

Making Website Accessibility Accessible: Understanding the Landscape of the Digital Age

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Background On Accessibility Obligations



Title III of the ADA

WHO IS COVERED?

- Governs **places of public accommodation**
 - Own, operate, control, lessor/lessee
 - Joint and several liability
- Places of public accommodation include:
 - inns, hotels, motels, or other places of lodging;
 - restaurants, bars, 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;



Title III of the ADA

WHO IS COVERED?

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

Title III of the ADA

A CIVIL RIGHTS LAW

- Title III guarantees individuals with disabilities the “**full and equal enjoyment** of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation” (42 U.S.C. § 12182(a))
- Key Types of Disabilities/Impairments
 - Visual (blind/low vision);
 - Aural (deaf/hard of hearing);
 - Physical (*e.g.*, can’t use hands); and
 - Cognitive (*e.g.*, learning disability).
- General Prohibitions:
 - Denying participation or the opportunity to participate;
 - Providing unequal benefits;
 - Providing separate benefits
 - Not having an integrated setting; and
 - Discrimination because of a relationship or association with an individual with a disability.

Title III of the ADA

SPECIFIC PROHIBITIONS/OBLIGATIONS



- Cannot utilize eligibility criteria that **screen out** individuals with disabilities;
- Requires **Modification of policies, Practices and Procedures** – unless doing so fundamentally alters goods and services provided;
- Requires provision of **Auxiliary Aids and Services** to the extent necessary to achieve **effective communication**; and
- Requires **Barrier Removal**.

State and Local Laws

- Most states and many localities have human rights/anti-discrimination laws prohibiting discrimination on the basis of disability and requiring accessibility in various public entities



Website Accessibility



Sources of Website Accessibility Obligations

BACKGROUND

- Title III of the ADA:
 - Prohibits places of public accommodation from discriminating on the basis of disability
 - Requires **“full and equal enjoyment”**
 - Does not explicitly define whether a place of public accommodation must be a physical place or facility, nor does it directly address whether it could be read or interpreted to apply to a non-physical place or facility
 - Currently, some ambiguity still exists regarding whether/to what extent Title III applies to websites
 - Court decisions on the issue – both generally and specific to websites – have been decided both ways, though are trending more towards requiring accessibility
- Other Sources
 - Title II of the ADA
 - Section 508 of Rehabilitation Act (Refresh expected October 2016)
 - Air Carrier Access Act
 - 21st Century Communications and Video Accessibility Act

Title III of the ADA

SCOPE OF COVERAGE: THE CURRENT JUDICIAL LANDSCAPE

- **Strict construction:** holding “Places of Accommodation” are limited to physical places so Title III does not apply
- **Nexus:** holding that Title III applies when there is a sufficient connection between the goods and services of traditional “Places of Accommodation” (*e.g.*, a restaurant or hotel) and the alternative consideration (*e.g.*, website)
- **Spirit of the law:** holding that “Places of Accommodation” are not limited to physical places so Title III does apply even without a nexus

Key Decisions Directly Addressing Title III's Applicability To Websites

▪ *Nat'l Federation of the Blind vs. Target Corp.* (N.D. Cal. 2006)

- Addressed whether Title III covers only physical “brick and mortar” structures or does it also cover the internet
- NFB alleged that Target violated Title III, California’s Unruh Act, and California’s Disabled Persons Act because Target.com – which offered a variety of store-related services – was inaccessible to the blind and thus Plaintiffs were denied full and equal access to Target stores
- Target asserted that the ADA and California state laws only cover access to physical spaces, such as Target’s brick-and-mortar stores, and that Target.com is not a physical space and thus not a “place of public accommodation”
 - Also asserted that Plaintiffs were not denied full and equal access to the Target stores because the services were provided via alternative means

Key Decisions

TARGET

- The Court held that Title III covers websites in situations where a nexus exists between the website and a physical place of public accommodation
 - “The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation”
- Many of the benefits and privileges of Target’s website – such as online information about store locations and hours and printable coupons that are redeemed in the stores – were “heavily integrated with the brick-and-mortar stores”
 - Did not rule on whether alternative measures provided by Target (*e.g.*, telephone line, in-store assistance) were effective alternatives
- Regarding the state law claims, the Court found that, since the plaintiffs stated a claim under the ADA and ADA claims are per se claims under the Unruh Act and the DPA, it would not reach Target’s challenges to the plaintiffs’ state law claims
 - Nevertheless, the Court stated in dicta that part of plaintiffs’ claim was “that Target.com is a service of a business establishment, and therefore defendant’s argument that a website cannot be a business establishment is unavailing”

