WEBSITE ACCESSIBILITY FOR INDIVIDUALS WITH DISABILITIES

by

Cynthia N. Sass, Esquire

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& Labor and Employment Law Section, The Florida Bar
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SASS LAW FIRM
601 West Dr. Martin Luther King Jr. Boulevard
Tampa, Florida 33603
813. 251.5599
www.EmploymentLawTampa.com

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Cynthia N. Sass, Esquire[2]
SASS LAW FIRM
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www.EmploymentLawTampa.com

I. DISABILITIES AND WEBSITE ACCESSIBILITY

A. Disabilities Affecting Internet Use. According to the U.S. Department of Justice ("DOJ"), millions of individuals in the United States have disabilities that affect their use of internet websites and mobile applications ("apps"). 75 Fed. Reg. 43462. For example:

1. Individuals with vision impairments may be unable to read the text or view images or videos displayed on the website.

2. Individuals with hearing impairments may be unable to access information in website videos that lack captions.

3. Individuals with mobility impairments regarding their hands may have difficulty navigating a website.

4. Individuals with intellectual impairments may struggle to use portions of websites that require timed responses from users.

B. Assistive Technology. Many people with disabilities rely on "assistive technology" to navigate websites and access information contained on those sites.

1. Examples of Assistive Technology.

   a. Individuals with vision impairments may rely on a screen reader to convert the visual information on a website into speech, i.e., to speak aloud the text found on a webpage.

   b. Individuals who have mobility impairments regarding their hands may use speech-recognition software to navigate a website.

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2. Other Tools to Help Those with Disabilities.

   a. Captions for videos, multimedia presentations, photographs and images.

   b. Adjustable font size and color contrast.

   c. Options to extend or stop timed portions of websites.

C. Inaccessibility. However, many websites and apps do not incorporate or activate features that enable disabled individuals to access all information or services.

1. Because screen readers require website code that is comprehensible to the screen reader, visually impaired individuals relying on screen readers may be unable to use websites with incomprehensible code.

2. Individuals who have hearing impairments may be unable to access information in website videos and other multimedia presentations that lack captions.

3. Individuals with limited manual dexterity who may use assistive technology that enables them to interact with websites cannot access sites that do not support keyboard alternatives for mouse commands.

4. Individuals with mental impairments may be unable to use websites that require timed responses but do not give users the ability to indicate that they need more time to respond.

D. Legal Implications of Inaccessibility. Multiple federal and state laws may be implicated where websites or apps are not equally accessible to disabled individuals. Most prominent among the federal provisions are the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.[4]

II. THE AMERICANS WITH DISABILITIES ACT ("ADA")

A. General Overview of the Americans with Disability Act.

1. General Prohibition. The Americans with Disabilities Act of 1990, 42 U.S.C. §§12101-12213 ("ADA"), prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public.

2. "Disability." The ADA defines disability broadly as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. §12102(1)(A). "Major life activities" include seeing, hearing, performing manual tasks, reading,

[4] See also, the Air Carrier Access Act, 49 U.S.C. 41705, and the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. 111-260.

concentrating, thinking, and learning. 42 U.S.C. §12102(2)(A).

3. Prominent ADA Titles/Sections. The ADA is divided into various titles (or sections) that relate to different areas of public life.

   a. *Title I: Employment*. Prohibits covered employers from discriminating against an individual on the basis of his or her disability in regard to hiring, compensation, advancement, terms and conditions of employment, or termination.

   b. *Titles II & III: Accessibility*. Govern accessibility standards and protect disabled individuals' access to facilities, goods, services, privileges, etc. Title II applies to public entities, whereas Title III applies to private entities that are places of public accommodation. Generally speaking, Titles II and III require governmental agencies and private businesses to make their goods and services as accessible to individuals with disabilities as they are to those without disabilities.

4. Agency Enforcement and Regulations.

   a. *Enforcement of the ADA.* The U.S. Equal Employment Opportunity Commission ("EEOC") regulates and enforces Title I, while the DOJ regulates and enforces Titles II and III. However, all state and local governments are covered by Title II—which the DOJ enforces—whether or not they are also covered by Title I (which the EEOC enforces). 29 CFR 1630, Appendix. So, a state or local governmental employer in an ADA employment discrimination case is covered by both Title I and II and the DOJ may enforce the ADA in such a case.[5]

   b. *Regulations*. Section 204(a) of Title II and §306(b) of Title III direct the Attorney General[6] to promulgate regulations to carry out the provisions of Titles II and III, other than certain provisions dealing specifically with transportation. 42 U.S.C. §§12134, 12186(b) (2011); 75 Fed. Reg. 43461.

5. Standing under Titles II and III.

   a. *General*. Article III of the United States Constitution requires three threshold elements in order to have standing:[7]

      - an injury-in-fact;

      - a causal connection between the asserted injury-in-fact and the challenged

[5] *See, e.g.,* DOJ's June 2014 settlement announcement with Florida State University. Available at http://www.justice.gov/opa/pr/justice-department-reaches-settlement-florida-state-university.
[6] The Attorney General is the head of the DOJ. 28 U.S.C. § 503.
[7] Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1328 (11th Cir. 2013); New v. Lucky Brand Dungarees Stores, Inc., 51 F. Supp. 3d 1284, 1285 (S.D. Fla. 2014).

action of the defendant;[8] and

- the injury will be redressed by a favorable decision.

b. *Injury-in-Fact*. An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[9] When injunctive relief is sought—as in an ADA accessibility case under Titles II or III[10]—an additional showing is required for standing: "In addition to past injury, a plaintiff seeking injunctive relief must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future."[11]

- "Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party shows 'a real and immediate—as opposed to a merely conjectural or hypothetical—threat of *future* injury.'"[12]

- "Immediacy in this context is an elastic concept, and 'means reasonably fixed and specific in time and not too far off.'"[13]

c. *Testers*. A plaintiff's status as an ADA compliance "tester" rather than a bona fide patron does not deprive him or her of standing to sue for violations of Titles II or III. A disabled individual's right to access "*does not* depend on the motive behind" his or her attempt to enjoy the goods, services, or facilities.[14]

d. *Examples from the Eleventh Circuit*.

- **"Near future" = standing.**

  - *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336, 1339-1340 (11th Cir. 2013) (serial ADA tester—271 previous cases—had standing to

[8] In the context of an ADA accessibility case, a causal connection exists where the barriers to access are under the defendant's ownership or direct control. See De Palo v. Walker Ford Co., Inc., No. 8:15-cv-169-T-27AEP, 2015 WL 4506890, at *3 (M.D. Fla. July 23, 2015).

[9] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted); De Palo, 2015 WL 4506890 at *2. When a disabled person is entitled to access a private or public entity and that access is limited on the basis of his or her disability, this constitutes an invasion of the individual's statutory rights and an injury-in-fact for the purposes of standing. Houston, 733 F.3d at 1332; De Palo, 2015 WL 4506890 at *2.

[10] As discussed under Sections III and IV of this outline, infra, other than reasonable attorneys' fees, injunctive relief is the only remedy available to plaintiffs suing under Titles II or III of the ADA. Houston, 733 F.3d at 1329; Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968) (noting that Title II of the Civil Rights Act of 1964 permits injunctive relief only).

[11] Houston, 733 F.3d at 1328 (internal quotation marks omitted).

[12] Houston, 733 F.3d at 1328 (quoting Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001)). See also New, 51 F.Supp.3d at 1285; Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1239 (11th Cir. 2000).

[13] New, 51 F.Supp.3d at 1285 (quoting Houston, 733 F.3d at 1339-1340); Payne v. Gulfstream Goodwill Industries, Inc., No. 15-cv-81120-BLOOM, 2015 WL 6123529, *4 (S.D. Fla. Oct. 19, 2015).

[14] Houston, 733 F.3d at 1332-1334, 1336; Payne, 2015 WL 6123529 at *4; De Palo, 2015 WL 4506890 at *2.

assert a Title III claim regarding access to supermarket located 31 miles from his home where supermarket was along a "routine travel route" and he "definitely" anticipated traveling that route "in the near future")

- *But see Access for the Disabled, Inc. v. Rosof*, 2005 WL 3556046, *2 (M.D. Fla. 2005) (plaintiff insufficiently pled the threat of a real future injury even though he alleged that he intended to return to the site "annually" and in the "near future" to verify compliance with ADA; the Court noted that the plaintiff did not reside in the county where the facility was located and did not allege any regular contact with the facility)

- *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1238-1239, 1242-1243 (11th Cir. 2000) (plaintiff took trip aboard defendant's cruise ship and allegedly encountered multiple ADA violations; plaintiff's allegation that she would take another cruise aboard defendant's ship "in the near future" was sufficient to allege standing for injunctive relief under Title III).

- *Seco v. NCL (Bahamas), Ltd.*, 588 F.App'x 863, 866 (11th Cir. 2014) (noting that future injury requirement was "satisfied" where plaintiff alleged that she would utilize defendant's services "in the near future")

- *De Palo v. Walker Ford Co., Inc.*, No. 8:15-cv-169-T-27AEP, 2015 WL 4506890, at *3 (M.D. Fla. July 23, 2015) (plaintiff had standing where his complaint alleged that he intended to visit defendant's place of business "again in the near future")

- **Past injury is inadequate.** *Shotz v. Cates*, 256 F.3d 1077, 1081-1082 (11th Cir. 2001) (plaintiffs' complaints did not allege facts giving rise to an inference that defendant will cause them future discrimination where the complaint alleged only past incidents of discrimination)

- **Unspecific "someday" allegations do not give standing.**

  - *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that [Article III] require[s].")

