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ADA Title III Litigation & Compliance

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Proposed Bipartisan Legislation Introduced to Address Website Accessibility Lawsuits

On October 2, 2020, Representatives Lou Correa (D-CA) and Ted Budd (R-NC) introduced a bipartisan bill titled the Online Accessibility Act, intended to curb predatory website accessibility lawsuits that accuse consumer-facing websites of violating Title III of the Americans with Disabilities Act ("ADA").

The Online Accessibility Act would take websites and mobile applications outside of Title III of the ADA—which was meant to address accessibility to services provided by physical businesses—and create a new ADA Title VI dedicated specifically to consumer facing websites and mobile applications.

The key points of the proposed legislation are discussed below. But first, a brief discussion of where we are and how we got here.

THE PRESENT LANDSCAPE

The ADA requires places of "public accommodation" to meet certain standards of accessibility for disabled visitors. The statute enumerates several specific public accommodations (*e.g.,* restaurants, hotels, etc.)—all of which are physical locations. Although the question of whether websites conducting online business must also be accessible is not addressed in the legislative text of the ADA, the Department of Justice ("DOJ") and scores of federal courts have concluded that websites are places of public accommodation and as such must be accessible to all visitors.

The main problem with shoehorning websites into Title III has been that, unlike physical premises, which are heavily regulated, the DOJ has failed to promulgate standards of online accessibility. There is simply not a regulatory standard against which to measure the accessibility of private websites to disabled persons. Despite commencing a proposed rulemaking process in 2010, which contemplated establishing website accessibility requirements based on the World Wide Web Consortium's ("WC3") Web Content Accessibility Guidelines 2.0 Level AA Success Criteria ("WCAG 2.0 AA"), the DOJ terminated the rulemaking process in 2017 and has not resumed it. Chaos has followed. Websites of all kinds have been left vulnerable to predatory litigation, and the federal courts have been deluged with thousands of cases. The result has been a patchwork of inconsistent decisions. In October 2019, the U.S. Supreme Court declined to clarify the issue, leaving in place a Ninth Circuit ruling that had determined Title III applies to the Domino's restaurant chain website and mobile application because each constitutes a "service of a place of public accommodation." *See Robles v. Domino's Pizza LLC,* 913 F.3d 898 (2019).

More than 2,800 federal "surf by" lawsuits are now filed each year, with most suits concentrated in three particularly plaintiff-friendly jurisdictions. Generally, these lawsuits are "sue and settle"—indeed, more than 90 percent settle quickly. In the absence of achievable safe harbor standards, the question of whether a website is accessible often presents "factual" issues that preclude pre-answer dismissal. Litigation gets significantly more costly once discovery begins, and the cost of litigation nearly always exceeds the cost of settlement in these cases. When faced with the choice between the relatively low cost of settling early and the uncertain outcome of protracted litigation, most businesses choose to pay for peace even if their website is significantly accessible.

The status quo is untenable for businesses. And now it appears that some in Congress are paying attention.

THE PROPOSED ONLINE ACCESSIBILITY ACT

Recognizing the unworkability wrought by years of legislative and regulatory inertia and a patchwork of sometimes inconsistent rulings in courts across the country, the proposed Online Accessibility Act is rooted in the premise that a predictable regulatory environment is critical for businesses. Further, the drafters recognize that, like physical premises, websites should be accessible to the disabled and their owners should have effective defenses to predatory litigation available to them. Title III provides physical businesses with comfort that compliance with the regulatory standards applicable to brick and mortar accessibility is a valid defense on the merits. Title VI aims to provide the same for businesses with consumer facing websites. The key points of the proposed legislation are discussed below.

Establishment of Standards

The Online Accessibility Act officially would officially adopt the WCAG 2.0 AA criteria, which would establish the first-ever statutory codification of an accessibility standard for business websites. Importantly, the drafters recognize that perfect conformance is not possible, and the bill provides that a website or mobile application should be considered accessible if it is in *substantial compliance* with WCAG 2.0 AA or any subsequent update, revision, or replacement to the WCAG 2.0 AA published by the WC3.