Key Decisions

TARGET



- Ultimately resulted in a court-approved class settlement agreement in which Target agreed to:
 - Establish a \$6 million fund from which members of the state settlement class could make claims;
 - Take the steps necessary to make its website accessible to the blind by early 2009 and obtain “certification” from NFB;
 - Pay NFB to train all its employees who work on its website; and
 - Pay attorneys’ fees and costs

Key Decisions

THE POST-TARGET LANDSCAPE

- Increased (threats of) litigation on this issue
- Significant number of settlements and “cooperative agreements” (e.g., via “structured negotiations”) between advocacy groups and/or state and/or federal government agencies and major companies regarding website accessibility
- Increased attention from DOJ and other Regulators
- Movement to adopt the World Wide Web Consortium/Website Accessibility Initiative’s Web Content Accessibility Guidelines 2.0



Key Decisions

POST-TARGET LITIGATION

- ***Ouellette v. Viacom* (D. Mont. Mar. 31, 2011):** the court dismissed claims against 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”
- ***Young v. Facebook, Inc.* (N.D. Cal. May 17, 2011):** the court restated that websites on their own do not constitute places of public accommodation under Title III and, therefore, a “nexus” must exist between a website’s services and a physical place of public accommodation for Title III obligations to apply to the website; **“Facebook operates only in cyberspace, and is thus is [sic] not a ‘place of public accommodation;’** as construed by the Ninth Circuit. While Facebook’s physical headquarters obviously is a physical space, it is not a place where the online services to which Young claims she was denied access are offered to the public”
- ***Earll v. eBay, Inc.* (N.D. Cal. Sept. 7, 2011):** the ADA could not afford a remedy to plaintiff because its definition of “places of public accommodation” is limited to actual physical spaces, plaintiff could assert an independent Unruh Act claim because **“[b]oth the Unruh Act and the [Disabled Persons Act] apply to websites ‘as a kind of business establishment and an accommodation, advantage, facility, and privilege of a place of public accommodation, respectively.** No nexus to . . . physical [places] need be shown”

Key Decisions

POST-TARGET LITIGATION

- ***Jancik v. Redbox Automated Retail, LLC* (C.D. Cal. May 2014):** the Court granted Defendant's motion to dismiss and held, among other things, that Redbox did not have to caption its library of web-based videos because a website is not a place of public accommodation under Title III
- ***National Federation of the Blind et al. v. Scribd* (D. Vermont, March 2015):** the Court rejected Defendant's motion to dismiss finding that the language of Title III, the ADA's legislative history (embracing a "liberal approach"), and DOJ's interpretation of the ADA all suggest that it can apply to establishments that offer goods and services to the public even if they do not have a physical location

Key Decisions

POST-TARGET LITIGATION

- ***National Association of the Deaf v. Harvard University; M.I.T. (D. Mass. 2015 – Ongoing)*** – In February 2016, in a case in which DOJ filed Statements of Interest, ALJ denied Defendants’ motion to dismiss for various technical/procedural grounds (*e.g.*, primary jurisdiction doctrine). Harvard has since filed objections to the ALJ’s report and recommendations.
- ***Various (2015 -)***: Upon learning the Title III DOJ regulations would be delayed beyond the 25th Anniversary of the ADA, hundreds of demand letters have been sent and multiple website accessibility litigations commenced on behalf of private individuals (some as class actions) by a handful of Plaintiff-side law firms.
- ***Davis v. BMI/BND Travelware (San Bernardino Superior Court; March 2016)***: held that defendant violated the ADA and the Unruh Act by denying plaintiff full and equal enjoyment of goods/services/accommodations offered vis its inaccessible website because a nexus existed between the website and defendant’s physical retail store.