  - *New v. Lucky Brand Dungarees Stores, Inc.*, 51 F.Supp.3d 1284, 1285-1286 (S.D. Fla. 2014) (blind customer brought Title III action against clothing retailer for discriminatory use of touchscreen point of sale devices that required blind customers to disclose personal identification numbers to store employees when making debit card purchases; dismissed for lack of standing because plaintiff did "not adequately plead a risk of imminent

future injury" by merely pleading an intent to make future debit card payments at the store; complaint "fails to expressly identify a reasonably fixed period of time not too far off within which Plaintiff intends to visit" the store, and does not imply such an intent where it did not allege that plaintiff frequently stops at the store or that it is in close proximity to where he lives or frequents).

- *Payne v. Gulfstream Goodwill Industries, Inc.*, No. 15-cv-81120-BLOOM, 2015 WL 6123529, *4 (S.D. Fla. Oct. 19, 2015) (plaintiff's "vague, conclusory allegation of future harm, devoid of factual enhancement" did not give her standing; although plaintiff alleged that she regularly travels through the counties in which defendant's stores are located, she made "no mention of specific, future plans to visit the Subject Property, nor does she include concrete facts which would allow for an inference of the same;" plaintiff merely alleged that she "desires to visit" the property and "plans to return to" the property; although plaintiff "need not provide Defendant or the Court with a date-certain on which she plans to return to the Subject Property, the single nebulous allegation that she will visit the Subject Property in the future is inadequate")

e. *Spokeo, Inc. v. Robins*, ___ U.S. ___ (May 16, 2016). Plaintiff brought a putative class action against a company that operated an online background search service, alleging that information provided about him in a background report was inaccurate. Plaintiff asserted that the company willfully violated the Fair Credit Reporting Act ("FCRA") by failing to adopt procedures to ensure the accuracy of its reports. The Ninth Circuit held that the *Spokeo* complaint sufficiently alleged the required injury-in-fact for standing; but the Supreme Court disagreed and remanded the case. The Court found that the Ninth Circuit failed to consider whether the alleged injury was sufficiently "concrete." To qualify as a "case or controversy" for jurisdiction purposes, there must be a concrete injury (i.e., it must "actually exist") that is "real" rather than "abstract." The Court reasoned that the *Spokeo* complaint was deficient because a violation of the FCRA's procedural requirements may result in no harm. On remand, the Ninth Circuit must consider "whether the particular procedural violations alleged . . . entail a degree of risk sufficient to meet the concreteness requirement."

- Although *Spokeo* did not involve the ADA, some believe that its holding may make it more difficult for Title III plaintiffs to have standing.[15] Such people question whether – under *Spokeo*'s analysis – an ADA tester (not a bona fide patron) suffers a "concrete" injury; whether a plaintiff's serial status has any bearing on whether he or she suffered a concrete injury; and whether plaintiffs can allege all barriers they observe or only those that actually limit their access to the public accommodation.

[15] *See, e.g.*, *Spokeo May Raise the Bar for Standing in ADA Title III Cases*, John W. Egan, LEXOLOGY (June 1, 2016).

- On the other hand, *Spokeo* may well have little or no affect ADA standing in the context of access to websites and apps. After all, *Spokeo* does not appear to limit a disabled individual's right to full access under Title III. The Eleventh Circuit has held that an injury-in-fact exists when a disabled person is denied full access on the basis of his or her disability. *Houston*, 733 F.3d at 1332; *De Palo*, 2015 WL 4506890 at *2. Under those decisions, violations of Titles II and III of the ADA necessarily result in harm (denial of right to full access)—unlike a violation of the FCRA's procedural requirements as was the case in *Spokeo*.

B. Application to Website Accessibility. As discussed below, there is a degree of uncertainty regarding whether, or to what extent, Titles II and III of the ADA apply to websites and apps of public and private entities. This uncertainty exists because neither the statutory language, nor the regulations, for Titles II and III specifically address website accessibility.

1. Neither the ADA's Statutory Language nor its Regulations Specifically Address Website Accessibility. The DOJ acknowledges that "the Internet as it is known today did not exist when Congress enacted the ADA and, therefore, neither the ADA nor the regulations the Department promulgated under the ADA specifically address access to Web sites." 75 Fed. Reg. 43463.

2. ADA Regulations. While the DOJ has promulgated specific accessibility standards for Titles II and III, the current regulations implementing Titles II and III do not include any specific website accessibility standards. However, since 2010, the DOJ has taken steps to revise the ADA regulations in order to establish requirements for website accessibility under Title II and III.

   a. *2010 Advance Notice of Proposed Rulemaking ("ANPR").* In 2010, the DOJ issued an ANPR stating that it was considering revising the regulations implementing Titles II and III to establish accessibility standards for the websites of public entities and public accommodations and to require public entities and public accommodations that provide products or services to the public through the Internet to make their websites accessible to individuals with disabilities. 75 Fed. Reg. 43460, 462.

      - **Historical Context**. On July 26, 1991, the DOJ "issued its final rules implementing title II and title III, which are codified at 28 CFR part 35 (Title II) and part 36 (Title III)." However, "[w]hen the ADA was enacted in 1990, the Internet as we know it today—the ubiquitous infrastructure for information and commerce—did not exist." 75 Fed. Reg. 43461. Thus, the regulations for Titles II and III do not address accessibility and ADA compliance in the realm of websites or apps.

- **Subsequent Technological Developments**. "Today the Internet, most notably the sites of the Web, plays a critical role in the daily personal, professional, civic, and business life of Americans." 75 Fed. Reg. 43461.

  - "Increasingly, private entities are providing goods and services to the public through Web sites that operate as places of public accommodation under title III of the ADA. Similarly, many public entities under title II are using Web sites to provide the public access to their programs, services, and activities." 75 Fed. Reg. 43461.

  - "Beyond goods and services, information available on the Internet has become a gateway to education. . . . Even if they do not offer degree programs online, most colleges and universities today rely on Web sites and other Internet- related technologies in the application process for prospective students, for housing eligibility and on-campus living assignments, course registration, assignments and discussion groups . . ." 75 Fed. Reg. 43461-43462.

  - "The Internet is also dramatically changing the way that governmental entities serve the public. Public entities are increasingly providing their constituents access to government services and programs through their Web sites. Through government Web sites, the public can obtain information or correspond with local officials without having to wait in line or be placed on hold. They can also pay fines, apply for benefits, renew State-issued identification, register to vote, file taxes, request copies of vital records, and complete numerous other everyday tasks. The availability of these services and information online not only makes life easier for the public, but also enables governmental entities to operate more efficiently and at a lower cost." 75 Fed. Reg. 43462.

- **Problem of Inaccessibility**. "Many Web sites of public accommodations and governmental entities, however, render use by individuals with disabilities difficult or impossible due to barriers posed by Web sites designed without accessible features." "Being unable to access Web sites puts individuals at a great disadvantage in today's society, which is driven by a dynamic electronic marketplace and unprecedented access to information." 75 Fed. Reg. 43461.

  > The ADA's promise to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be achieved in today's technologically advanced society only if it is clear to State and local governments, businesses, educators, and other public accommodations that their Web sites must be accessible. Consequently, the Department is considering amending its title II and title III regulations to require public entities and public accommodations that provide products or services to the public through Web sites on the Internet to make their

sites accessible to and usable by individuals with disabilities under the legal framework established by the ADA.

75 Fed. Reg. 43462.

- **Titles II and III Apply to Websites**. "The plain language of" Title II (42 U.S.C. 12132) and Title III (42 U.S.C. 12182(a)) "applies to discrimination in offering the goods and services 'of' a place of public accommodation or the services, programs, and activities 'of' a public entity, rather than being limited to those goods and services provided 'at' or 'in' a place of public accommodation or facility of a public entity." 75 Fed. Reg. 43463.

  - Title II. "There is no doubt that the Web sites of state and local government entities are covered by title II of the ADA." 75 Fed. Reg. 43464 (citing 28 CFR 35.102).

  - Title III. "The Department has also repeatedly affirmed the application of title III to Web sites of public accommodations." 75 Fed. Reg. 43464.[16] The DOJ asserted that although "neither the ADA nor the regulations the Department promulgated under the ADA specifically address access to Web sites . . . the statute's broad and expansive nondiscrimination mandate reaches goods and services provided by covered entities on Web sites over the Internet." 75 Fed. Reg. 43463.

b. *Separate Rulemakings for Title II and Title III*. Since the publication of the 2010 ANPR, the DOJ announced that it was dividing the rulemaking process so as to proceed with separate notices of proposed rulemaking for Title II (RIN AA65; 28 CFR 35) and Title III (RIN AA61; 28 CFR 36). *See* Unified Agenda, 78 Fed. Reg. 1317, at 1415 (Jan. 8, 2013).

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[16] "The Department first made this position public in a 1996 letter from Assistant Attorney General Deval Patrick responding to an inquiry by Senator Tom Harkin regarding the accessibility of Web sites to individuals with visual disabilities. See Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), available at www.justice.gov/crt/foia/tal712.txt. The letter has been widely cited as a statement of the Department's position. The letter does not, however, state whether entities doing business exclusively on the Internet are covered by the ADA." 75 Fed. Reg. 43464.

