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TAKE 5

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Key Issues Facing Places of Public Accommodation at the 25th Anniversary of the ADA

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With all of the presents, decorations, and champagne now firmly in the rearview mirror, January is a time customarily spent reflecting on the year that was and planning for the year ahead. For places of public accommodation, governed by Title III of the Americans with Disabilities Act ("ADA")—including, among other facilities, retail stores, restaurants/bars, places of lodging, stadiums and arenas, academic institutions, and hospitals and other health care facilities—this exercise is of particular importance.

While 2014 was certainly a noteworthy year under Title III of the ADA ("Title III"), July 26, 2015, will mark the 25th anniversary of the ADA ("25th Anniversary"), an event that will almost certainly be celebrated with significant developments impacting the scope of Title III's coverage. The U.S. Department of Justice ("DOJ"), charged with regulating Title III, is expected to advance and finalize regulations affecting a variety of industries, including those discussed in greater detail below. Additionally, it would be reasonable to expect advocacy groups and plaintiffs—buoyed by these looming developments and emboldened by the 25th Anniversary—to continue the path followed over the past year, aggressively pursuing an expansive interpretation of Title III in "cooperative" agreements and litigation.

Contemplating what lies ahead is best done in tandem with an eye towards the year that was. The year 2014 saw a variety of developments under Title III, some of which targeted specific industries (including retail, hospitality, sports/entertainment, and health care), while others had potentially broader implications arguably impacting any entity covered by Title III. This *Take 5* will highlight five recent developments and future trends under Title III that places of public accommodation should keep their eyes on in 2015:

1. **Website Accessibility**
2. **Accessible Point-of-Sale Devices and Other Touchscreen Technology**
3. **Movie Theater Captioning & Audio (Narrative) Description**
4. **The Availability of Sign Language Interpreters at Health Care Facilities**
5. **"Drive By" Design/Construction Lawsuits**

At a quick glance, the majority of these developments could seem somewhat distinct and unrelated. However, a closer look suggests that they are governed by a unifying concept. The majority of recent key developments fall outside Title III's more heavily regulated brick-and-mortar, design/construction, and "barrier removal," context. Instead, they are focused on the application of Title III's overarching civil rights provisions to areas currently lacking specific regulations and/or requiring a nuanced context-specific and individualized analysis in their application.

Background

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). Places of public accommodation are expressly comprised of a litany of places open to the public, including, among others, retail stores, theaters, stadiums and arenas, restaurants and bars, hotels and other places of lodging, academic institutions, and health care and social services facilities ("Places of Public Accommodation").

Under the general umbrella of requiring "full and equal enjoyment," Title III imposes a variety of more specific obligations and prohibitions upon Places of Public Accommodation, including:

- a prohibition on denying individuals with disabilities participation or the opportunity to participate, or providing separate or unequal benefits to individuals with disabilities;
    - more specifically, a prohibition on the use of eligibility criteria that screen out individuals with disabilities (42 U.S.C. § 12182(b)(2)(A)(i); 28 C.F.R. § 36.301);
- a requirement to modify policies, practices, and procedures to accommodate individuals with disabilities, unless doing so would constitute a fundamental alteration of the goods and services that they provide (42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.301); and
- an obligation to provide auxiliary aids and services to the extent necessary to achieve "effective communication," unless doing so constitutes an undue burden or results in a fundamental alteration of the goods and services that they provide (42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303).

In addition, Places of Public Accommodation have obligations relating to accessible design and construction. Specifically, they must engage in readily achievable barrier removal in existing facilities, address accessibility to the maximum extent feasible when making alterations, and undertake accessible new construction, unless structurally impracticable. 42 U.S.C. §§ 12182(b)(2)(iv) and (v), 12183; 28 C.F.R. § 35.151; 28 C.F.R. §§ 36.401-406.

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1. Website Accessibility

Over the past decade, website accessibility has become one, if not the most, prominent issue under Title III, as regulatory agencies and experienced advocacy groups have challenged the inaccessibility of websites under Title III and related state and local accessibility laws with increasing frequency. The legal landscape regarding this issue remains conflicted as courts have split over the issue of whether the term "Places of Public Accommodation" applies to websites and, if so, to what extent.