Netflix Cases: Impact of the Judicial Split

NAT'L ASSOC. OF THE DEAF v. NETFLIX, INC. (D. MASS. JUNE 19, 2012)

■ *Nat'l Assoc. of the Deaf v. Netflix, Inc.* (D. Mass. June 19, 2012)

- Alleged that Netflix's failure to provide closed captioning on their "Watch Instantly" streaming video programming website violated ADA
- The court held that 1st Circuit precedent, Congressional intent, and the plain language of the ADA clearly supported a finding that accessibility obligations are not limited to physical places:

- **"Carparts's reasoning applies with equal force to services purchased over the Internet**, such as video programming offered through the Watch Instantly web site. In a society in which business is increasing conducted online, **excluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes and would severely frustrated Congress's intent** that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."
- **"The ADA covers services 'of' a public accommodation, not services 'at' or 'in' a public accommodation"** (citing *Target*)

Netflix Cases

NAT'L ASSOC. OF THE DEAF v. NETFLIX, INC. (D. MASS. JUNE 19, 2012)

- Netflix's Watch Instantly website could fall into several categories listed in the ADA:
 - “service establishment”: provides customers with the ability to stream video programming over the Internet
 - “place of exhibition or entertainment”: displays movies, television programming, and other content
 - “rental establishment”: engages customers to pay for the rental of video programming
- Entered into a consent decree (Oct. 9, 2012) in which Netflix agreed to, among other things,:
 - 100% of on-demand streaming content has captions or subtitles
 - Captions available within an average of 15 days (by Sept. 30, 2014) and 7 days (by Sept. 30, 2016) after content's on-demand launch
 - Pay **\$755,000 in attorneys' fees and costs**
 - Pay NAD **\$40,000 for compliance monitoring**

Netflix Cases

CULLEN V. NETFLIX, INC. (N.D. CAL. JULY 2012; 9th Cir. April 2015)

■ *Cullen v. Netflix, Inc.*

- Alleged that Netflix's failure to provide closed captioning on their "Watch Instantly" streaming video programming website violated ADA
- The court held that 9th Cir. precedent controlled, finding that plaintiff could not rely on a violation of the ADA to state *per se* violations of the Unruh Act and the Disabled Persons Act, and granting Netflix's motion to dismiss with leave to amend to state independent causes of action under the Unruh Act and Disabled Persons Act
- **"The Netflix website is not 'an actual physical place' and therefore, under Ninth Circuit law, is not a place of public accommodation.** Because the website is not a place of public accommodation, the ADA does not apply to access to Netflix's streaming library." (citing *Weyer*)
- **On April 1, 2015, the Ninth Circuit held that web-only businesses are not places of public accommodation under Title III.**
 - Explained that the phrase "place of public accommodation" requires, "some connection between the good or service complained of and an actual physical place."

Netflix Cases

■ RECENT DEVELOPMENTS

- ***American Council of the Blind; Bay State Council of the Blind; Baran & Netflix Settlement (April 2016)***
 - Requires provision of narrative description created by television and movie studios;
 - Expands website accessibility obligations; and
 - Covers mobile platforms (websites and applications)
 - References British Broadcasting Corporation's Mobile Accessibility Standards and Guidelines 1.0

U.S. Department of Justice

- DOJ takes the position that Title III as written applies to the websites of private places of public accommodation:
- DOJ has made its position clear in various forms:
 - amicus briefs/statements of interest
 - guidance publications
 - letters and testimony before Congress
 - settlements agreements
 - ANPRM (and its hearings)
- “Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. . . .”
 - Preamble, Final rule, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43465 (published Sept. 15, 2010)

Some Early Offerings from DOJ

- 1996 then-Assistant Attorney General Deval Patrick wrote, “[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet.”
- Amicus Brief: *Hooks v. OKBridge, Inc.* (5th Cir. 2000) – whether Title III applies to an online gaming site that operates solely on the Internet
 - “The [ADA] covers the services ‘of’ of a place of public accommodation, not ‘at’ the place of public accommodation. The definition of a ‘public accommodation’ is intentionally broad and is not limited to those entities providing on-site services.”

