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INTELLECTUAL PROPERTY ALERT

Website ADA Compliance Remains a Pressing Concern

December 20, 2016

As discussed in a prior client alert, Title III of the Americans with Disabilities Act (ADA), which forbids "places of public accommodation" from discriminating against those with disabilities, may also apply to websites. Blind and visually disabled people often use adaptive software to "read" websites and navigate using keystrokes rather than a mouse. For this assistive technology to work properly, particular coding must be used in creating the website.

Observers and experts in this area have been waiting for the Department of Justice, which enforces the ADA, to promulgate rules regarding the ADA's applicability to websites for years, but the rulemaking has been repeatedly delayed. Most recently, the DOJ issued notice that it intended to release rules in April 2016. Instead, at that time, the DOJ withdrew its notice and indicated that it "intend[ed] to solicit additional public comment on various issues to help the Department shape and further its rulemaking efforts" in light of continually changing technology. It now appears that rules will be promulgated in 2018 at the earliest.

In the meantime, in the absence of concrete guidance from the DOJ, businesses and their compliance and IT professionals have scrambled to determine whether the ADA applies to their website, and, if so, what, if any, accessibility fixes are required. Recent cases indicate that the "places of public accommodation" language of the ADA applies to websites, though there is a Circuit split about whether there needs to be a "nexus" between the website and an actual physical location. That is, the Third, Sixth, Ninth, and Eleventh Circuits have held that a solely web-based businesses is not a "place of public accommodation" under the ADA, but the online arm of a brick-and-mortar retailer is. By contrast, the First, Second, and Seventh Circuits do not require a physical location for the website to be considered a place of public accommodation.

Currently, there is no firm guidance regarding what constitutes adequate accessibility for a website, but there is a growing consensus that a relevant standard is the World Wide Web Consortium's (W3C) Web Content Accessibility Guidelines 2.0 (WCAG), Level AA. Full text of the WCAG is available at http://www.w3.org/TR/WCAG20/. The DOJ has specifically signed off on settlements where alleged ADA violators agree to comply with WCAG at the AA level, and many commentators believe that, when the DOJ does issue rules, they will either mirror or specifically incorporate the WCAG AA guidelines.

Now more than ever, businesses building or updating their websites should consider accessibility from the outset, because litigation in this area appears to be increasing. Moreover, plaintiffs are generally not required to notify allegedly noncompliant businesses and allow them to remediate any issues prior to filing suit. Plaintiffs can only obtain injunctive relief and attorney's fees in litigation under the ADA, i.e., punitive damages are not available, yet private settlements of these cases have been very costly. The majority of these cases have been filed in California, New York, and Pennsylvania — the homes of the primary filers of these suits. California-based businesses in particular should be cautious, in light of the California state counterpart to the ADA, the Unruh Civil Rights Act, which provides remedies beyond those provided by the ADA.

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