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Website Accessibility and ADA: Don't Wait For DOJ to Regulate to Get Compliant

According to some experts, website accessibility for individuals with disabilities is the new civil rights movement. Others may call it a “silent civil rights movement,” as most lawyers and businesses are unaware of the recent wave of litigation and developing law in the digital access arena, labor and employment attorney Cynthia N. Sass said March 9 during a webinar sponsored by the American Bar Association Section of Labor and Employment Law and the ABA Commission on Disability Rights.

As businesses with a digital presence and state and local governments await regulatory guidance to clarify accessibility standards under Titles II and III of the Americans with Disabilities Act, panelists urged entities not to delay compliance efforts based on ADA enforcement activity and action in the courts.

Barriers in Commerce, Education. A broad range of technologies may present accessibility barriers for people with disabilities, said Amanda Maisels, Deputy Chief in the Disability Rights Section of the U.S. Department of Justice. Commercial and public websites, E-readers and point-of-sale devices, educational software, mobile applications, electronic documents and E-books have been the subject of DOJ enforcement actions.

The DOJ has reached settlements with Peapod, an online grocery delivery service, and H&R Block, an online tax preparation software and filing service, to make websites and mobile apps accessible, as well as with seven public employers to make online job applications and websites accessible. Following the investigation of a vision-impaired attorney's complaint, the Orange County Clerk of Courts in Florida agreed to make case documents available in an accessible format upon request, Maisels said.

The department also has filed a statement of interest in a lawsuit against retailer Lucky Brands challenging POS touchscreen keypads under Title III, she added.

State attorney generals' offices—the Massachusetts, Connecticut and New Jersey state attorney generals, in particular—have taken a “keen interest” in website accessibility, said partner Gregory P. Care of Brown Goldstein and Levy, LLP, an advocate for individuals with disabilities facing access barriers.

Inaccessible Technology and Title I Issues. Three areas where inaccessible technology can create problems for employers are job applications, technology necessary for employees to perform essential job functions and

employee portals, noted Joshua A. Stein of Epstein, Becker & Green, P.C.

Stein co-chairs the ADA and Public Accommodations Group in the firm's New York office and advises businesses on ADA and FMLA compliance issues.

Given the significant restrictions the ADA places on employers' ability to obtain medical information or to conduct medical testing prior to extending an offer of employment, “employers have to be very careful about creating some sort of online application system that, because of its inaccessibility, might have the de facto effect of identifying applicants as disabled during the pre-offer stage,” said Stein. Thus, if an employer only puts its application process online, then “it's going to need to be via an accessible platform” so as not to force an applicant to disclose his or her status as a person with a disability prior to the time Title I allows the employer to have that information, he explained.

“Conversely, if an employer has a robust application process—and you can apply online, by mail, in person, on the phone—and all of these are used to some degree” and all are reviewed with the same level of care, timeliness and consideration, “then the fact that the online method isn't accessible, while maybe not ideal, is not necessarily an actual violation of Title I of the ADA.”

Another potential Title I claim arises when inaccessible technology precludes performance of essential functions, promotion or career advancement. Further if an employee with a disability doesn't have access to an intranet portal where information and resources are shared, “then arguably they are being denied some form of benefit of their employment,” Stein said.

Care highlighted *Reyazuddin v. Montgomery County*, 789 F.3d 407, 31 AD Cases 1265, 2015 BL 188233, 4th Cir., No. 14-1299, 6/15/15 (24 ADAM 131, 7/16/15), in which the Fourth Circuit held a public employee with vision impairments had a triable disability bias claim under the Rehabilitation Act for the county's failure to provide an accommodation for inaccessible workplace software, which prevented the employee from performing her duties.

Engage in an Interactive Process. The EEOC has made clear that under the post-ADA Amendments Act employers should focus on whether a reasonable accommodation exists, as opposed to whether or not a person is disabled, Stein said. “So therefore, under Title I, website accessibility and other accessible technology issues are really going to be considered the same way that employers have to assess any other request for reasonable accommodations—by way of engaging employees in an interactive process.”

An employer must determine whether a reasonable accommodation exists that allows an employee to not only safely and effectively perform the essential functions of a particular job “but also have access to the benefits of perks of employment that come with that job,” absent undue hardship, he explained.

Employers subject to Title I have a great advantage over places of public accommodation subject to Title III because they dictate what accommodation they provide, as long as it’s effective, Stein said.

The Second Circuit’s decision in *Noll v. IBM Corp.*, 787 F.3d 89, 31 AD Cases 1049, 2015 BL 160331 (2d Cir. 2015) (24 ADAM 104, 6/18/15), and the March 1 settlement in *EEOC v. AT&T*, D.P.R., No. 3:11-cv-01964, *consent decree approved 3/1/16* (see related story), demonstrate how Title I gives flexibility to employers who are prepared to make good faith efforts to grant an accommodation in the accessible technology space, Stein said.