Thomas Perez, Then Assistant Attorney General, Civil Rights Division, U.S. DOJ

- “Let me be clear. **It is and has been the position of the Department of Justice since the late 1990’s that Title III of the ADA applies to Web sites.** We intend to issue regulations under our Title III authority in this regard to help companies comply with their obligations to provide equal access.”
- **“Companies that do not consider accessibility in their Web site or product development will come to regret that decision,** because we intend to use every tool at our disposal to ensure that people with disabilities have equal access to technology and the worlds that technology opens up.”
 - Speaking at Jacobus tenBroek Disability Law Symposium (April 25, 2010)
- **“It is the position of the Department of Justice since the late 1990s that the ADA applies to websites. Companies that do not consider accessibility in their website or product development will come to regret that decision,** because we intend to use every tool at our disposal to ensure that people with disabilities have equal access to technology and the worlds that technology opens up.”
 - Speaking at the DOJ Celebration of the 22nd anniversary of the Americans with Disabilities Act (July 26, 2012)

The Rulemaking Process

- July 26, 2010 ANPRM – Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government
 - Contemplating amending Title II and Title III regulations
 - Public hearings held throughout Fall/Winter 2010/2011
 - Public comment period ended January 24, 2011
 - Formalizes intent to adopt standards expressly covering websites owned, operated, and controlled by entities covered by Titles II and III
 - Scope of DOJ's web accessibility standards most likely limited to public accommodations that offer goods and services, either exclusively on the Internet (*e.g.* Amazon.com) or in conjunction with a physical location (*e.g.* Target stores)
 - Proposed staggered compliance deadlines
 - Likely to include affirmative defenses akin to those used in brick and mortar context

The Rulemaking Process (cont.)

■ DELAYS

- **Title II** – NPRM had been expected by 25th Anniversary of ADA in July 2015, then Summer/Fall 2016, now delayed following May 2016 publication of SNPRM
- **Title III** – NPRM had been expected by 25th Anniversary of ADA in July 2015, then April 2016, now 2018
- December 2015 letter by Senators to OMB seeking promulgation of regulations
 - Industry groups following suit
- **Title II SANPRM** – by August 8, 2016, seeks comments on a variety of issues, including, among others:
 - The appropriate technical standards for providing an accessible website (*e.g.*, WCAG 2.0);
 - The time period covered entities should be given for compliance once the regulations are effective (*e.g.*, two years?) and whether additional time should be granted for any specific requirements (*e.g.*, narrative description?);
 - Whether exemptions should be granted for a variety of reasons (*e.g.*, smaller entities; archived materials; existing pdf/Word documents; third-party content/links);
 - Should alternative formats ever be an acceptable alternative to an accessible website? and
 - Should mobile applications be covered by the regulations?

Key Settlement Agreements and Partnerships With Advocacy Groups

- **Amazon** and National Federation of the Blind (2007)

- Cooperative agreement to develop and promote technologies that improve web accessibility and take measures to support use of screen-readers



- **Radio Shack** (2007); **Rite Aid** (2008); **Staples** (2009); and **CVS** (2009) each with American Council of the Blind, the California Council of the Blind *et al.*

- Required substantial compliance with WCAG (specifics varied based on which version of WCAG governed at the time)

- **MLB** and American Council of the Blind, the Bay State Council of the Blind, and the California Council of the Blind (2010)

- MLB agreed to improve the accessibility of MLB.com and the websites of all 30 major league baseball clubs by following the WCAG 2.0 Level A and AA guidelines
- 2012 Addendum, extends initial agreement and expands coverage to mobile devices and applications

Key Settlement Agreements and Partnerships With Advocacy Groups

- **Travelocity** and National Federation of the Blind (Jan. 2011)
 - Website to be made fully accessible over staggered, 14 month, compliance window
- **American Cancer Society** and American Council of the Blind (Feb. 2011)
 - ACS, as part of a “structured negotiation” in lieu of litigation with ACB, agreed to ensure that its website satisfies WCAG 2.0 Levels A and AA Success Criteria
 - Website accessibility is part of a broader initiative to ensure that ACS’ information is available to people who are blind and visually impaired
 - Extended in 2012
- **Ticketmaster** and National Federation of the Blind (Apr. 2011)
 - Website will be fully accessible to blind users utilizing screen access technology by December 31, 2011
 - Ticketmaster will submit its website to the NFB Nonvisual Accessibility Web Certification program, which is NFB’s testing program to ensure that websites remain compliant
- **Penn State University** (2011); **Florida State University** (2012) and National Federation of the Blind
 - Full website accessibility under WCAG 2.0 Levels A and AA; \$75,000 to each of the two named FSU Plaintiffs