Generally, the division among courts has created three lines of thought: (i) the ADA must be read broadly to successfully achieve its purpose, allowing individuals with disabilities to fully and equally participate in society and, therefore, websites must be made accessible under Title III; (ii) the ADA must be read as it is written and, because "Places of Public Accommodation" are plainly defined with an extensive list of solely physical locations, the ADA must be amended, or new regulations promulgated, before Title III can apply to websites; and (iii) Title III applies to websites of Places of Public Accommodation to the extent there is a nexus between the goods and services provided by the brick-and-mortar Place of Public Accommodation and the website.

Notwithstanding this tension among the courts, DOJ—relying upon Title III's "full and equal enjoyment" obligation—has long taken a strident position that Title III, as currently drafted, unquestionably applies to the websites of Places of Public Accommodation. In addition, to further strengthen its position and to remove ambiguity about what constitutes an accessible website under Title III, since the summer of 2010, DOJ has been taking the steps necessary to promulgate regulations specifically addressing the requirements for website accessibility for public accommodations. At the time of this writing, the most recent estimates project that the next step in this rulemaking will occur this summer, shortly before the 25th Anniversary.[1]

Despite the fluid state of this issue on both the judicial and regulatory front, over the past year, both DOJ and advocacy groups, such as the National Federation of the Blind and the American Counsel for the Blind, have continued to press the issue, utilizing the threat of litigation and/or investigation to prompt website accessibility agreements with notable entities in a variety of industries. These agreements involved, among others, H&R Block, Peapod, Safeway, eBay, multiple colleges and universities (e.g., Florida State University, the University of Montana, and the University of Cincinnati), and other facilities, including hospitals and fashion retailers.

Fortunately, for those looking for guidance on how to make their websites accessible now or to take steps to prepare for the eventual finalization of DOJ's looming regulations, there is a fairly clear path. Both the pending regulations and settlement agreements entered into by DOJ and advocacy groups generally define the appropriate level of website accessibility by referencing the Website Content Accessibility Guidelines ("WCAG") 2.0, Levels A and AA, prepared by the Website Accessibility Initiative ("WAI") of the World Wide Web Consortium ("W3C"). Places of Public Accommodation that wish to assess the accessibility of their websites and/or take steps to enhance their accessibility should engage in a user-based and programming-based dual-pronged audit of their websites against WCAG 2.0, Levels A and AA.

2. Accessible Point-of-Sale Devices and Other Touchscreen Technology

Another "front burner" issue over the past year also involves accessible technology; specifically, the adoption of touchscreen devices, predominantly for use at the point of sale ("POS"). Similar to the website accessibility context, specific federal regulations governing the accessibility of such devices do not currently exist.[2] DOJ began the process of implementing such regulations several years ago, but significant developments are not expected any earlier than late this year.

Notwithstanding the lack of specific regulations, over the past year, a handful of plaintiffs and advocacy groups have repeatedly brought class action lawsuits against a "who's who" of retailers and big-box stores in virtually all contexts (e.g., fashion, cosmetics, home improvement, electronics, jewelry, office supplies, and toys) alleging a violation of Title III for failing to provide POS devices that are accessible to the blind. Specifically, these lawsuits allege that retailers are denying patrons who are blind the "full and equal enjoyment" of their shopping experience because, by installing touchscreen devices that do not provide a tactile keypad, in order to utilize their debit cards via the POS device, patrons who are blind must disclose their debit card PIN to another person (e.g., the sales person). This process not only invades the privacy of patrons who are blind, but also requires them to take a disadvantageous step that is not required for patrons who are not blind. Some of the lawsuits also allege that retailers are failing to meet their obligation to provide auxiliary aids and services necessary for patrons who are blind to effectively communicate with store employees when shopping and making purchases.

Not surprisingly, DOJ has aligned itself with the plaintiffs in these cases (even submitting statements of interest—setting forth DOJ's position on the matter for the court—as necessary). DOJ firmly takes the position that Places of Public Accommodation are not relieved of their obligation to provide accessible POS devices just because patrons who are blind have other methods of payment available for use.