Baking in the concept of substantial (as opposed to perfect) compliance is critical. Even substantial compliance is difficult to obtain and fraught with technical challenges. Websites are fluid. Every new page, photo, or link that is added triggers new potential screen reader accessibility issues that may not be immediately apparent. To account for this reality, the bill contemplates that some degree of flaws and errors must be acceptable.

To be sure, the Online Accessibility Act's proposed target line is itself imperfect. Just as unclear language in a contract leaves room for argument (and litigation), the statutory term "substantial compliance" is no doubt in the eye of the beholder and the likely subject of future litigation for clarification. To that end, the bill would grant the Architectural and Transportation Barriers Compliance Board (an existing independent United States government agency devoted to accessibility for people with disabilities) with the authority to promulgate rules defining, among other key terms, "substantial compliance," and "alternative means of access."

Administrative Remedies

One of the most consequential elements of the Online Accessibility Act is its requirement of the exhaustion of administrative remedies designed to give businesses the opportunity to remedy any alleged accessibility barriers before being sued.

An individual claiming denial of access must first notify the owner or operator of the website or mobile application that the website or app is not in compliance with the established standard. If the business fails to bring the website or app into compliance within 90 days, the individual can then file a complaint with the DOJ, which will investigate whether a violation exists and issue a final determination. If the DOJ finds discrimination, it may file a civil lawsuit for injunctive relief and damages, including civil penalties of $20,000 for initial, and $50,000 for subsequent, violations.

Private Remedy Remains, But Requires a More Exacting Pleading

After exhausting the administrative remedies (and assuming the DOJ does not bring a civil action), an individual claiming denial of access can file a civil action under the new ADA Title VI. But the boilerplate cut and paste complaints that have inundated courts under the current rubric will no longer suffice. A would-be plaintiff will have to plead each element of the claim with particularity, including the specific barriers to access.

CONCLUSION

If enacted, the Online Accessibility Act will be a meaningful step towards providing a reliable statutory and regulatory framework for businesses to maintain accessible customer facing websites, curb the serial litigation that has exploded in recent years, and create real remedies to resolve violations.

It is especially encouraging that the drafters of the Online Accessibility Act recognize that accessibility is not a one size fits all proposition and should be scalable based on the size of the business. The bill provides that any regulations issued under the new Title VI should include "flexibility" for small business concerns to comply with the accessibility standards. This flexibility directive should benefit companies offering overlay accessibility solutions (plugins and widgets) that a user activates by clicking an "accessibility" button. Because overlay products modify only the front-side code of the website, they cost significantly less than the typical services offered by vendors that manually audit and test websites to provide manual remediation at the code level. For example, *accessiBe,* the leading global company providing automated solutions, uses AI technology to offer a "set and forget" accessibility tool for under $50 per month. If the regulations are written effectively, this tool should suffice for the majority of companies active in e-commerce.

Nevertheless, the Online Accessibility Act is missing a few provisions that would be essential to businesses. Chiefly, in its present form the proposed bill would not preempt state regulation of website accessibility. If not modified, the Online Accessibility Act would miss the opportunity to stop the rising trend of cases filed under California's Unruh Civil Rights Act. Unruh, unlike the ADA, includes a backwards looking monetary damages provision that allows for $4,000 in damages for each incident of discrimination that has already happened. The damages component deprives the defense bar of one of the few effective tools currently available in defending ADA lawsuits, dismissal under the "mootness" doctrine.

Despite the possibilities offered by the Online Accessibility Act, there is no guarantee that it will become law. For the foreseeable future, there is no safe harbor and all businesses with an internet presence remain vulnerable to accessibility lawsuits. A coordinated strategy is the best approach to manage risk before, during, and even after a lawsuit. Successful strategies involve internal decision-makers, solid legal advice, and qualified website design professionals. Businesses should continue to conduct audits of their websites and mobile apps to ensure accessibility to screen reader software and devices used by blind and visually impaired individuals. From a practical standpoint, businesses should strive to be as compliant as possible with the WCAG 2.0 (and, if practicable, the recently issued and updated version 2.1). If sued, several valid defenses still exist, including lack of nexus (in nexus jurisdictions). Traditional defenses like mootness, failure to plead a particularized injury, and lack of personal jurisdiction may also exist.

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