"In 2000, the Department filed an amicus brief in the Fifth Circuit in *Hooks v. OKbridge, Inc.*, which involved a Web-only business. The Department's brief explained that a business providing services solely over the Internet is subject to the ADA's prohibitions on discrimination on the basis of disability. See Brief of the United States as Amicus Curiae in Support of Appellant, 232 F.3d 208 (5th Cir. 2000) (No. 99–50891), 1999 WL 33806215, available at http:// www.justice.gov/crt/briefs/hooks.htm." 75 Fed. Reg. 43464.

"In a 2002 amicus brief in the Eleventh Circuit in *Rendon v. Valleycrest Productions, Inc.*, the Department argued against a requirement, imposed outside of the Internet context by some Federal courts of appeals, that there be a nexus between a challenged activity and a private entity's 'brick-and-mortar' facility to obtain coverage under title III. See Brief for the United States as Amicus Curiae in Support of Appellant, 294 F.3d 1279 (11th Cir. 2002) (No. 01-11197), 2001 WL 34094038, available at http://www.justice.gov/crt/briefs/ rendon htm. Although Rendon did not involve Web site access, the Department's brief argued that title III applies to any activity or service offered by a public accommodation, on or off the premises." 75 Fed. Reg. 43464.

c. *2014 Title II Notice of Proposed Rulemaking ("NPR") to the Office of Management and Budget ("OMB").*[17] The DOJ submitted a Title II NPR to the OMB for review pursuant to Executive Order 12866.[18] After the DOJ issues an ANPR (like the 2010 ANPR regarding Titles II and III) and solicits public comments on the same, the next step in the regulatory process is for the DOJ to submit a NPR to the OMB for review before the NPR is announced to the public in the Federal Register.

d. *December 2015 Senator Letter to the OMB.* On December 17, 2015, nine democratic senators sent a joint letter to the OMB requesting that the OMB "complete its review" of the 2010 ANPR regarding Title III. This request was misplaced in that the OMB already reviewed the ANPR before it was published in September 2010, and there is nothing more for the OMB to do with respect to the 2010 ANPR.[19]

- The senators urged the Obama administration to adopt the privately developed Web Content Accessibility Guidelines ("WCAG") 2.0 level AA as the accessibility standard for websites of public accommodations. They also sought to require public accommodations to make additional reasonable modifications on a "case-by-case" basis for individuals who may still have problems accessing a WCAG 2.0 conforming website, unless the public accommodation can demonstrate that such additional efforts would be an undue burden.

- The senators also requested that the regulations make clear that Title III covers the websites of online-only businesses.

3. Current Status and Timetable for Title II and III Regulations.

a. *Fall of 2015.* In the fall of 2015, the DOJ announced that it will issue the Title II website accessibility regulations in early 2016, but it will not issue any Title III regulations for public accommodations' websites until fiscal year 2018. The DOJ stated that the Title II regulations on website accessibility will provide a potential framework for the Title III NPR, which is why the Title III NPR is being delayed.

b. *April 2016.* The DOJ announced that it had withdrawn its Title II NPR (previously submitted to the OMB), and would instead be issuing a Title II Supplemental Advance Notice of Proposed Rulemaking ("SANPR"), seeking additional public comment.

[17] The Title NPR was titled "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities" (RIN 1190-AA65).
[18] As of this writing, the DOJ has not yet submitted a NPR for Title III to the OMB.
[19] *See Nine U.S. Senators Urge Obama Administration to Issue Title III Website Regulations ASAP*, Minh Vu, Seyfarth Shaw (Jan. 11, 2016), available at: http://www.adatitleiii.com/2016/01/nine-u-s-senators-urge-obama-administration-to-issue-title-iii-website-regulations-asap/ (last accessed June 15, 2016).

c. *May 2016*. In May 2016, the DOJ published its Title II SANPR in the Federal Register.[20] The public comment period for the SANPR concludes August 8, 2016. The SANPR poses 123 questions for public comment, including:

- **Scope of Regulation**. The DOJ is considering expanding the scope of the Title II regulations from "websites" to "Web content."

- **Accessibility Standard**. The DOJ believes that WCAG 2.0 AA should be the standard for Web content.

- **Coverage of Mobile Apps**. The DOJ is considering whether the Title II regulations should cover apps and, if so, what accessibility standard should apply. The DOJ specifically note WCAG 2.0, the User Agent Accessibility Guidelines 2.0, the Authoring Tools Accessibility Guidelines 2.0, or ANSI/Human Factors Engineering of Software Interfaces 200 as possible accessibility standards for apps.

- **Compliance Period**. The DOJ is considering giving public entities two years after the publication of a final rule to make their websites and Web content comply with WCAG 2.0 Level AA, unless compliance with the requirements would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. The DOJ is also considering a longer three-year compliance period for captioning of live audio content.[21]

- **Less Demanding Standard for Small Public Entities**. The DOJ is considering whether "small public entities" or "special district governments" should have a different compliance deadline and/or be subject to a less demanding standard, such as WCAG 2.0 A (as opposed to AA).

- **Social Media**. The DOJ "considers social media platforms such as Facebook, YouTube, Twitter, and LinkedIn to be covered by Title III of the ADA and proposes to not address the use of these platforms by state and local governments (subject to Title II) in this rule. However, DOJ says that any information provided by public entities on those social media platforms must also be available in some alternative way if the platforms are not accessible."[22]

d. *July 2017*. The DOJ now plans to issue the Title II NPR in July 2017, which will commence the period for public comment on the Title II NPR.

4. Takeaways. The DOJ has not provided a revised date for issuance of the Title III NPR, previously expected to be issued in 2018. However, the DOJ previously delayed the

[20] https://www.ada.gov/regs2016/sanprm html.
[21] *Attention Public Accommodations: DOJ's Recent Rulemaking Action for State and Local Government Websites Reveals its Current Thinking on Web Accessibility*, Minh Vu and Kristina Launey, Seyfarth Shaw (May 20, 2016).
[22] *Id.*

issuance of the Title III NPR to 2018 to allow the Title II regulations to provide a framework for the Title III NPR; now that the DOJ has changed the expected issuance date for the Title II NPR from January 2016 to July 2017, it appears that the Title III NPR date will be delayed beyond 2018.

Meanwhile, federal courts across the country continue to decide website accessibility cases under Titles II and III despite the absence of statutory language or regulations regarding website accessibility under the ADA. As discussed in Section III (below), these decisions involve inconsistent interpretations and applications of Title III among the different jurisdictions, which has created a patchwork of varying Title III website accessibility law. As the DOJ noted in the 2010 ANPR:

> Although the Department has been clear that the ADA applies to Web sites of private entities that meet the definition of "public accommodations," inconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III. For these reasons, the Department is exploring what regulatory guidance it can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible.

75 Fed. Reg. 43464.

III. TITLE III OF THE AMERICANS WITH DISABILITIES ACT ("TITLE III")

A. General Overview of Title III of the Americans with Disabilities Act.

1. Private Entities Constituting Public Accommodations. Title III applies to any "private entity" that is considered a "place of public accommodation."

   a. *Private Entities*. Title III defines a "private entity" simply as "any entity other than a public entity" as defined in Title II. 42 U.S.C. §12181(6). Under Title II, public entities are any state or local government and any department or agency of a state or local government. 42 U.S.C. §12131(1).

   b. *Public Accommodations*. Title III provides that private entities are considered places of public accommodation if their operations affect commerce and fall within at least one of the following 12 categories:

   - An inn, hotel, motel, or other place of lodging;
   - A restaurant, bar, or other establishment serving food or drink;
   - A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

- An auditorium, convention center, lecture hall, or other place of public gathering;

- A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

- A laundromat, drycleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

- A terminal, depot, or other station used for specified public transportation;

- A museum, library, gallery, or other place of public display or collection;

- A park, zoo, amusement park, or other place of recreation;

- A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

- A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; or

- A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. §12181(7).

c. *Exemptions*. Title III does "not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000–a(e))[23] or to religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. §12187.

2. Prohibited Discrimination. Title III requires places of public accommodation to make their goods, services, and accommodations equally accessible to individuals with disabilities:

> No 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.

[23] 42 U.S.C. 2000a(e) exempts "a private club or other establishment not in fact open to the public . . . ."

42 U.S.C. §12182(a).

3. Remedies. Title III adopts the remedies set forth in §204(a) of the 1964 Civil Rights Act (42 U.S.C. §§2000a-3(a)). 42 U.S.C. §12188(a). These remedies include:

   - Injunctive Relief. 42 U.S.C. §2000a-3; 28 C.F.R. §§36.501(a) and (b).

   - Reasonable Attorneys' Fees and Litigation Expenses (including experts' fees) to the Prevailing Party. 42 U.S.C. §2000a-3; 42 U.S.C. §12205; 28 C.F.R. §36.505; *Lovell v. Chandler*, 303 F.3d 1039, 1058-1059 (9th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (Title II case).

   - Monetary Damages. Only recoverable in an action brought by the Attorney General in cases of general public importance or a "pattern or practice" of discrimination is alleged. 42 U.S.C. §12188(b)(2)(B); *Powell v. National Bd. of Medical Examiners*, 364 F.3d 79, 86 (2d Cir. 2004); *Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002); *Hobleman v. Kentucky Fried Chicken*, 260 F. Supp. 2d 801, 805 (D. Neb. 2003); *Dorsey v. Detroit*, 157 F. Supp. 2d 729, 733 (E.D. Mich. 2001); *U.S. v. Morvant*, 843 F. Supp. 1092, 1095-1096 (E.D. La. 1994).

