

NATIONAL ASSOCIATION OF REALTORS TRADE EXPO



IS YOUR WEBSITE ADA COMPLIANT?

RISK MANAGEMENT AND LICENSE LAW FORUM

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PART 1



TITLE III OF THE AMERICANS WITH DISABILITIES ACT

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TITLE III OF THE AMERICANS WITH DISABILITIES ACT



- The ADA was enacted to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”
42 U.S.C. § 12101(b)(1).
- Divided into five (5) separate titles, Title III of the ADA (“Title III” or the “Act”) prohibits discrimination against individuals in any place of public accommodation.

ADA COMPLIANCE



- To comply with the ADA, a public accommodation must:
 - i. Provide goods and services in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity;
 - ii. Eliminate unnecessary eligibility standards or rules that deny individuals with disabilities an equal opportunity to enjoy the goods and services of a place of public accommodation;
 - iii. Make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration would result in the nature of the goods and services provided;

ADA COMPLIANCE (CONT.)



- To comply with the ADA, a public accommodation must:
 - iv. Furnish auxiliary aids when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result;
 - v. Remove architectural and structural communication barriers in existing facilities where readily achievable;
 - vi. Maintain accessible features of facilities and equipment;

ADA COMPLIANCE (CONT.)



- To comply with the ADA, a public accommodation must:
 - vii. Provide equivalent transportation services and purchase accessible vehicles in certain circumstances;
 - viii. Design and construct new facilities and, when undertaking alterations, alter existing facilities in accordance with the Americans with Disabilities Act Accessibility Guidelines issued by the Architectural and Transportation Barriers Compliance Board and incorporated in the final Department of Justice Title III regulation.

PART 2



WHO IS COVERED BY TITLE III OF THE ADA?

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WHO IS COVERED BY TITLE III OF THE ADA



- The Title III regulation covers:
 - i. Public Accommodations: i.e. private entities that own, operate, or lease to places of public accommodation;
 - ii. Commercial facilities: nonresidential facilities, including office buildings, factories, and warehouses, whose operations affect commerce; and
 - iii. Private entities that offer certain examinations and courses related to educational and occupational certification

WHO IS NOT COVERED BY TITLE III OF THE ADA



- The Title III regulation does not cover:
 - Entities controlled by religious organizations, including places of worship
 - Private clubs, except to the extent that the facilities of the private club are made available to customers or patrons of a place of public accommodation
 - State and local governments are not covered by the Title III regulation, but rather by the Department of Justice's Title II regulation

PART 3



“PLACES OF PUBLIC ACCOMMODATION” DEFINED

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PLACES OF PUBLIC ACCOMMODATION



- The Act defines “places of public accommodation” as:
- A facility operated by a private entity whose operations affect commerce and fall within at least one of the following categories
 - i. A place of lodging, as that term is define by the Act;
 - ii. A restaurant, bar, or other establishment serving food or drink;

PLACES OF PUBLIC ACCOMMODATION (CONT.)



- iii. A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- iv. An auditorium, convention center, lecture hall, or other place of public gathering;
- v. A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

PLACES OF PUBLIC ACCOMMODATION (CONT.)



- vi. A laundromat, dry-cleaner, 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;
- vii. A terminal, depot, or other station used for specified public transportation;
- viii. A museum, library, gallery, or other place of public display or collection;

PLACES OF PUBLIC ACCOMMODATION (CONT.)



- ix. A park, zoo, amusement park, or other place of recreation;
- x. A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- xi. A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- xii. A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12182.

PART 4



IS A WEBSITE A PLACE OF PUBLIC ACCOMMODATION?

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THE U.S. DEPARTMENT OF JUSTICE (“DOJ”) SAYS: YES.



- A. The DOJ has filed recent Statements of Interest in the matters of:
- National Association of the Deaf, *et al.* v. Harvard University *et al.*,
Civil Action No. 3:15-cv-30023 (D.C. Mass. 2015).
http://www.ada.gov/briefs/harvard_soi.pdf
 - National Association of the Deaf *et al.* v. Massachusetts Institute of Technology,
Civil Action No. 3:15-cv-30024 (D.C. Mass. 2015).
http://www.ada.gov/briefs/mit_soi.pdf

THE U.S. DEPARTMENT OF JUSTICE (“DOJ”) SAYS: YES.