Key Settlement Agreements and Partnerships With Advocacy Groups

- **Bank of America** and Bay State Council of the Blind (2013)
 - Must continue to use WCAG 2.0 Level AA as the standard for ensuring that its Online and Mobile Banking application content, features, and services are accessible to people who are blind or visually impaired
- **Weight Watchers** and American Council of the Blind (2013)
 - Must make its website and mobile applications compliant with WCAG 2.0 Levels A and AA
- **Square, Inc.** and National Federation of the Blind (2013)
 - Must make mobile applications accessible to individuals who are blind
- **Safeway** (settlement with individual reached via “structured negotiation”; 2013)
 - Given until April 15, 2014 to achieve substantial compliance with WCAG 2.0 (A-AA) for ecommerce webpages and Safeway mobile optimized page

Key Settlement Agreements and Partnerships With Advocacy Groups

- **Wellpoint** (settlement with individual plaintiff reached via “structured negotiation”; settlement announced in February 2014)
 - Given until March 31, 2014 to achieve substantial compliance with WCAG 2.0 (A-AA) for website)
- **Vudu Inc.** and National Association of the Deaf (2015)
 - Agreed to provide captioning (or in limited instances subtitles) for all its streaming movies and television shows
- **Atlantic Cape Community College** and NFB (2015)
 - Agreed to make website accessible in six months, and library website accessible
- **Scribd** and NFB (2015)
 - Make online services accessible by the end of 2017.
- **Denny’s** and ACB (2015)
 - Make website and mobile applications compliant with WCAG 2.0, Levels A and AA.

Key Settlement Agreements With Advocacy Groups and Plaintiffs

- *Judith Smith, Bonnie Lewkowicz and AXIS Dance Company v. Hotels.com L.P.* (2009) (settlement of claims brought under California state law) **Hotels.com** and **Expedia, Inc.** agreed to implement improved accessibility features throughout its website; \$200,000 in attorneys' fees)
- **Charles Schwab & Co., Inc.** (settlement with individual plaintiff reached via "structured negotiation" commenced in December 2010; settlement announced on May 1, 2012; staggered dates for WCAG 2.0 (A-AA) compliance; agreed to make public and individual investor log-in sites accessible; also agreed to use "good faith efforts" to select third-party vendors whose content complies with WCAG 2.0 (A-AA); confidential amount of attorneys' fees)

Key Settlement Agreements With Advocacy Groups and Plaintiffs

- *Shields, et al. v. Walt Disney Parks and Resorts US, Inc., et al.*, No. CV 10-05810 (DMG) (FMOx) (C.D. Cal.) (class action, including a “website class,” for violations of the ADA, the Unruh Act, and the DPA; on January 25, 2013, the court approved a revised class settlement that includes staggered dates (from December 2012 – December 2015) for achieving WCAG 2.0 (all Level A and certain specified provisions in Level AA) compliance for various sections of www.disneyworld.com, www.disneyland.com, www.disneycruises.com, as well as express compliance exclusions; \$1,403,500 million in attorneys’ fees (cap had been set at \$1,550,00); \$15,000 to named plaintiffs)
- **Bank of America Rewards Redemption** (2015): reached agreement with private plaintiff to make website compliant with WCAG 2.0 Levels A and AA
- **Carlson Lynch/Newport Trial Group/Lee Litigation Group** (2015 -): significant numbers of settlements reached across industries requiring partial to substantial compliance with WCAG 2.0 Levels A and AA; often add a parallel data privacy claim

Key Settlement Agreements With Offices of State Attorney Generals

▪ **Ramada Inn/Priceline** and NYSAG (2004)

- Complaints alleged that the “critical functions” of the websites were difficult to use, in violation of the ADA, NYHRL, and New York Civil Rights Law
- Agreed to bring their entire websites into compliance with a combination of Section 508 and WCAG 1.0 guidelines (except pages, components, and content displayed directly by third-party using third party’s software)
- Ramada and Priceline paid \$40,000 and \$37,500 respectively for costs involved with NYSAG investigation
- Required to report compliance efforts for three years

▪ **Apple/iTunes** and Mass. Attorney General’s Office (2008)