4. Increased Prevalence of Title III Claims. The past few years have seen the total number of ADA Title III cases filed nationwide increase from 2,722 in 2013 to 4,789 in 2015;[24] and more than 3,400 Title III claims were filed in just the first six months of 2016.[25] Expectedly, law firms are reporting seeing a swell in Title III demand letters and lawsuits alleging inaccessible web technologies.[26] Moreover, during each of the past three years, Florida has been the state with the second most Title III cases (behind California).[27]

B. Website Accessibility Case Law: Split among Federal District Courts. The legal landscape regarding this issue remains conflicted as courts have split over the issue of whether the term "places of public accommodation" applies to websites and, if so, to what extent.

The two most prominent lines of decision addressing website accessibility are (1) courts holding that places of public accommodation are not limited to physical locations and, thus, Title III does not require an actual physical location, and (2) courts that hold that places of public accommodation are limited to physical locations and Title III requires a nexus between an actual physical structure and the goods, services, or privileges denied.

[24] "ADA Title III Lawsuits Continue to Rise," Seyfarth Shaw LLP (Jan. 15, 2016), available at http://www.adatitleiii.com/2016/01/ada-title-iii-lawsuits-continue-to-rise-8-increase-in-2015/. Discussing the rise of Title III ADA cases in general, i.e., not Title III just website accessibility cases.
[25] "ADA Title III Lawsuits Up 63% From 2015," Seyfarth Shaw LLP (July 26, 2016), available at http://www.adatitleiii.com/lawsuits-investigations-settlements/.
[26] "Website Accessibility Lawsuits by the Numbers," Seyfarth Shaw LLP (March 14, 2016), available at http://www.adatitleiii.com/2016/03/tracking-the-trends-website-accessibility-lawsuits-by-the-numbers/.
[27] "ADA Title III Lawsuits Continue to Rise," Seyfarth Shaw LLP (Jan. 15, 2016).

1. Public Accommodations Do Not Require Any Physical Location. This line of cases does not limit "places of public accommodation" to actual physical places under Title III of the ADA. This view has been adopted by federal courts in at least the First, Second, and Seventh circuits.

   a. *The First Circuit*.

   - *Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Assoc. of New England, Inc.*, 37 F.3d 12, 19-20 (1st Cir. 1994). Employee (and employer) sued employer's health insurance provider for discriminating against him on the basis of his disability. The court allowed plaintiff's Title III claim to proceed against the insurance provider even though it had no physical place of business patronized by customers. The court concluded that Title III is not limited to provision of goods and services provided in physical structures, but also covers access to goods and services offered by a place of public accommodation through other mediums, such as telephone or mail. "It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." "Neither Title III nor its implementing regulations make any mention of physical boundaries or physical entry. Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity."

   - *National Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196, 200-201 (D. Mass. 2012) (citing *Carparts*). The court held that Netflix's watch-instantly video streaming website was a place of public accommodation even though its web-based services could only be accessed in private residences. "The ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation. . . . Consequently, while the home is not itself a place of public accommodation, entities that provide services in the home may qualify as places of public accommodation." The court also noted that "the legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology."

   b. *The Second Circuit*.

   - *National Federation for the Blind v. Scribd*, 97 F. Supp. 3d 565, 569-576 (D. Vt. 2015). Scribd's "NetFlix-for-books" program allows subscribers to read ebooks from its library for a small monthly fee. Plaintiffs alleged that "because Scribd's website and apps are not programmed to be accessible through [screen reader] software, Scribd is denying blind persons access to all of the services, privileges, advantages, and accommodations that Scribd offers and is excluding them from accessing information critical to their education, employment, and community integration." Scribd moved to dismiss on the basis that Title III

does not apply to a website-only business and that "place of public accommodation" requires that the business have a physical place where it offers its goods and services to the public. Relying on *National Ass'n of the Deaf v. Netflix*, the district court denied Scribd's motion and found that Scribd's services fall within at least one of Title III's enumerated categories of public accommodations. The Court held that "a website with no physical retail outlet or building open to the public," but that nevertheless provides goods or services to the public, can be a place of public accommodation under Title III.

c. *The Seventh Circuit*.

- *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999). "The core meaning of" Title III's anti-discrimination provision "is that the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, website, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do."

2. The Nexus Theory. This line of cases limits "places of public accommodation" under Title III to actual physical locations and requires a nexus between the website or apps providing goods, services, or privileges and the actual physical place of public accommodation.

Thus, under the nexus theory, Title III does not cover web-only businesses, which lack an actual physical place of public accommodation. For instance, this line of cases makes a distinction between Target—a retail company with a physical place of accommodation as well as a website—and eBay, which has no physical location providing goods, services, or privileges to the public. Federal courts in at least the Third, Sixth, Ninth, and Eleventh circuits have adopted the nexus theory.

a. *The Third Circuit.*

- *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-613 (3d Cir. 1998). Former employee sued her employer and the insurance carrier for providing benefits that allegedly discriminated against individuals with disabilities. The court affirmed the lower court's dismissal of plaintiff's Title III claim because there was no nexus between a physical place of public accommodation and the insurance benefits offered by the employer. The court held that although "an insurance office is a public accommodation," that "does not mean that the insurance policies offered at that location are covered by Title III." *Id*. at 612. The court held that places of public accommodation under Title III refer to physical places and that because the plaintiff "received her disability benefits via her employment . . . , she had no nexus to" the insurance office "and thus was not discriminated against in connection with a public accommodation." *Id*. at 612-613. The court further held that Title III's reference to "goods, services,

facilities, privileges, advantages, or accommodations" does not provide "protection from discrimination unrelated to places." *Id*. at 613.

b. *The Sixth Circuit.*

- *Stoutenborough v. National Football League*, 59 F.3d 580, 583-584 (6th Cir. 1995). The court affirmed the dismissal of plaintiff's claim under Title III because the challenged service, the live telecast of a football game, was not offered by a place of public accommodation (the football stadium). The court found that a place of public accommodation is "a facility, operated by a private entity"—which is a physical place. *Id*. at 583. The court also found that the "service" plaintiff sought to obtain—the televised broadcast of home football games—"does not involve a 'place of public accommodation.'" *Id*. It did not suffice that the football games were played in a place of public accommodation under Title III (the stadium). *Id*.

c. *The Ninth Circuit*.

- *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114-1116 (9th Cir. 2000). Former employee sued her employer and the insurance administrator for providing benefits that allegedly discriminated against individuals with mental disabilities. The court affirmed the lower court's dismissal of plaintiff's Title III claim. The court found that Title III's term, "place of public accommodation," requires "some connection between the good or service complained of and an actual physical place." *Id*. at 1114. The court noted that this list of "public accommodations" in §12181(7) are all "actual, physical places where goods or services are open to the public, and places where the public gets those goods or services." *Id*. Citing *Ford v. Schering-Plough Corp.*, the court held that plaintiff had not demonstrated the necessary nexus between the goods or services in question (disability benefits) and the physical place of accommodation (insurance office). *Id*. at 1115.

- *National Federation for the Blind v. Target, Inc.*, 452 F. Supp. 2d 946, 953-55 (N.D. Cal. 2006). Class of visually impaired plaintiffs alleged that they could not access Target's website to purchase products, redeem gift cards, or find Target stores. The district court noted that the Ninth Circuit has limited "a 'place of public accommodation,' within the meaning of Title III, to a physical place" and "has declined to join those circuits which have suggested that a 'place of public accommodation' may have a more expansive meaning." *Id*. at 952 (citing *Carparts* and *Doe*). The court nonetheless rejected Target's argument that the ADA prohibits "only discrimination occurring on the premises of a place of public accommodation, and that 'discrimination' is limited to the denial of physical entry to, or use of, a space." *Id*. at 953.

> The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to

> discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute. [*Id*.]
>
> "[N]o court has held that under the nexus theory a plaintiff has a cognizable claim only if the challenged service prevents physical access to a public accommodation. Further, it is clear that the purpose of the statute is broader than mere physical access—seeking to bar actions or omissions which impair a disabled person's 'full enjoyment' of services or goods of a covered accommodation." *Id.* at 953-954 (quoting 42 U.S.C. § 12182(a)). The Court rejected the "defendant's attempt to draw a false dichotomy between those services which impede physical access to a public accommodation and those merely offered by the facility." *Id*. at 955. The court found there was enough of a nexus between the use of the website services and those provided at the actual bricks-and-mortar stores to bring the website within the definition of a "place of public accommodation." *Id.* at 954-955. Concluding that "[a]lthough the Ninth Circuit has determined that a place of public accommodation is a physical space," accessibility under Title III is not limited to access to that physical space, but rather includes access to goods and services provided by public accommodation. *Id*. at 955.

- *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (dismissing ADA claim against Facebook® because, in part, "Facebook operates only in cyberspace, and thus is not a 'place of public accommodation' as construed by the Ninth Circuit").

- *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL (D. Mont. Mar. 31, 2011) (citing *Weyer*) (dismissing ADA claims against various websites including Google.com, YouTube.com, and MySpace.com on the grounds that "[n]either a website nor its servers are 'actual, physical places where goods or services are open to the public,' putting them within the ambit of the ADA").

- *Cullen v. Netflix*, 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012) (web-only Netflix Internet services had no nexus to a place of public accommodation within meaning of ADA; conflicts with *National Ass'n of the Deaf v. Netflix*).

- *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC, 2014 U.S. Dist. LEXIS 67223 (C.D. Cal. May 14, 2014) (Redbox Digital is not required to caption library of web-based videos for hearing-impaired customers because website is not place of public accommodation).