- The DOJ asserted in the Harvard and MIT cases:
 - That it has a longstanding position that the ADA applies to websites of public accommodations and reiterated, consistent with the preamble to the 1991 regulations, that the ADA regulations should be interpreted to keep pace with developing technologies.
 - A public accommodation has an obligation to ensure that the content of its videos is accessible to every person with a disability in the public at large, not just individuals who are customers or potential customers. The obligation to provide an accessible website goes beyond students.

ADVANCE NOTICE OF PROPOSED RULEMAKING



B. 2010 DOJ Advance Notice of Proposed Rulemaking

http://www.ada.gov/anprm2010/web%20anprm_2010.htm

- In 2010, the DOJ announced that it would be publishing a rule, and the technical accessibility standards for websites of public accommodations
- As of 2015, we are still waiting for the rule and the technical standards

ADVANCE NOTICE OF PROPOSED RULEMAKING



- On November 19, 2015, the DOJ published its Statement of Regulatory Priorities advising that there will be additional delays in the promulgation of a rule, and technical standards, for web sites of public accommodations.
- The DOJ has decided to extend the time period for development of the rule, and the accompanying technical standards, to sometime during fiscal year 2018.

ADVANCE NOTICE OF PROPOSED RULEMAKING



- Department of Justice Fall 2015 Statement of Regulator Priorities - Civil Rights Division
http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html
- Regulation Identification Number Data (RIN):
<http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1190-AA61>

DOJ ENFORCEMENT, SETTLEMENT AND CONSENT ORDERS



C. www.ada.gov/access-technology/index.html

- edX, Inc. Settlement Agreement (April 1, 2015)
Improving the accessibility of its Massive Open Online Courses (MOOCs) on its website, Platform, and Mobile Applications to individuals with disabilities.
- National Federation of the Blind *et al* and the United States of America v. HRB Digital LLC and HRB Tax Group, Inc. (March 6, 2014)
Consent Decree regarding compliance with Web Content Accessibility Guidelines (WCAG) 2.0 AA for tax company's website and mobile applications.

DOJ ENFORCEMENT, SETTLEMENT AND CONSENT ORDERS



- Peapod, LLC Settlement Agreement (November 17, 2014)
Settlement Agreement requiring improved access for individuals with disabilities to an online grocery shopping and delivery service's website and mobile applications.
- National Federation of the Blind v. Law School Admission Council Settlement Agreement (April 27, 2011)
Inaccessibility of the Law School Admission Council's website to blind individuals using screen reader technology required to be cured.

DOJ ENFORCEMENT, SETTLEMENT AND CONSENT ORDERS



- QuikTrip Corporation Consent Decree (July 15, 2010)
Addressed accessibility of hundreds of gas stations, convenience stores, truck stops, and travel centers; fueling and other types of assistance including website accessibility.
- Hilton Worldwide, Inc. Consent Order (November, 2010)
Improvement of accessibility of websites for Hilton and its affiliated companies.

THE U.S. COURT OF APPEALS



D. The U.S. Courts of Appeal are divided on the issue of whether a website is a public accommodation

i. The Third, Sixth, Ninth and Eleventh Circuits have asserted a narrow approach:

Title III only applies to physical structures. For a web site to be designated a public accommodation, there must be a “nexus to a physical structure”.

THE THIRD, SIXTH, NINTH AND ELEVENTH CIRCUIT COURTS



- Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (some connection between the good or service complained of and an actual physical place is required).
- Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998) (Title III's protections are not ambiguous and did not refer to non-physical access).
- Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (*en banc*) (a public accommodation is a physical place and a benefit plan offered by an employer is not a good offered by a place of public accommodation).

THE THIRD, SIXTH, NINTH AND ELEVENTH CIRCUIT COURTS



- Rendon v. Valleycrest Productions, Ltd., 294 F.3d 1279, 1283 (11th Cir. 2002) (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.).
- Jancik v. Redbox Automated Retail, LLC, No. SACV 13-1387-DOC (RNBx), 2014 U.S. Dist. LEXIS 67223, 2014 WL 1920751, at *8-9 (C.D. Cal. May 14, 2014) (a website is not a place of public accommodation because it is not a physical place and there was not a sufficient nexus between the website and physical kiosks).