Given the current landscape on this issue, Places of Public Accommodation—including those outside California—that are considering the installation of touchscreen devices (e.g., for retail POS, hotel check-in, purchasing tickets at theaters or sporting venues, and dvd/video game rental kiosks) would be advised to consider traditional accessible design issues (e.g., reach range, accessible route, and protruding objects/detectable warnings) as well as the

provision of measures for individuals who are blind and deaf to make full use of the devices.

3. Movie Theater Captioning & Audio (Narrative) Description

The next item of note also involves the juxtaposition of accessibility and technology with respect to Title III's "full and equal enjoyment" and "effective communication" obligations. On August 1, 2014, DOJ published a Notice of Proposed Rulemaking ("NPRM") addressing closed captioning and audio (narrative) description requirements for movie theaters and seeking to create a consistent nationwide standard governing the exhibition of movies that are available with closed captioning and audio description[3] at theaters. The previously extended deadline for public comments closed on December 1, 2014, and the latest estimate for the issuance of final rules is this coming fall.

The scope of the proposed rules would cover "facilities, other than drive-in theaters, used primarily for the purpose of showing movies to the public for a fee."[4] Covered theaters would: (i) have to obtain and install equipment to transmit closed captions and audio description; (ii) make available a specific number of individual captioning devices that deliver captioning to patrons at their seats (based on the size of the theater); and (iii) provide at least one individual audio-description listening device per screen (with each theater having no fewer than two devices total). For now, the proposed rules would only definitely apply to digital movie screens, granting them six months to comply with the rules, once effective. Analog movie screens remain an open issue—with the NPRM seeking input on whether they should even be covered at this time (and if so, suggesting several years to come into compliance).

Nothing in the proposed rules would preclude a theater from showing a movie that is not produced or distributed with closed captioning and/or audio description, nor would it place any affirmative obligation on theaters themselves to create such resources. If a movie is made available with captioning and/or audio description, then the theater would be required to obtain and screen those versions. Additionally, the proposed rules would not require open captioning under any circumstances. Finally, if necessary, movie theaters would still be able to avail themselves of the undue burden affirmative defense.

4. The Availability of Sign Language Interpreters at Health Care Facilities

The next issue pays further attention to the obligation of Places of Public Accommodation to provide visitors with auxiliary aids and services to enable effective communication,[5] focusing on the provision of sign language interpreting services in the health care context. Over the past year, DOJ has (with the assistance of U.S. Attorney Offices acting on its behalf) actively pursued such matters at health care facilities of sizes and scopes ranging all over the spectrum—from small individual physician practices to major hospitals. This endeavor has resulted in a significant number of settlement agreements focusing almost exclusively on the need for health care facilities to successfully develop and implement policies, practices, and procedures for determining whether patients require interpreting services and, when they do, providing such services in an appropriately prompt and effective manner.

The DOJ agreements, in the aggregate, provide very useful guidance for health care facilities looking to evaluate, augment, and/or develop policies, practices, and procedures governing the provision of sign language interpreter services (both live and via Video Remote Interpreting ("VRI")) as auxiliary aids and services for patients and companions who are deaf or hard of hearing.[6] While understanding what is necessary and/or appropriate will almost certainly differ depending upon a variety of context-specific factors, such as the nature of the health care facility and the scope of services provided therein, some provisions for consideration include:

- adoption of general policies: (i) requiring the provision of appropriate auxiliary aids and services (including, at times, qualified interpreters) for patients and companions with disabilities to enable effective communication and the full and equal enjoyment of the health care facility's services, privileges, facilities, advantages, and accommodations; and (ii) prohibiting discrimination, retaliation, and/or coercion on the basis of disability, requests for auxiliary aids and services, or complaints about the facility's failure to do so;
- development of an auxiliary aid and services assessment document to be utilized by staff to determine—in consultation with the person with the disability (as possible)—what auxiliary aids and services are necessary or would be appropriate;
    - inclusion of the results of the assessment on the patient's chart, so that the appropriate auxiliary aid/service will be provided going forward;
- acknowledgement that under certain situations—depending upon the complexity and nature of the communication—a qualified sign language and/or oral interpreter (either on site or via VRI) may be necessary to ensure effective communication for patients and companions;
    - examples of circumstances that may be sufficiently lengthy and/or complex to require an interpreter can include, among others: (i) discussing a patient's symptoms and medical condition, medications, and medical history; (ii) explaining medical conditions, treatment options, tests, medications, surgery, and other procedures; (iii) providing a diagnosis and recommendation for treatment; (iv) communicating with a patient during non-routine treatment and testing procedures; (v) obtaining informed consent for treatment; (vi) providing instructions for medications, post-treatment, and follow-up procedures; and (vii) discussing powers of attorney, living wills, and/or complex billing/insurance maters;
- establishment of a relationship with one or more qualified interpreter services to promptly provide on-site and VRI services when needed;
- assurance that VRI services, to the extent they are provided, are supplied in a manner that actually provides effective communication (e.g., sufficient high-speed, wide-bandwidth network connection for clear, non-lagging, real-time images; clear images; a large enough screen to see the interpreter; and staff training on how to set up VRI);