- *Earll v. eBay, Inc.*, No. 13-15134 (9th Cir. April 1, 2015). Plaintiff brought a putative class action under Title III of the ADA and state law, alleging that eBay's seller verification system is inaccessible to the deaf community. The district court dismissed the ADA claim. The appellate court affirmed the

dismissal, holding that "[b]ecause eBay's services are not connected to any 'actual, physical place[],' eBay is not subject to the ADA."

d. *The Eleventh Circuit.*

- *Rendon v. Valleycrest Prod., Ltd.*, 294 F.3d 1279 (11th Cir. 2002). The Eleventh Circuit held that the telephone process for selecting contestants for "Who Wants to be a Millionaire" discriminated against people with hearing and other physical disabilities in violation of Title III. *Id*. at 1280-1281. The court found that the studio where the show was filmed was a place of public accommodation and that competing on the show was a privilege provided by the place of public accommodation. *Id.* at 1283-1284. Thus, by using a discriminatory telephonic process for screening potential contestants, defendant was denying disabled persons equal enjoyment of a privilege (competing on the show) of a place of public accommodation (the studio). *Id.* at 1284-1285. Significantly, the Eleventh Circuit noted that the plaintiffs stated a claim under Title III because they demonstrated "a nexus between the challenged service and the premises of the public accommodation," namely the concrete television studio. *Id.* at 1284 n. 8.

  The show selected contestants by utilizing an automated fast finger telephone answering system whereby potential contestants would answer questions. *Id*. at 1280. "Aspiring contestants call a toll-free number on which a recorded message prompts them to answer a series of questions. Callers record their answers to these questions by pressing the appropriate keys on their telephone keypads." *Id*. The plaintiffs were potential contestants with hearing or mobility impairments and were unable to register their answers either because they could not hear the automated questions or could not move their fingers fast enough on the phone pad to record their answers. *Id*. at 1280-1281.

- *Access Now v. Southwest Airlines*, 227 F.Supp.2d 1312 (S.D. Fla. 2002). The plaintiff alleged that the inaccessibility of southwest.com prevented access to Southwest's "virtual" ticket counters. *Id*. at 1321. The court held that plaintiff failed to state a claim under the ADA because "virtual" ticket counters are not actual, physical places, and therefore not places of public accommodation. *Id.* So, there was no nexus between the discriminatory conduct/access and a place of public accommodation. *Id*.

3. Takeaway Regarding the Case Law Split.

a. Currently, whether, and to what extent, Title III of the ADA applies to websites depends in no small part on where the plaintiff brings the claim.

b. The implication of this split is that online-only entities with a broad geographic presence face a patchwork of liability based on where a plaintiff is located. By way of example, Netflix and its exclusively Internet-based business found itself on both

sides of the split in 2012. The U.S. District Court for the District of Massachusetts ruled that Netflix's video streaming website is a "place of public accommodation" covered under Title III, even though the website has no nexus to a physical place. Conversely, later that same year, the U.S. District Court for the Northern District of California reached the opposite conclusion in *Cullen v. Netflix, Inc.*, concluding that Netflix's web-based services lacked the necessary nexus to an "actual physical place."

4. Further Examination of Eleventh Circuit Law.

   a. *Rendon v. Valleycrest Prod., Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

      - Cited with approval in *National Federation for the Blind v. Target, Inc.*, 452 F. Supp. 2d 946, 953-955 (N.D. Cal. 2006) (holding that Title III does not prohibit discrimination only occurring on the premises of a place of public accommodation). "*Rendon* neither states nor suggests that a plaintiff proceeding under the 'nexus' theory must plead denial of physical access to a place of public accommodation. On the contrary, the court held that tangible barriers restrict the disabled individual's right to access the physical space while intangible barriers 'restrict a disabled person's ability to *enjoy* the defendant entity's goods, services and privileges.'" *Id.* at 954 (quoting *Rendon* 294 F.3d at 1283 (emphasis added in *Target*)). Notes that the plaintiff in *Rendon* did not contest the actual physical barriers of the facility in question. *Id*. at 955.

      - *National Federation for the Blind v. Scribd*, 97 F. Supp. 3d 565 (D. Vt. 2015). States that "the fact that reasonable jurists have reached different conclusions about how far Title III extends reveals some measure of ambiguity in the text of the statute. There are two main threads in the case law explored below." *Id*. at 568-569. "[S]ome courts have reasoned that because all of the examples listed in Section 12181(7) are physical places, Title III only applies to discrimination occurring at a physical place or somewhere with a sufficient nexus to a physical place, while others have interpreted the statute more broadly." *Id*. at 569.

        "On the narrow end, the Ninth, Third, and Sixth Circuits each considered ADA claims brought by an employee who received benefits through his or her employer that were issued by a third party insurance company. All three courts held that Title III did not apply because there was not a sufficient connection between the discrimination the plaintiffs alleged and a physical place." *Id*. (citing *Weyer*, 198 F.3d at 1114; *Ford*, 145 F.3d at 613; *Parker*, 121 F.3d at 1011). "In a related but somewhat more expansive vein the Eleventh Circuit held that Title III covers both tangible barriers (*e.g.,* physical barriers preventing a disabled person from entering an accommodation's facilities) and intangible barriers (*e.g.,* eligibility requirements or discriminatory policies) to a physical place." *Id*. (citing *Rendon*, 294 F.3d at 1283). "The Eleventh Circuit explained that *Weyer, Parker,* and *Ford* do not stand for the broad proposition

that a place of public accommodation may exclude persons with disabilities as long as the discrimination occurs offsite or over the telephone. At most those three cases can be read to require a 'nexus' between the challenged service and the premises of the public accommodation." *Id*. (citing *Rendon*, 294 F.3d at 1284 n. 8).

"On the broad end, other circuit courts have read Title III to apply even in the absence of some connection to a physical place." *Id.* at 570 (citing *Carparts*, 37 F.3d at 19; *Doe*, 179 F.3d at 55). "The Northern District of Illinois recently followed suit and concluded that even though the American Bar Association does not offer its services at a physical site such as a store it nevertheless could be a public accommodation for purposes of the ADA." *Straw v. Am. Bar Ass'n*, No. 14-C-5194, 2015 WL 602836, at *6 (N.D. Ill. Feb. 11, 2015).

b. *Access Now v. Southwest Airlines*, 227 F.Supp.2d 1312 (S.D. Fla. 2002). Held that southwest.com was not a place of public accommodation under Title III. *Id*. at 1318-1319. Stated that "the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation." *Id.* at 1318 (citing *Rendon*, 294 F.3d at 1283-1284; *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000)). Further stated that "the Eleventh Circuit has not read Title III of the ADA nearly as broadly as the First Circuit" and *Carparts*. *Id.* at 1319 (citing *Rendon*).

The Court distinguished this case from *Rendon* because, unlike *Rendon*, there was no nexus to a physical place of public accommodation in this case. *Id*. at 1321. Specifically, the Court noted that in *Rendon*, "the game show at issue took place at a physical, public accommodation (a concrete television studio)," whereas "the Internet website at issue here is neither a physical, public accommodation itself as defined by the ADA, nor a means to accessing a concrete space such as the specific television studio in *Rendon.*" *Id.* The Court further noted that "aircrafts are explicitly exempted from Title III of the ADA," 42 U.S.C. § 12181(10), and the plaintiffs did "not argue that Southwest's website impedes their access to aircrafts." *Id.* at 1321 n. 12. The Court was unpersuaded by the plaintiff's contention "that this 'is a case seeking equal access to Southwest's virtual ticket counter' as they exist on-line.'" *Id.* at 1321 (internal quotation marks omitted).

The Court concluded that "because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency. Having failed to establish a nexus between southwest.com and a physical, concrete place of public accommodation, Plaintiffs have failed to state a claim upon which relief can be granted under Title III of the ADA." *Id.*

The Court also stated that it is Congress' role, not the Court's, to expand the ADA's definition of public accommodation "beyond physical, concrete places of public

accommodation, to include 'virtual' places of public accommodation." *Id.* at 1321 n. 13.

- Discussed in *National Federation for the Blind v. Target, Inc.*, 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (distinguishing *Access Now*'s holding). "'Virtual' ticket counters are not actual, physical places, and therefore not places of public accommodation. Since there was no physical place of public accommodation alleged in *Access Now,* the court did not reach the precise issue presently in dispute: whether there is a nexus between a challenged service and an actual, physical place of public accommodation." *Id*. at 954 (citing *Access Now*, 227 F.Supp.2d at 1321).

- *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 544 (E.D. Va. 2003) (stating that *Access Now* reaffirmed "the principle that a "places of public accommodation," even under the ADA's broader definition, must be actual, physical facilities"). "The *Access Now* court held that places of public accommodation under the ADA are limited to 'physical concrete structures,' and that the web site was not an actual physical structure." *Id.* (quoting *Access Now*, 227 F.Supp.2d at 1319).

5. Liability under Title III

   a. *General Liability*.

   - Multiple entities or individuals may be simultaneously liable under Title III as the owner, lessee, or operator of a place of public accommodation.[28]

     EXAMPLE: If an office building contains a law office, both the owner of the building and the law office are required to comply with the ADA and may be liable under Title III.[29]

   - Although entities such as the law office and the building owner in the foregoing example may contract for an indemnification provision between themselves, neither entity is able to contract away liability under Title III. In other words, both entities remain fully liable for compliance with the ADA notwithstanding any indemnification agreement between the parties against losses caused by a failure to comply with the ADA.[30]

   b. *Title III Liability in Context of Inaccessible Websites and Apps*. Who is liable for inaccessible websites and apps will vary depending on whether it is a nexus jurisdiction or not.

