

ONLINE RETAILERS BEWARE: COURT HOLDS WEBSITE VIOLATES ADA DESPITE LACK OF PHYSICAL STORE

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Courts across the country continue to weigh in on the issue of website accessibility. Last week, the U.S. District Court for the District of New Hampshire denied a motion to dismiss filed by online food delivery servicer Blue Apron. In denying the motion, the court found that Blue Apron's website is a place of public accommodation – despite the fact that Blue Apron operates only online and has no traditional brick and mortar locations. *Access Now, Inc. v. Blue Apron, LLC*, Case No. 17-cv-00116, Dkt. No. 46 (D. N.H. Nov. 8, 2017).

In so finding, the court relied on binding precedent in the First Circuit, and noted that other Courts of Appeals, namely the Third, Fifth, Sixth and Ninth Circuits, have held that in order to be considered a "public accommodation," an online business must have a nexus to an actual, physical space. *Id.* at pp. 9-10. This decision highlights that the issue of website accessibility, especially as it applies to online only businesses, remains a contested issue.

The New Hampshire federal court also found that despite the lack of regulations from the Department of Justice ("DOJ"), "Blue Apron must still comply with Title III's more general prohibition on disability-based discrimination...." *Id.* at pp. 14-15. The court noted that there might have been a due process violation if plaintiffs had "attempt[ed] to hold Blue Apron liable for failure to comply with independent accessibility standards not promulgated by the DOJ, such as the WCAG 2.0 AA standards...." *Id.* at p. 20. This was not a concern, however, because plaintiffs relied on Title III of the ADA as governing potential liability and only invoked compliance with WCAG 2.0 AA standards as a "sufficient" but not "necessary" condition. *Id.* at p. 21.

The Court also took up the issue of primary jurisdiction and held that because "the potential for delay" was "great," it would not invoke the primary jurisdiction doctrine and dismiss or stay the matter until DOJ issues regulations concerning website accessibility. This holding is in direct contrast to the holding in *Robles v. Dominos Pizza, LLC*, where the United States District Court for the Northern District of California held that it would violate Domino's due process rights to find that its website violates the ADA because the DOJ still has not promulgated regulations defining website accessibility. *See Robles v. Dominos Pizza LLC*, No. 16-cv-06599, Dkt. No. 42 (N.D. Cal. Mar. 20, 2017). Further analysis regarding the *Robles* case can be found by clicking [here](#).

As we have previously [reported](#), the DOJ recently placed the website accessibility regulations on its inactive list. With the absence of government regulations governing website accessibility, courts have been filling the void with a patchwork of conflicting decisions.

Demand letters and lawsuits typically demand compliance with the Web Content Accessibility Guidelines (WCAG) 2.0 level AA guidelines. WCAG 2.0 is based on four principles: Websites should be (1) perceivable, (2) operable, (3) understandable, and (4) robust.

As a practical matter, this means the following:

(1) Perceivable: Disabled users should be able to perceive website content using their available senses.

(2) Operable: Websites should be operable using a variety of assistive technologies or adaptive strategies.

(3) Understandable: Users should be able to easily understand not only the content, but how to operate the website.

(4) Robust: Websites should be accessible using a variety of assistive technologies, and continue to be compatible as technology improves.

Bryan Cave has experience in defending against website accessibility claims and responding to demand letters alleging violation of the ADA. Bryan Cave has also presented webinars on the issue of website accessibility.

If you would like to schedule a similar webinar or presentation, or for more information on website accessibility, advising clients concerning compliance, or defending against such claims, please contact any of the Bryan Cave attorneys listed.

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