- iTunes U (education content) must be fully accessible by Dec. 31, 2008; general iTunes site accessible to blind by June 30, 2009
- Apple contributed \$250,000 to Massachusetts Commission for Blind for purchase of adaptive technology

▪ **HSBC Card Services, Inc.** and NYSAG (2009)

- Given nine (9) months to make website compliant with WCAG 2.0 Levels A and AA

▪ **Monster.com** and Mass. Attorney General’s Office/NFB (2013)

- In accordance with the agreement, Monster is in the process of making its desktop and mobile websites fully and equally accessible and will have its mobile applications accessible within two years. Monster has also ensured the templates employers use to post job advertisements on its site will be fully and equally accessible within six months.
- Monster contributed \$50,000 to Massachusetts Commission for Blind and \$50,000 to the National Federation of the Blind, and must serve as 2013 title sponsor of NFB annual convention
- Requires training and a working arrangement with the NFB going forward

DOJ Settlement Agreements

- **QuikTrip** (July 19, 2010)

- Required convenience store retail chain to evaluate its website according to “generally accepted standards for website accessibility, such as the Standards promulgated pursuant Section 508 . . .”

- **McNeese State University** (September 10, 2010)

- Required to make new and modified webpages accessible.

- **Hilton Worldwide Inc.** (Nov. 9, 2010)

- Hilton agreed to bring its website into compliance with WCAG 2.0, Level A success criteria



DOJ Settlement Agreements

- ***Nat'l Fed. of the Blind v. Law School Admissions Council ("LSAC")*** (Apr. 25, 2011) (DOJ later joined)
 - LSAC agreed to ensure that website users who are blind and utilize screen-reader technology are able to obtain the same information and take part in the same transactions as other guests (*e.g.*, register for LSAT; access practice LSAT materials, and submit online law school applications); and
 - Agreed to provide technology that enables participating law schools to add school-specific inquiries in an accessible manner
- **Wells Fargo & Co.** (May 31, 2011)
 - As part of much broader settlement, agreed to continue its ongoing actions regarding website accessibility
 - No standard given – focused on concepts (*e.g.*, screen-reader features; low vision; testing)

DOJ Settlement Agreements

- **The Price Is Right** (Sept. 20, 2011)

- Price is Right must redesign two websites associated with the show in accordance with many of the requirements set forth in current version of Section 508

- **Quicken Loans Arena**, Cavaliers Operating Co., LLC (Dec. 13, 2012)

- As part of a broader settlement, the Cavs agreed that its websites – www.cavs.com and www.thegarena.com – will comply with WCAG 2.0, Level AA success criteria within six (6) months
- Must develop policy to routinely evaluate/remedy any accessibility problems encountered on its websites

- **Louisiana Tech University** (July 23, 2013)

- New webpages must comply with WCAG 2.0, Levels A and AA; existing webpages since September 2010 by 2014; older webpages upon request

DOJ Settlement Agreements

- **Newseum** (December 2013)
 - Website must be compliant with WCAG 2.0, Levels A and AA within one year.
 - \$15,000 in civil penalties.
- **HRB Tax Group, Inc.** (March 2014) (DOJ joined a litigation commenced by the NFB)
 - H&R Block Web site and Online Tax Preparation Product must be made accessible under WCAG 2.0 A and AA by January 1, 2015, with additional accessibility deadlines over the following years of the decree for the other covered applications and content. Also contained various training, policy, and compliance monitoring obligations.
 - \$22,500 in damages for each Plaintiff and \$55,000 in civil penalties

DOJ Settlement Agreements

- **Peapod** (November 2014)

- Website and mobile application must be compliant with WCAG 2.0, Levels A and AA within 5 months and 10 months respectively.
- Commitment to making third-party content accessible.

- **National Museum of Crime and Punishment** (January 2015)

- Website must be compliant with WCAG 2.0, Levels A and AA within 120 days.

- **Dekalb, Ill.; Vero Beach, Fla.; Fallon, Nev.; Isle of Palms, SC** (February 2015)

- Job applications/employment websites must be compliant with WCAG 2.0, Levels A and AA within 90-150 days.