[28] *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832-834 (9th Cir. 2000); *Howard v. Cherry Hills Cutters, Inc.*, 979 F. Supp. 1307, 1309 (D. Colo. 1997).
[29] *Botosan*, 216 F.3d at 832; *Howard*, 979 F. Supp. at 1309 n. 1.
[30] *Botosan*, 216 F.3d at 832-834; *Connors v. Orlando Regl. Healthcare System, Inc.*, No. 6:08CV206-ORL35-DAB, 2009 WL 2524568 at *2 (M.D. Fla. June 12, 2009).

- **Non-nexus Jurisdiction** (places of public accommodation are not limited to physical locations)**.** In non-nexus jurisdictions—where a website itself may be a place of public accommodation—the owner, operator, lessor, or lessee of the website may all be liable for the inaccessible website.

- **Nexus Jurisdiction** (places of public accommodation are limited to physical locations)**.** In nexus jurisdictions, the pertinent inquiry is who owns, operates, leases, or leases out the physical place of public accommodation—not who owns, operates, etc., the website in question.

  If the facilities, goods, services, or privileges of a physical place of public accommodation are not equally available to disabled individuals because of an inaccessible website connected to the public accommodation, the owner, operator, lessee, or lessor may be liable under Title III. In other words, to the extent an inaccessible website or app denies a person with disabilities equal access to the goods, services, or facilities of a place of public accommodation—the owner, operator, lessor, or lessee of the place of public accommodation would be liable under Title III.

C. Notable Settlements.

1. H&R Block. *NFB, et al. v. HRB Digital LLC and HRB Tax Group Inc.*, No. 1:13-cv-10799-GAO (D. Mass. April 2013). Plaintiffs alleged that H&R Block violated Title III and state disability law because its website was inaccessible to people with various disabilities. Soon after the DOJ intervened, H&R Block agreed to a consent decree under which it would make its website, tax preparation tool, and apps conform to the Web Content Accessibility Guidelines ("WCAG"). H&R Block also paid $22,500 in damages to each plaintiff and paid $55,000 in civil penalties.

2. Peapod. In November of 2014, the DOJ announced that it had reached a settlement agreement with the owners and operators of www.peapod.com, a leading internet grocer. The DOJ had alleged that the online grocer's website violated Title III by being inaccessible to disabled customers. Under the agreement, Peapod is required to adopt measures to ensure that users with disabilities are able to fully and equally enjoy the various goods, services, facilities and accommodations provided through www.peapod.com. These measures include:

   - Ensure that www.peapod.com and its apps conform to, at minimum, the Web Content Accessibility Guidelines 2.0;

   - Designate an employee as web accessibility coordinator for www.peapod.com, who will report directly to a Peapod, LLC executive;

   - Retain an independent website accessibility consultant, who will annually evaluate the accessibility of the website and its apps;

- Adopt a formal web accessibility policy;

- Provide a notice on www.peapod.com soliciting feedback from visitors on how website accessibility can be improved;

- Provide for accessibility testing of www.peapod.com and its apps; and

- Provide mandatory annual training on website accessibility for Peapod's website content personnel.

3. edX, Inc. In April 2015, the DOJ reached a settlement agreement with edX Inc., a provider of purely online educational courses with no connection to a physical location. The settlement resolved allegations that edX's website violated Title III because it was not fully accessible to individuals with disabilities. In the settlement, edX entered a four-year agreement to make its system "fully accessible within 18 months." The agreement also requires edX to provide training for course creators, appoint web accessibility positions, solicit feedback, and "retain a consultant to evaluate conformance of the website, platform, and mobile applications."

4. Carnival Corporation (Carnival Cruise Line). In July 2015, the DOJ entered into a landmark settlement agreement with Carnival to improve the physical accessibility of 62 cruise ships. The agreement also addressed the accessibility of Carnival's website and apps, requiring that they comply with the WCAG. The agreement further required Carnival "include a section or link on each of the Covered Websites explaining the Company's accessibility policies and identifying the designated ADA Responsibility Officer . . . ."

5. Target. *National Federation for the Blind v. Target, Inc.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006). Class of visually impaired plaintiffs brought claims under Title III and state disability law (which allowed for damages), alleging that they could not access Target's website to purchase products, redeem gift cards, or find Target stores. The parties reached a settlement following the federal district court's denial of Target's motion to dismiss. As part of the settlement, Target agreed to make changes to its website to ensure "that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use." In addition, Target agreed to pay more than $6 million to the class and $20,000 to a nonprofit corporation dedicated to helping the blind.

D. Notable Pending Cases.

1. Harvard University and Massachusetts Institute of Technology (MIT). The National Association of the Deaf sued Harvard and MIT, respectively, under Title III of the ADA and Section 504 of the Rehabilitation Act, alleging that they had failed to caption the many thousands of videos that are posted to their various websites.

Both schools asked the federal court to stay their respective cases until the DOJ issues final regulations specifying what the law requires of public accommodations websites or, alternatively, to dismiss the cases on other grounds. In June 2015, the DOJ filed statements of interest in the cases against Harvard and MIT. The most significant takeaway in the DOJ's statements of interest is its assertion that there is a "preexisting" obligation for public accommodations to have accessible websites regardless of any yet pending regulation. The DOJ stated that **"the scope and timing of any final rule on web accessibility is speculative and far from imminent" and the obligation to make public accommodations websites accessible exists right now, even in the absence of any new regulations.**

2. NBA. *Jahoda v. National Basketball Association*, No. 2:15-cv-01462 (W.D. Pa. Nov. 6, 2015).[31] In November 2015, a visually impaired plaintiff sued the NBA, alleging a violation of Title III and seeking a permanent injunction requiring the NBA to (1) implement corporate policies that ensure website accessibility for the blind; and (2) format its website so that it is compatible with screen reading or text-to-audio software, upon which the visually impaired rely to use the Internet.

3. Home Depot. *Diaz v. The Home Depot Inc.*, No. 1:15cv09178 (S.D. N.Y. Nov. 20, 2015). The visually impaired plaintiff alleges that Home Depot's website currently relies on an exclusively visual interface that denies blind people full and equal access to its website.

4. Reebok. *Jose Del-Orden v. Reebok International Ltd.*, No. 1:15-cv-08101 (S.D. N.Y. Oct. 14, 2015). Plaintiff filed a putative class action against Reebok, seeking to represent a nationwide class of visually impaired consumers who he says have been denied equal access to Reebok's website in violation of Title III. Plaintiff alleges Reebok's website relies on an exclusively visual interface and "contains thousands of access barriers that make it difficult if not impossible for blind customers to use the website" or "even complete a transaction."

   In September 2015, the same plaintiff filed similar lawsuits against *Kohl's Corp.* and *J.C. Penney Co. Inc.*, claiming ADA violations due to their inaccessible websites.

E. Rise in Title III Claims. In recent years, there has been a marked rise in Title III disability discrimination claims predicated on access to websites and apps,[32] which dictates that private entities should take notice.

[31] The plaintiff in this action, Robert Jahoda, has filed approximately 70 similar lawsuits since 2012.

[32] Seyfarth Shaw LLP (analyzing data from PACER, the federal court electronic docket system), available at http://www.adatitleiii.com/2015/04/ada-title-iii-lawsuits-surge-by-more-than-63-to-over-4400-in-2014/; http://www.adatitleiii.com/2015/11/ada-title-iii-lawsuit-numbers-hold-steady-for-first-half-of-2015/.

IV. OTHER LEGAL IMPLICATIONS OF INACCESSIBLE WEBSITES

A. Title II of the Americans with Disabilities Act.

1. General Overview of Title II of the ADA.

   a. *Public Entities*. Title II applies to public entities, which the statute defines as any state or local government, any department or agency of a state or local government, and the National Railroad Passenger Corporation and any commuter authority. 42 U.S.C. §12131(1).

   b. *Prohibited Discrimination*. "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.

      Thus, Title II requires public entities to make their programs, services and activities equally accessible to individuals with disabilities.

   c. *Remedies*. Title II provides that the remedies for disability discrimination are the same as those set forth in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794a, which in turn adopts the remedies available under Title VI of the Civil Rights Act of 1964. These remedies include:

      - Injunctive relief.

      - Reasonable attorneys' fees to the prevailing party. 29 U.S.C. §794a(b).

      - Compensatory damages. Private individuals may recover compensatory damages under Title II, but only in cases of intentional discrimination. *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334, 346 (11th Cir. 2012). The Eleventh Circuit held that in the context of either the Rehabilitation Act or Title VI, a plaintiff may establish discriminatory intent by showing deliberate indifference. *Id*. at 347-348.

      - Punitive damages are NOT available. *Barnes v. Gorman*, 536 U.S. 181, 189, 122 S. Ct. 2097 (2002).

2. Application to Website Accessibility. Unlike Title III's application to websites, there is little debate that Title II of the ADA applies to websites and apps of covered public entities.

3. 2003 DOJ Guidelines. In 2003, the DOJ published guidelines for state and local governments to make government websites more accessible.[33] These guidelines stated that one way to meet the Title II's general requirement that public entities provide qualified individuals with disabilities equal access to their programs, services, or activities "is to ensure that government websites have accessible features for people with disabilities."

   The DOJ further noted that the Rehabilitation Act of 1973 also imposes similar requirements on the private entity if it receives federal funding.