“There’s a lot of different technologies out there that enable the disabled to access the web and other software tools,” said Eric Singleton, co-founder and managing partner of Eric Singleton & Associates. There are screen readers and braille notetakers for the visually impaired, eye gaze and sip-and-puff systems assistive technologies, BigKeys keyboards, foot-operated mice, light-operated mice and keyboards, and voice recognition software.

DOJ Access Regs ‘Under Development.’ The Justice Department’s current position is that the websites of state and local governments and places of public accommodation are covered by Titles II and III of the ADA.

This has been the department’s position “for two decades,” Maisels stated. Proposed rules will serve “to provide further guidance about the standards that would apply and to resolve uncertainty that has been expressed in some inconsistent court decisions,” she said.

The Justice Department in July 2010 released an advance notice of proposed rulemaking on accessibility of web information and services of state and local government entities and public accommodations. Since then, the DOJ has been working on notices of proposed rulemaking.

As to publication timelines, “those have changed over time,” Maisels said.

The agency announced in November 2015 in its statement of regulatory priorities that state and local governments can expect a proposed rule under Title II in 2016 (RIN: 1190-AA65), but that businesses will have to wait until 2018 for a Title III proposal (RIN: 1190-AA61) (24 ADAM 242, 12/17/15).

In the interim, Web Content Accessibility Guidelines published by W3C—WCAG 2.0 Level AA—is the industry standard the department has used in settlement agreements to make websites and mobile apps accessible, Maisels said.

Undecided Title III Issues. There is a conflict in the circuits on whether a brick and mortar presence is required for Title III coverage, Care said. The DOJ and a court in the First Circuit have held no brick and mortar presence is required (*Nat’l Fed’n of the Blind v. Scribd, Inc.*, 97 F. Supp. 3d 565, 2015 BL 75312 (D. Vt. 2015)) (24 ADAM 246, 12/17/15), whereas the Ninth Circuit has held a company’s website must have a nexus to a brick and mortar location to be covered (24 ADAM 66, 4/16/15).

Based on recent litigation trends, it’s growing more difficult for businesses that aren’t purely in cyberspace to argue, as a threshold matter, that Title III doesn’t apply to their websites, Stein said.

He further noted recent decisions out of Pennsylvania and Massachusetts district courts suggesting that technical arguments regarding the primary jurisdiction doctrine are unlikely to preclude litigation from moving forward in the absence of agency regulations.

Observing that several circuits have yet to rule on the application of Title III to non-brick and mortar entities, or to websites specifically, and that the procedural posture of the existing case law is at the motion to dismiss stage, Stein predicted over the next two years district court decisions will “flesh this area of the law out and better define obligations and defenses for businesses who want to be compliant.”

Take Action and ‘Control the Narrative’. Businesses should develop a productive dialogue that precludes enforcement activity, Stein said.

When the DOJ comes knocking, “already be working on these issues” and “be in the process of assessing a business’ policies and their actual technology,” he recommended. “Ideally, they’d already be taking action to enhance the current situation on their own terms.”

“If you’re able to offer a genuine descriptive narrative that demonstrates to DOJ that your client has an understanding of the concept of website accessibility and is taking steps on their own to address things both on a policy level and a more granular technology level, I’d like to think that would help you develop a productive dialogue with DOJ that ideally precludes litigation,” Stein said. “You want to control the narrative.”

Care agreed with this approach, stating the lack of regulation “is not a reason not to get compliant” and that entities “can take the WCAG 2.0 Level AA as being the gospel” accessibility standard for websites. His firm has begun to look at the British Broadcasting Corp.’s standard for mobile apps.

Since the DOJ announced it would delay issuance of its web access regulations, there has been a “dramatic deluge” of demand letters from plaintiffs’ law firms on behalf of individual clients seeking to assert negotiated settlements, Stein said. In many instances, bootstrapped to claims of website inaccessibility are “some-what tenuous” data privacy claims, he added.

To businesses who seek to settle with an individual claimant, “be sure to do it in a way that creates value and protective value” against copycat suits, Stein advised.

Drive Change from Top Down. Companies seeking to achieve and maintain accessibility need to make sure they have “top-down buy in” because they’re effecting a cultural change, Stein said.

Singleton agreed. “It is crucial to drive this change from the top down,” he stated.

Stein also cautioned against just using “online automated scrollers” for assessing compliance. “In order to do a really good job you need to do human-based review from both a user perspective using assistive technology” and “on the programming side, you need to do the code review,” he said.

To bridge the gap period between noncompliance and compliance, Stein advised to “be prepared to make sure people have other ways to obtain goods and services that are available on your website.”

Finally, when contemplating the roll out of new features, new technology, new benefits and services to clients or to the public, Stein urged: “Accessibility has to be something you keep in mind or you’re just going to find yourself being part of the next wave of the next target for the next technology issue.”

BY KATARINA E. KLENNER

Additional resources provided in the ABA’s presentation “Most Websites Are Not ADA Compliant: Is Yours

One of Them?” are available at http://www.beaconliveweb.com/assets/ll1603ada/163064/Most_Websites_Are_Not_ADA_Compliant-LL1603ADA-Complete_Program_Materials.pdf.