DOJ Settlement Agreements

- **edX, Inc.** (April 2015)

- Must make its massive online open courses platform (website and mobile applications) compliant with WCAG 2.0, Levels A and AA within 18 months.

- **Carnival Corp.** (July 2015)

- Website and mobile application must be compliant with WCAG 2.0, Levels A and AA within 18 months and 36 months respectively.

- **Greyhound Lines** (February 2016)

- Requires a variety of information be provided in an accessible format – complying with WCAG 2.0 Levels A and AA

- Multiple additional Title II settlements with localities (2015 -)

- April 2016: DOJ launches www.adad.gov/access-technology/index.html

Looking for Guidance? WCAG 2.0

- Published in December 2008
- World Wide Web Consortium (“W3C”)
 - stated mission is to lead the World Wide Web to its full potential by developing protocols and guidelines that ensure the long-term growth of the web
- Web Accessibility Initiative (“WAI”)
 - created by W3C to develop guidelines for international standards of website accessibility
 - created several guidelines, primarily technical standards referenced by Web developers, including Web Content Accessibility Guidelines (“WCAG”)



Looking for Guidance? WCAG 2.0

- While not yet officially part of DOJ Title III regulations, WCAG 2.0 is currently the dominant website accessibility guideline
- DOJ, DOT, OFCCP, and the Access Board have all utilized WCAG 2.0 as the primary standard for website accessibility
- Advocacy groups also support WCAG 2.0 – public hearings for DOJ’s ANPRM re Website Accessibility and Access Board’s Section 508 Refresh NPRM, and settlement and/or cooperative agreements
- Sets Forth “the Four Principles of Accessibility”: perceivable, operable, understandable, and robust.
 - Each principle has a set of guidelines, which in turn has success criteria
 - Gradations of compliance: level A (must satisfy), AA (should satisfy), and AAA (may satisfy)
- Also suggests specific technical methods to meet and/or test each of these success criteria, which a web developer can utilize to appropriately design the website so that it is accessible to individuals with disabilities

Common Website Accessibility Issues

- Alt Attributes/Accurate Descriptions
- Skip Navigation/By-pass Blocks
- Methods of Navigation
- Focus
- Order of Content
- Forms/Tables
- Resizing Text
- Contrast
- PDFs
- Captioning/Narrative Description
- Language
- Control of Moving Content



Common Elements of Website Accessibility Settlement Agreements

- Adoption of Website Accessibility Policy
 - Incorporating the concept of website accessibility into key aspects of website development/design
- Training Related to Specific Job Responsibilities
- Achieving Substantial Conformance with WCAG 2.0, Levels A and AA within a reasonable amount of time
 - Website Accessibility Auditing
 - Utilizing both human and automated elements
 - From both the user perspective (with assistive technology, *e.g.*, screen-reader software) and programming perspective (reviewing code)
 - Accessibility Enhancements
 - Compliance Certification
- Monetary Component

State and Local Laws



- Distinct obligations may exist at the state and/or local level that mimic and/or go beyond the scope of 508 and/or the ADA
 - These obligations most often fall under a states' respective public accommodations laws as they relate to government websites
- For such government websites, most states require Section 508 compliance at a minimum, while some require compliance with some iteration of WCAG (1.0 or 2.0)
- A vast majority of states have published their website accessibility guidelines (or policies) on their official state websites

21st Century Communications and Video Accessibility Act ("CVAA")



- Goal: “To increase the access of persons with disabilities to modern communications, and for other purposes.”
- Amends the Communications Act of 1934 (as amended by the Telecommunications Act of 1996)
- Expands coverage to include modern technological advances (*i.e.*, new digital, broadband, and mobile innovations)
- Enforced by the FCC

CVAA

CAPTIONING OF VIDEO PROGRAMMING DELIVERED VIA INTERNET

- The Internet closed captioning rules only apply if the video programming was shown on TV in the U.S. with captions.
- "Full-length video programming" is video programming that is shown on TV and is distributed to end users, substantially in its entirety, through the Internet.
- "Video clips" are excerpts of full-length video programming that are posted online.
 - The rules require video programming distributors that show programming on TV to post captioned clips of their programming on their own websites or applications ("apps"). At this time, the video clips rules do not apply to third party websites or apps.
- Consumer-generated media (e.g., home videos) shown on the Internet are not required to be captioned, unless they were shown on TV with captions.
- Movies shown on the Internet are not required to be captioned unless they have been previously shown on TV with captions.