4. Notable Examples of Cases and Settlements.

   a. *American Council of the Blind, et al., v. United States General Services Administration*, Civil Action No. 14-671 (D.C. April 22, 2014). The American Council of the Blind and three individuals filed suit in the federal District Court for the District of Columbia against the U.S. General Services Administration ("GSA"). The complaint alleged that GSA's website, SAM.gov, violates Title II and Section 504 of the Rehabilitation Act of 1973 because it is inaccessible to certain visually impaired individuals and prevents impaired government contractors from registering or timely renewing their government contracts. According to the complaint, SAM.gov was not "viewable" by the types of talking screen readers on which millions of visually impaired individuals rely to navigate the Internet. As a result, visually impaired federal contractors were required to divulge sensitive, personal information (social security numbers, usernames, passwords, etc.) to third parties so that the third parties could enter the individuals' information into SAM.gov. The complaint further alleges that SAM.gov's helpdesk and technical assistance staff were not equipped to effectively assist blind and visually impaired users. The complaint noted that the GSA requires federal contractors to provide visually impaired users equal access to the contractors' websites in compliance with Section 504 of the Rehabilitation Act, and the GSA should be required to abide by the same standard and ensure equal access to SAM.gov.

      On November 10, 2015, the plaintiffs announced that the parties had reached a settlement, which requires GSA to make significant changes to SAM.gov to make it more accessible. Interestingly, the announcement did not reference the Web Content Accessibility Guidelines (WCAG 2.0), even though the DOJ has been using this set of guidelines for all of its website settlements with private businesses.

   b. *Dudley v Univ. of Miami*, No. 1:14-cv-00038 (S.D. Ohio 2015). With the assistance of the National Federation of the Blind ("NFB"), a blind student at the University of Miami (Ohio) sued the university for disability discrimination in violation of Title II of the ADA and Section 504 of the Rehabilitation Act. The United States intervened as an additional plaintiff. The plaintiffs alleged that, among other things, the university purchased and deployed inaccessible course management and

[33] *Accessibility of State and Local Government Websites to People with Disabilities*, U.S. Dep't of Justice (June 2003), available at http://www.ada.gov/websites2 htm.

assignment software. This prevented the student from being able to use text-to-speech software to obtain the information she needed to succeed in her courses. As of this writing, it appears that this case is still pending.

c. For additional cases brought under Title II of the ADA, please see the cases discussed under the Rehabilitation Act, below.

B. The Rehabilitation Act of 1973, as Amended in 1992 and 1998 ("Rehab Act").

1. General Overview of the Rehab Act. Like the ADA, the Rehab Act is a civil rights law that protects individuals with disabilities from discrimination.

a. *Purpose*. The Rehab Act is the federal law that authorizes the formula grant programs for vocational rehabilitation, supported employment, independent living, and client assistance. It also includes a variety of provisions focused on rights, advocacy and protections for individuals with disabilities.

b. *"Individual with a Disability."* The Rehab Act defines an "individual with a disability" as anyone who "has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and can benefit in terms of an employment outcome from vocational rehabilitation services . . . ." 29 U.S.C. §705(20); 29 U.S.C. §794(a).

c. *Coverage*. The Rehab Act applies to the following groups:

- The federal government and federal agencies;
- Federal contractors; and
- Recipients of federal funding, including private businesses or organizations. *Barnes*, 536 U.S. at 185.

Note that the Rehab Act's coverage may overlap with that of the ADA and an entity or program may be covered by both laws. For instance, state and local government entities that receive federal funding could be covered under both the Rehab Act and Title II of the ADA. Likewise, a private university that receives federal funding could be a covered entity under both the Rehab Act and Title III.[34]

d. *Employment Discrimination*. The standards for determining employment discrimination under the Rehab Act—against employers or federal contractors—are the same as those used in Title I of the ADA.

[34] *See, e.g., Argenyi v. Creighton University*, 703 F.3d 441 (8th Cir. 2013) (medical student with a hearing disability brought suit under Title III and Section 504 of the Rehab Act, alleging school failed to reasonably accommodate his need for lectures to be transcribed).

e. *Remedies*. As discussed above, the remedies available for disability discrimination under the Rehab Act, 29 U.S.C. §794a, are the same as those available under Title II of the ADA. *Barnes*, 536 U.S. at 184-185. These remedies include:

- Injunctive relief.
- Reasonable attorneys' fees to the prevailing party. 29 U.S.C. §794a(b).
- Compensatory damages. Private individuals may recover compensatory damages under Section 504 of the Rehab Act, but only in cases of intentional discrimination. *Liese*, 701 F.3d at 346. A plaintiff may establish discriminatory intent by showing deliberate indifference. *Id*. at 347-348.
- Punitive damages are NOT available. *Barnes*, 536 U.S. at 189.

f. *Sections Relevant to Website Accessibility*. As discussed below, Sections 504 and 508 are relevant to the accessibility of websites and apps to people with disabilities.

g. *Enforcement and Administrative Requirements*. The U.S. Department of Justice Office of Civil Rights ("OCR") enforces Sections 504 and 508. An aggrieved person under Sections 504 or 508 may file a formal complaint through the OCR or, alternatively, file a private lawsuit in federal district court.

2. Section 504 of the Rehabilitation Act, 29 U.S.C. §794. Section 504 of the Rehab Act was the first civil rights legislation designed to protect individuals with disabilities from discrimination based on their disability status.

a. *Prohibits Disability Discrimination.* Section 504 provides that no individual with a disability "shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. §794(a). Businesses, organizations, or agencies that receive federal funds must make their programs and activities accessible to individuals with disabilities.

b. *Parallels to Title II of the ADA.* Section 504 and Title II of the ADA provide the same remedies. Title II applies the same requirements to state and local government entities that Section 504 applies to federal government entities and those receive federal funding. Between the two laws, all government-funded programs are covered; and there are many programs and entities that are covered by both laws at the same time.

3. Section 508 of the Rehabilitation Act, 29 U.S.C. §794d.

a. *Accessibility Requirements*. Section 508 provides that each federal department or agency, "[w]hen developing, procuring, maintaining, or using electronic and information technology, . . . shall ensure, unless an undue burden would be imposed

on the department or agency, that the electronic and information technology allows" both federal employees and the general public access equal to those without disabilities. 29 U.S.C. §794d(a)(1)(A).

- Federal employees. Section 508 guarantees federal employees with disabilities "access to and use of information and data that is comparable to" that of federal employees without disabilities. 29 U.S.C. §794d(a)(1)(A)(i).

- General public. Section 508 also guarantees that members of the general public with disabilities who are "seeking information or services from a Federal department or agency" will "have access to and use of information and data that is comparable to" members of the public who do not have disabilities. 29 U.S.C. §794d(a)(1)(A)(ii).

b. *Prohibits Disability Discrimination*. Thus, Section 508 requires federal electronic and information technology to be accessible to individuals with disabilities, including federal employees and members of the general public.

c. *Relation between Sections 504 and 508*. Section 504 provides the Rehab Act's general prohibition against disability discrimination, while Section 508 specifically addresses accessibility standards for federal electronic and information technology as it relates to individuals with disabilities. Thus, complying with Section 508 is one method of complying with Section 504. Section 504 provides the remedies and cause of action for disability discrimination under the Rehab Act.

4. Notable Cases and Settlements.

a. *American Council of the Blind, et al., v. United States General Services Administration*, Civil Action No. 14-671 (D.C. April 22, 2014). The American Council of the Blind and three individuals filed suit against the GSA for violations of Section 504 of the Rehab Act and Title II of the ADA regarding GSA's website, SAM.gov. Parties settled in November 2015. (See further discussion of case under Title II section, above.)

b. *University of Cincinnati and Youngstown State University*. Two separate OCR complaints against Ohio universities were settled in December 2014, with very similar resolution agreements. In relevant part, the OCR investigation in both cases found that the universities failed to comply with Section 504 of the Rehab Act and Title II of the ADA due to their inaccessible websites. In both resolution agreements, the universities agreed to several remedial efforts, including developing a website accessibility policy and accompanying implementation and remediation plan; providing training to staff; reviewing their websites, e-learning platforms, and other information technologies and developing remediation plans; and ensuring comparable access to computer labs and the provision of assistive technology.

c. *Penn State University*. The National Federation of the Blind ("NFB") filed a complaint against the university because a variety of computer and technology-based websites were inaccessible to blind students and faculty. According to the complaint, visually impaired students encountered departmental websites with images and links that were inaccessible to the read-aloud software the students used to navigate the Internet. The complaint also alleged that the university's ANGEL course-management software (which has since been acquired by Blackboard) "is almost totally inaccessible for blind users." ANGEL's standard version was inaccessible (including e-mail, calendar, assignments, chat, discussion groups and gradebook), and blind students were required to use a "PDA mode" with less utility than the standard version.

