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Is it Time to Prioritize Making Websites and Mobile Apps Accessible?

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Companies should take steps to ensure that their websites and mobile apps are accessible to persons who are blind or vision impaired, based on the Supreme Court's recent refusal to review an appellate court decision that allowed a blind man to sue a national pizza chain under the Americans with Disabilities Act.

The case involved a blind California man who claimed he could not order a custom pizza from Domino's website or mobile application, even while using screen-reading software. The plaintiff filed suit in federal district court in 2016, alleging that Domino's had discriminated against him under Title III of the Americans with Disabilities Act (ADA). That section of the ADA prohibits discrimination on the basis of disability in the activities of places of public accommodations—businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices. Title III and its implementing regulations require that covered entities provide auxiliary aids and services to ensure that goods, services, and activities provided by places of public accommodation be accessible to people with disabilities to allow for their "full and equal enjoyment" of those goods, services and activities.

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The Department of Justice has long taken the position that the ADA applies to the websites of public accommodations and in 2010, issued advance notice of proposed rulemaking to establish accessibility standards for website compliance. However, that rulemaking was withdrawn. In September 2018, Assistant Attorney General Stephen Boyd said that "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication" and that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

In 2017, the trial court dismissed the Domino's lawsuit, agreeing with Domino's that in the absence of clear web accessibility regulations from the Department of Justice, allowing the case to proceed would violate Domino's due process rights. The Ninth Circuit (the federal appellate court covering courts in California, Alaska, and Hawaii) reversed the trial court decision. The Ninth Circuit held that Title III of the ADA applied to Domino's website and mobile application, because customers use the website and app to locate a nearby Domino's and order pizzas for at home delivery or in-store pickup, creating a critical nexus between the website and app and the physical restaurants. "[T]he statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation," the court said. The court noted that Domino's online offerings "must effectively communicate with its disabled customers and facilitate 'full and equal enjoyment of Domino's' goods and services."

Domino's asked the Supreme Court to review the Ninth Circuit decision, noting that the federal appellate courts were divided as to "whether Title III extends to enterprises that solely exist online, and whether Title III mandates discrete accessibility

requirements for web-sites maintained by brick-and-mortar enterprises." Courts in the First, Second, and Seventh Circuits have found that the ADA can apply to a website independent of any connection between the website and a physical place, while courts in the Third and Sixth Circuits have found that places of public accommodation must be physical spaces. Domino's argued that the lack of clarity was untenable for organizations "which face different rules in different jurisdictions depending on their web presence." However, the Supreme Court declined to review the Ninth Circuit decision, thus leaving it to stand.

Accordingly, where a website or app facilitates the use of the goods or services offered by a place of public accommodation, employers should be upgrading their technology. Because the law is still in flux, and litigation regarding the required nexus between an online presence and a brick and mortar location is still undecided in some jurisdictions, all employers that operate websites and mobile applications should audit those to assess the level of accessibility for persons with disabilities. Note that even if you already have provided the ability to use screen reader software, that will not necessarily guarantee accessibility.

To provide some guidance to companies, the Department of Justice recently took the position that voluntary compliance with the World Wide Web Consortium's Web Content Accessibility Guidelines ("WCAG" 2.0 and the newly implemented WCAG 2.1) is a helpful – though not necessarily decisive – indication of compliance. These guidelines are privately developed by technology and accessibility experts.

For further information on website accessibility, see our recent post on manual and automated testing to ensure website compliance with the ADA.