CVAA

■ CAPTIONING OF VIDEO PROGRAMMING DELIVERED VIA INTERNET

- **Full-length Internet video programming** must be captioned if the programming is shown on TV in the U.S. with captions on or after the following dates:
 - **September 30, 2012**, for prerecorded programming that is not "edited for Internet distribution." "Edited for Internet distribution" means the TV version has been substantially edited. Examples of substantial edits are deleting scenes or altering musical scores. Changing the number or duration of commercials is not considered substantial editing.
 - **March 30, 2013**, for live and near-live programming.
 - "Live programming" is defined as programming that is shown on TV substantially simultaneously with its performance.
 - "Near-live programming" is defined as programming that is performed and recorded less than 24 hours before it was first shown on TV.
 - **September 30, 2013**, for prerecorded programming that is substantially edited for Internet distribution.

CVAA

■ CAPTIONING OF VIDEO PROGRAMMING DELIVERED VIA INTERNET

- **Internet video clips** must be captioned if the associated programming is shown on TV in the U.S. with captions on or after the following dates:
 - **January 1, 2016**, where the video clip contains a single excerpt of a captioned TV program with the same video and audio that was shown on TV ("straight lift" clips).
 - **January 1, 2017**, where a single file contains multiple straight lift video clips ("montages").
 - **July 1, 2017**, for video clips of live and near-live TV programming (such as news or sporting events).
 - For clips of live programming, up to a 12-hour delay is permitted in posting a captioned clip after the programming has been shown on TV.
 - For clips of near-live programming, up to an 8-hour delay is permitted in posting a captioned clip after the programming has been shown on TV.

CVAA

■ CAPTIONING OF VIDEO PROGRAMMING DELIVERED VIA INTERNET

- **Archival internet video programming** - the following deadlines apply to video programming that a distributor already shows on the Internet. Distributors have extra time to add captions to video programming that they already show on the Internet and that is later shown on TV with captions, as follows:
 - Within 45 days after the date it is shown on TV with captions on or after March 30, 2014 and before March 30, 2015;
 - Within 30 days after the date it is shown on TV with captions on or after March 30, 2015 and before March 30, 2016; and
 - **Within 15 days after the date it is shown on TV with captions on or after March 30, 2016.**

The Employment Law Perspective

- Obligations stemming from Sections 503 and Title I of the ADA
 - Duty to provide reasonable accommodations; and
 - Restraints on ability to seek/obtain medical information/documentation.
- Impacts Application/Hiring Process
- May Become Relevant During Employment



The Employment Law Perspective

■ July 2008 - OFCCP Directive

- Purpose: to provide guidance in evaluating federal contractors' obligations under 503 and Title I the ADA, et al., with respect to online application systems.
- Requires that all compliance evaluations include a review of the contractor's online application systems to ensure that the contractor is providing equal opportunity to qualified individuals with disabilities and disabled veterans.
 - The term "online system" includes all electronic or web-based systems that the contractor uses in all of its personnel activities

The Employment Law Perspective

- The review must include whether the contractor is providing reasonable accommodation(s), when requested, unless such accommodation(s) would cause an undue hardship.
 - If a contractor routinely offers applicants various methods of applying for jobs and all methods of application are treated equally, then an employer may not need to ensure that its online application system is fully accessible.
 - However, if a contractor only uses an online application system to accept applications for employment, it must ensure that potential applicants with disabilities either can use the system or can submit an application in a timely manner through alternative means.
 - This includes providing a means to contact the contractor, other than through the online system, to request any reasonable accommodation needed to provide an applicant with a disability an equal opportunity to apply and be considered for the contractor's jobs.

The Employment Law Perspective

- **Revised Section 503 Regulations**
- Published in the Federal Register on September 24, 2013
 - **Effective Date was March 24, 2014**
- Under the discussion of Section 60-741.44 there is a footnote regarding website accessibility:
 - Contractors are encouraged to make their information and communication technology accessible;
 - Refers contractors to WCAG 2.0 and Section 508.

ANY
QUESTIONS
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Contact Information



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Making Website Accessibility Accessible: Understanding the Landscape of the Digital Age

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