THE THIRD, SIXTH, NINTH AND ELEVENTH CIRCUIT COURTS



- Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012) (websites are not places of public accommodation because they are not physical places).
- Ouellette v. Viacom, No. CV 10-133-M-DWM-JCL, 2011 U.S. Dist. LEXIS 52570, 2011 WL 1882780, at *4-5 (D. Mont. Mar. 31, 2011) (a website by itself is not a physical place and the plaintiff did not allege a sufficient connection between the website and a physical structure).
- Young v. Facebook, Inc., 790 F. Supp. 2d 1110, 1114-16 (N.D. Cal. 2011) (a website is not a physical structure and plaintiff did not alleged a sufficient nexus to a physical place of public accommodation)

THE THIRD SIXTH, NINTH AND ELEVENTH CIRCUIT COURTS



- Earll v. eBay, Inc., No. 5:11-cv-00262-JF (HRL), 2011 U.S. Dist. LEXIS 100360, 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011) (places of public accommodation are limited to physical places).
- National Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954 (N.D. Cal. 2006) (plaintiffs had alleged sufficient facts to state a claim because the website was heavily integrated with brick-and-mortar stores and operated as a gateway to the stores).
- Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1319-21 (S.D. Fla. 2002) (rejecting the application of Title III to a website because it was neither a physical location nor a means of accessing a concrete space).

THE FIRST, SECOND, AND SEVENTH CIRCUIT COURTS



ii. The First, Second and Seventh Circuits broad approach.

A place of public accommodation does not need a physical structure. A place of public accommodation encompasses both physical and electronic spaces.

THE FIRST, SECOND, AND SEVENTH CIRCUIT COURTS



- Nat'l Fed'n of the Blind v. Scribd, Inc., No. 14-162, 2015 WL 1263336 (D. Vt. Mar. 19, 2015) (digital library's website and mobile applications are covered by Title III) (request for interlocutory appeal denied).
- Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994) (health benefits plan).
- Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999) (a nexus existed because the insurance company operated an insurance office, which is explicitly mentioned in the statute).

THE FIRST, SECOND, AND SEVENTH CIRCUIT COURTS



- Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196 (D. Mass. 2012) (video streaming website), but see contrary opinion issued by Cullen v. Netflix, Inc., 880 F. Supp. 2d 1017, 1023-24 (N.D. Cal. 2012) (websites are not places of public accommodation because they are not physical places).
- Doe v. Mutual Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (facilities that exist in electronic space, including a website, are covered by Title III).

THE FIRST, SECOND, AND SEVENTH CIRCUIT COURTS



- Morgan v. Joint Admin. Bd., Ret. Plan of the Pillsbury Co. and Am. Fed'n of Grain Millers, AFL-CIO-CLC, 268 F.3d 456, 459 (7th Cir. 2001) (The defendant asks us to interpret "public accommodation" literally, as denoting a physical site, such as a store or hotel but we have already rejected that interpretation. An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store).
- Straw v. Am. Bar Ass'n, No. 14 C 5194, 2015 U.S. Dist. LEXIS 16296, 2015 WL 602836, at *6 (N.D. Ill. Feb. 11, 2015) (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).

CALIFORNIA STATE COURT



iii. California State Court

- Davis v. Bmi/Bnd Travelware, Docket No. CIVDSI1504682, Superior Court (San Bernadino, April 2016) (Granting Plaintiff's Motion for Summary Judgment - Defendant directed to take steps necessary to make coloradbaggage.com readily accessible to and usable by visually impaired individuals or to terminate website).

PART 5



CURRENT ADA TITLE III WEBSITE LITIGATION

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CURRENT ADA TITTLE III WEBSITE LITIGATION



- Sipe et al. v. American Casino & Entertainment Properties, LLC, Civil Action No. 2:16-cv-124 (W.D. Pa. January 29, 2016)

PART 6



WCAG 2.0 AA STANDARDS & SUCCESS CRITERIA

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WCAG 2.0 AA STANDARDS & SUCCESS CRITERIA



- <http://www.w3.org/TR/2008/REC-WCAG20-20081211/>
- Easy Checks - A First Review of Web Accessibility
<http://www.w3.org/WAI/eval/preliminary.html>

PART 7



MISCELLANEOUS APPLICATIONS

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MISCELLANEOUS APPLICATIONS



- Real Estate Offices
- Personal residences used for business purposes
- Builders
 - Model Homes

Sapp v. MHI Partnership, Ltd., 199 F.Supp. 2d 578 (N.D. Texas 2002); housing developers model home was a “sales or rental establishment” that constituted a place of public accommodation when also used as a sales office.

MISCELLANEOUS APPLICATIONS



- Mobile Home parks

Kalani v. Castle Village, LLC, 14 F. Supp. 3d 1359 (E.D. Ca. 2014) (rental and sales office of mobile home park was a place of public accommodation)

SUMMARY AND QUESTIONS



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