   In the parties' 2013 settlement, the university agreed to complete a technology accessibility audit; develop a corrective action strategy based on the audit findings; develop a policy and accompanying procedures; institute procurement procedures requiring bidders to meet WCAG 2.0 Level AA standard for web-based technology and Section 508 standards for other technology; bring all university websites up to WCAG 2.0 Level AA compliance; replace their ANGEL learning management system with one that meets Section 508 guidelines; implement accessibility solutions for classroom technologies including podiums and displays, as well as remote-control-like devices that allowed students to answer multiple-choice questions during lectures ("clickers"); and request accessibility of websites and ATMs of banks that have a contractual relationship with the university.

d. *Florida State University*. With the assistance of the NFB, two blind students filed a lawsuit against Florida State University ("FSU"), alleging that the Department of Mathematics violated Section 504 of the Rehab Act and Title II of the ADA by failing to provide them with appropriate accommodations. The complaint alleged that various inaccessible technologies were used for course instruction, including a web-based application and clickers. Specifically, the students could not access software that was used for homework and tests, and the course also relied on inaccessible clickers. The parties reached a settlement in 2012, under which FSU agreed to pay each student $75,000 and "to continue its efforts to make courses accessible to all students." FSU did not admit liability or wrongdoing.

e. *Sabino v. Ohio State University*, No. 2:09-cv-544 (S.D. Ohio) and *Mitchell v. University of Kentucky, et al.*, No. 5:11-cv-152 (E.D. Ky. May 4, 2011). In separate complaints, the National Association of the Deaf ("NAD") alleged that both universities violated Section 504 and Title II due to the lack of access to public service announcements, play-by-play commentary, and other audio content at university football games. The cases settled in 2010 and 2012, respectively, with both universities agreeing to display captions of public address announcements, including play-by-play and player introductions, on the scoreboard and ribbon boards, as well as televisions in the concourse areas.

f. *Maricopa Community College District*, No. CV 12-907-PHX-NVW (D. Ariz. May 22, 2012). The NFB and a blind student who recently graduated from Mesa Community College filed a lawsuit alleging that the college violated Section 504 and Title II because its third-party websites and software applications used for coursework did not work with screen reading software and that clickers were used that are not accessible to blind students. In the parties' 2014 settlement, the college agreed to take a series of steps to procure and deploy electronic and information technology that is accessible to all students, including those who are blind. Specific technologies covered by the settlement are consistent with those covered in OCR resolutions, including Penn State University profiled above.

g. *University of Montana*. In 2014, the University of Montana reached an agreement with the OCR stemming from a 2012 student complaint to OCR that the university was discriminating against students with disabilities. The OCR alleged that the university violated Section 504 of the Rehab Act and Title II of the ADA because of its inaccessible internet technology, including library database materials, web-based course registration, and videos without captions. The parties reached a settlement in 2014, requiring the university to develop and establish an electronic and information technology policy "that demonstrates its commitment to implementing accessibility." Specific technologies covered by the settlement are consistent with those covered in OCR resolutions, including Penn State University profiled above.

C. Title I of the Americans with Disabilities Act.

1. General Overview of Title I of the ADA.

a. *Employers*. Applies to employers with 15 or more employees.

b. *Purpose and Requirements*. Designed to help people with disabilities have the same employment opportunities and benefits available to people without disabilities. Prohibits disability discrimination in employment, and requires employers to provide reasonable accommodations to qualified applicants or employees.

c. *Remedies*.

- Injunctive relief.

- Employer may be compelled to hire, reinstate, or provide a reasonable accommodation to the prevailing plaintiff.

- Compensatory damages. Compensatory damages may be awarded for actual monetary losses (back pay) and for future monetary losses (front pay), mental anguish, and inconvenience.

- Punitive damages. Punitive damages may be available as well, if an employer acts with malice or reckless indifference.

- Reasonable attorneys' fees.

2. Application to Website Accessibility. Unlike Titles II and III, Title I of the ADA is not directed toward access to goods, services, facilities, and privileges. Rather, it addresses employment opportunities and the terms and conditions of employment.

   a. The EEOC, the agency frequently responsible for enforcing Title I of the ADA, which prohibits disability-based discrimination in employment, has said very little about the issue of website and apps accessibility.

   b. However, it appears that Title I at least requires private employers without accessible employment websites to ensure that disabled applicants have an alternate way to look and apply for jobs and requires employers to engage in the interactive process to discuss what reasonable accommodation is required for each individual applicant.

3. DOJ Signals Title I Requires Accessible Employment Websites. The DOJ has pushed the issue of website and apps accessibility even in cases arising under Title I of the ADA.

   a. EXAMPLE: *United States v. Florida State University*, No. 205-17-13 (settled on June 5, 2014). Action brought against FSU under Title I of the ADA, alleging that the FSU Police Department's online application form asked questions about a past or present disability and other medical conditions in violation of the ADA. Notably, the 2014 settlement included a provision requiring the FSU Police Department website and apps to conform to the WCAG 2.0 technical standards. The DOJ stated that this settlement agreement "ensures that people with disabilities will have an equal opportunity to compete for jobs in the FSU Police Department. . . . The Justice Department is committed to knocking down employment barriers for people with disabilities, and we commend the FSU for its cooperation and continuing efforts to improve accessibility for all job applicants."

   b. *Takeaway and Implications*. Where an employer utilizes its website to advertise or promote employment opportunities and solicit and receive application materials, a disabled job applicant could bring a Title I claim against the employer if the website is not equally accessible to disabled applicants.

D. Privacy Claims. Websites and apps that discriminate against individuals with disabilities may also implicate state privacy claims. For instance, an entity may be liable if its website or apps' privacy disclaimer or policy is not accessible to the disabled user who provides private or confidential information.

V. TIPS AND RESOURCES FOR IMPROVING WEBSITE ACCESSIBILITY

A. Website Audit. Businesses and public entities should consider hiring a third-party digital consultant to conduct a thorough audit of their website and apps to determine what features might be insufficient and develop a plan for implementing necessary updates.

B. Implement the Steps Outlined in the DOJ Settlements. The DOJ settlements mentioned above include numerous measures to ensure compliance with federal provisions against disability discrimination, including the following:

1. Develop a website accessibility policy and accompany implementation and remediation plan.

2. Provide mandatory regular training on website accessibility for website and apps content personnel.

3. Designate an employee as web accessibility coordinator for the website(s) and/or apps.

4. Provide for accessibility testing of websites and apps.

5. Retain an independent website accessibility consultant, who will annually evaluate the accessibility of the website and apps.

6. Provide a notice on the website or app soliciting feedback from users regarding how website or apps accessibility can be improved.

7. Ensure that websites and apps conform to, at minimum, the Web Content Accessibility Guidelines 2.0, which is discussed in more detail below.

C. The Web Content Accessibility Guidelines ("WCAG"). The WCAG contain an international standard for web accessibility, intended primarily for website developers. The Website Accessibility Initiative ("WAI") of the World Wide Web Consortium ("W3C") provides information about the analytical processes and the technology required to make websites accessible to individuals with disabilities.

1. The WAI issued the WCAG, which address website accessibility issues:

   - Compatibility: Maximize compatibility with assistive technology.

   - Text alternatives: Provide text alternatives for any non-text content (e.g., images) so that it can be changed into other forms, such as large print or Braille and accessed by individuals with disabilities.

   - Video and audio content: Provide alternatives (e.g., transcript) to video-only or audio-only content that present equivalent information, or link to textual information with comparable information.

- Time-based media: Provide an alternative for time-based media (e.g., audio/video) that presents equivalent information, or link to textual information with comparable information for non-prerecorded media.

- Versatility: Create content that can be presented in different ways without losing information or structure.

- Distinguishability: Make it easier for users to see and hear content (e.g., separating foreground and background text, using adjustable font sizes).

- Keyboard accessibility: Make all functionality available from a keyboard.

- Timed portions: Provide adequate time for users to access and use website functions, or provide a way for users to indicate they need more time.

- Epilepsy/Seizures: Avoid design elements that are known to cause seizures (e.g., rapid flashing images).

2. The WCAG standard has three different levels: A, AA and AAA. A is the weakest level, while AAA is the strongest level. WCAG's AAA compliance correlates with complete Section 508 compliance.

3. WCAG standards are likely to be incorporated into proposed ADA regulations at some point, as evidenced by the DOJ's 2010 ANPR (75 Fed. Reg. 43460), which sought comments on whether the DOJ should adopt the most recent version of WCAG standards (WCAG 2.0).

4. Many settlement agreements generally define the appropriate level of website accessibility by referencing the WCAG 2.0.

5. The Rehab Act included portions of the earliest version of the WCAG standards.

6. Mobile Applications. Public and private entities should approach accessibility of apps in the same manner as website accessibility insofar as liability is concerned. When adopting compliance standards and policies for apps, however, it may be appropriate for such standards and policies to differ from those of websites.

    a. EXAMPLE: NetFlix was recently sued for its inaccessible website ***and*** app. NetFlix's April 27, 2016 settlement adopted the WCAG 2.0 as the accessibility standard for NetFlix's website, but adopted the British Broadcasting Corporation's Mobile Accessibility Standards and Guidelines 1.0 ("BBC") for apps.[35] This departed from the DOJ's typical practice of using the WCAG as the accessibility standard for apps.

[35] *American Council of the Blind v. Netflix, Inc.* (April 27, 2016).

D. Accessibility Statement. One way to curtail lawsuits is to prominently include an accessibility statement on the website expressing that the entity creates and maintains a website which is accessible to people with disabilities, and provides contact information for any user with a concern or complaint regarding the website's accessibility.

E. 24/7 Telephone Service. Companies seeking to limit potential liability while working make their websites or apps accessible should, to the extent possible, ensure that all of the goods, services and information available on their websites can be accessed via 24/7 phone service.

F. Other Considerations.

1. Making a website accessible can be simple or complex, depending on many factors such as the type of content, the size and complexity of the website, and the development tools and environment. Moreover, fixing inaccessible websites can require significant effort, especially sites that were not originally "coded" properly with standard XHTML markup, and sites with certain types of content such as multimedia.

2. It is easier to implement accessibility features if they are planned from the beginning of the website development or redesign. Thus, businesses and public entities should consider enacting policies that require accessibility to be a design consideration from the outset.

3. Businesses and public entities should also consider enacting policies that call for periodic accessibility testing to ensure their websites are still accessible.

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