

Access Denied: the ADA & the Internet

Cynthia L. Effinger

Recently, the Department of Justice announced that it had entered into a consent decree with H&R Block, the national tax-preparation company, to remedy alleged violations of the Americans with Disabilities Act. The well-known company offers numerous services through its website and mobile apps, including instructional videos, interactive live video conferencing and chat services, electronic tax-return filing, and DIY tax preparation. According to court papers, however, the site and apps are not designed to be used with commonly available technology—such as screen reader software, refreshable braille displays and keyboard navigation aids—for people with vision, hearing or manual dexterity disabilities, thus violating Title III of the ADA.

The decree, filed in the U.S. District Court for the District of Massachusetts, resolves the complaints filed by the National Federation of the Blind, two individual plaintiffs and the United States DOJ. Under its terms, H&R Block's website, tax filing utility and mobile apps must conform to the Level AA Success Criteria of the WCAG 2.0, which are technical standards for making Internet content accessible to the disabled. Additionally, the company will have to appoint a skilled Web accessibility coordinator who will report to H&R Block's enterprise chief information officer; adopt a Web accessibility policy; and initiate training on accessible design for its Web content personnel, among other things. H&R Block will also pay \$45,000 to the two individual plaintiffs, and a \$55,000 civil penalty.

Title III of the ADA prohibits discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation by any private entity that owns, leases (or leases to), or operates any place of public accommodation. While businesses have long known that their facilities must be accessible to individuals with disabilities, many are unaware of online accessibility regulations. The businesses are not alone; courts have long struggled with the same issue. For example, courts in the Ninth Circuit hold that Title III of the ADA applies only when there is a "nexus" between a challenged service offered over the Internet and a physical place of public accommodation. Taking a different approach, a court in Massachusetts held that Web-streaming services offered by Netflix are subject to Title III of the ADA, even without a "nexus" to a physical place of accommodation.

The DOJ took the stance that because H&R Block was offering Web-based goods and services, they had a responsibility to ensure that disabled individuals could fully and equally access its site and mobile apps. This position is of no surprise; the DOJ has publicly stated that it interprets Title III of the ADA to apply to websites operated by public accommodations. Interestingly however, the DOJ has not yet published any regulations concerning website accessibility, despite it soliciting public comments for potential publication in 2010. Regulations are expected soon and the consent decree is a good indication that the DOJ will adopt the WCAG 2.0 Level AA Success Criteria as its compliance standard. The specifics, such as whether all businesses or just those of a certain size must comply, remain unknown.

Website accessibility is set to be the next big litigation wave under Title III, so companies that offer services to the public should assess their websites and apps now and keep watch for the forthcoming regulations. If these suits are gaining traction and garnering headlines under Title III, businesses should also be aware of the potential for an increase in suits brought pursuant to Title I.

Title I, which applies to private employers, state and local governments, employment agencies, and labor unions with 15 or more employees, prohibits discrimination in job application procedures; the hiring, advancement or discharge of employees; employee compensation; job training; and other terms, conditions and privileges of employment. Pursuant to Title I, employers must make reasonable accommodations to individuals with disabilities in order for them to participate in the workplace. The accommodation process starts before an individual even becomes an employee, as the application process must be accessible to individuals. Businesses that promote or allow for online job applications may need to make adjustments to their online presence so that everyone can participate in the hiring process.

A few common barriers to Web accessibility include:

- Poor page structure that cannot be read by screen-reader software
- Audio-only content without captioning or transcripts
- Timed response entries
- Small or low-contrast text

With some help from IT consultants, small adjustments that make a big difference can be implemented. Possible modifications include:

- Making videos accessible via text and sequencing
- Minimizing use of blinking and flashing
- Providing documents in text based, not image based, formats for ease of reading

Despite a lack of concrete regulations now, the H&R Block consent decree gives us an idea of where the DOJ is headed with respect to Title III. By reviewing accessibility as it relates to every area of the ADA, we can help minimize a business' risk of exposure and also make the Internet more user-friendly for all individuals.

Cynthia L. Effinger is an associate at McBrayer, McGinnis, Leslie & Kirkland, practicing employment law and commercial litigation. She is also a member of the LBA Labor & Employment and Litigation sections. ■