- use of alternative means of communication with patients or companions who are deaf or hard-of-hearing prior to the provision of an interpreter (e.g., pen/pad, electronic devices, and sign language pictograms);
- provision of updates to the patient or companion as the facility works to obtain the interpreter services;
- adoption of a policy that the facility will not rely upon an adult friend or family member of the patient or companion to interpret, except: (i) in an emergency involving an imminent threat to the safety of an individual or the public where no interpreter is available, or (ii) where the patient or companion specifically requests that the adult friend or family member interpret, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances (e.g., there is no risk that the interpreter will not accurately convey and transmit information);[7]
- appointment of an ADA Coordinator (or Co-Coordinators) to answer questions and provide assistance regarding immediate access to, and the proper use of, appropriate auxiliary aids/services, including qualified interpreters;
- documentation of both requests for, and efforts to provide, auxiliary aids and services (including qualified interpreters on site or through VRI);
- use of an existing grievance resolution mechanism for the investigation of disputes regarding effective communication with patients and companions who are deaf or hard of hearing;
- training of appropriate staff and management; and
- notice and dissemination of these policies, practices, and procedures to patients.

5. “Drive By” Design/Construction Lawsuits

While novel issues involving the application of Title III to technology and nuanced ones regarding the appropriate provision of auxiliary aids and services may have dominated recent development discussions, that should not be interpreted as a statement that more traditional issues regarding the accessible design/construction of brick-and-mortar Places of Public Accommodation are no longer of serious concern. To the contrary, in large part due to a very active plaintiffs’ bar (particularly in California, Florida, and New York) partnering with very persistent individual plaintiffs or ambitious advocacy groups, Title III lawsuits alleging a failure to comply with either the 1991 ADA Accessibility Guidelines or the 2010 ADA Standards for Accessible Design, as appropriate, are as commonplace as ever before.

Perhaps emboldened by decisions over the past 14 months in the U.S. Courts of Appeals for the 10th and 11th Circuits confirming standing for plaintiffs who were admittedly merely “testers”—i.e., people who visit Places of Public Accommodation for the sole purpose of determining whether or not there are violations to sue over—Places of Public Accommodation in all industries and of all sizes continue to fall prey to what are often referred to as “drive by” lawsuits. Drive-by lawsuits ordinarily involve serial plaintiffs who partner with a plaintiff’s

counsel to continuously file actions in federal court alleging violations of Title III and state/local accessibility laws (thus enabling claims for individual damages). These tandems often file multiple lawsuits a week, if not each day, often targeting a specific geographic region, industry, or company (with multiple locations). At their worst, drive-by lawsuits feature complaints containing allegations that have been blatantly "cut and pasted" from a prior action. While resolving these matters does require a Place of Public Accommodation to make some accessibility enhancements to its property, the true focus of the majority of these actions is to extract damages for the plaintiff and fees for the plaintiff's counsel.

Drive-by lawsuits thrive on volume and achieving a quick resolution with minimal litigation. Therefore, would-be plaintiffs are less apt to target Places of Public Accommodation that—at first glance—do not appear to have obvious accessibility issues. While, of course, the best defense against such suits is to fully comply with the requirements of Title III, at a minimum, Places of Public Accommodation would be advised to eliminate any "low hanging fruit" to encourage the "drive by" plaintiff to bypass its location for an alternative. For example, Places of Public Accommodation should provide:

- an appropriate number of accessible parking locations, properly located and signed;
- an accessible entrance (and, if the main entrance does not appear accessible, provide clear signage that explains where/how to enter the location);
- accessible routes to and around all key public elements in the location;
- accessible service/sales counters;
- to the extent one is open to the public, an accessible restroom (e.g., one containing sufficient clear floor/turning/transfer space, grab bars, lavatory); and
- permanent room and space and way-finding signage.

