice and cure period that is required before filing lawsuit
  - Requires the Judicial Conference of the United States to develop a model program to promote alternative dispute resolution to resolve ADA claims
  - Requires the Disability Rights Section of the Department of State to develop an educational program to promote ADA compliance

# Thanks!



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Anne Marie Estevez defends clients in complex, class, and collective action employment, Americans with Disabilities Act (ADA), and public accessibility cases in US federal and state court. Fluent in Spanish, she represents a broad range of US and international clients in employment and labor-based cases nationally, from wage and hour to discrimination to trade secrets litigation. Anne Marie also counsels employers nationally in these areas, negotiates high-level executive contracts and terminations, and handles due diligence for complex employment and accessibility matters. She co-leads the firm's retail practice.

# Thanks!



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Please join us for next month's webinar:

*"Fast Break: Self-Disclosures: CMS and OIG Protocols for Addressing Non-Compliance"*

Featuring Jake Harper

➤ June 21, 3:00 PM (EST)