Looking Ahead

While 2014 was certainly a year filled with significant developments for Title III, this year's 25th Anniversary may potentially mark even greater change for, and ideally bring greater clarity to, the obligations placed upon Places of Public Accommodation. While some might be tempted to await the final publication of impending regulations impacting their Places of Public Accommodation before taking any action to rectify areas totally lacking, or deficient, in accessibility, doing so creates ongoing vulnerability to both DOJ enforcement and plaintiff/advocacy group activity that rely upon Title III's overarching civil rights obligations to fill regulatory gaps and/or cover newly utilized technology.

Places of Public Accommodation are better served by getting ahead of the curve and creating demonstrable evidence that they are aware of, understand, and are taking steps to address relevant accessibility. The consideration of accessibility issues should be incorporated into the ordinary course of day-to-day planning and management. Accessibility policies, practices, and procedures

should be developed to create an infrastructure to handle accessibility issues as they arise, and then appropriate management and employees should be trained on how to properly apply them. In areas that are novel or present less certainty regarding how to best achieve compliance, Places of Public Accommodation should consider implementing pilot programs to allow them to assess the viability and effectiveness of a preferred option. And, throughout, Places of Public Accommodation should document their efforts to address accessibility.

While it is true that, in unregulated areas, there are rarely definitive actions that Places of Public Accommodation can take to wholly safeguard themselves against Title III claims, demonstrating an understanding and acceptance of overarching accessibility obligations and taking some documented actions to address them will leave these facilities better positioned in the event that a plaintiff, advocacy group, or regulator raises a concern. Even if there is ultimately a disagreement about how a Place of Public Accommodation has chosen to address a certain issue, the fact that it is already doing something to address it will generally better position the Place of Public Accommodation for a quicker and more amicable resolution.

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ENDNOTES

[1] Separately, the U.S. Access Board continues to work on promulgating a revised version of Section 508 of the Rehabilitation Act of 1973, which addresses, among other accessible information and technology, website accessibility for federal agencies and the contractors of federal agencies in certain specific contexts. At the time of this writing, the most recent estimates project the next step in this rulemaking to occur sometime between this past December and early 2015. Previously, in December 2013, the U.S. Department of Transportation issued an amendment to the Air Carrier Access Act of 1986 (“ACAA”) placing accessibility obligations on public-facing websites of covered airlines and airports. 49 U.S.C. § 41705; 14 C.F.R. Part 382.

[2] We note that at least one state—California—has an explicit accessible POS requirement. Cal. Financial Code § 13082. Additionally, the accessibility of touchscreen kiosks in the airline industry is separately governed by the aforementioned recent

amendments to the ACAA.

[3] Closed captioning and audio (narrative) description allow individuals with aural and visual disabilities to have full and equal access to, and enjoyment of, movies during their theatrical releases. Closed captioning conveys the written text of a film's dialogue and other sounds via a device at the patron's seat that is only visible to the patron who requires the captioning (as opposed to open captioning that would be on the movie screen for all patrons to see). Audio description enables individuals who are blind or have low vision to enjoy a spoken narrative of key visual elements of a movie, such as settings, costumes, facial expressions, actions, and scene changes.

[4] This definition does not apply to facilities that screen movies, such as museums, hotels and resorts, or cruise ships, even if they charge an additional fee, as long as the facility is not used primarily for the purpose of showing movies for a fee.

[5] This on the heels of DOJ's January 2014 publication of an updated technical assistance guidance elaborating upon effective communication obligations, as set forth in the revised regulations governing Titles II and III and the 2010 ADA Standards for Accessible Design.

[6] With respect to the circumstances surrounding each settlement, in general, patients and/or their companions alleged that the health care facility did not provide them with sign language interpreters necessary to achieve effective communication.

[7] A minor child or patient will never be relied upon to interpret, except in the event of the emergency circumstances just described.

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