

CONSUMER FINANCE PODCAST EPISODE 1

DOJ's Recent Guidance on Website Accessibility and the ADA — What Does It Tell Us?

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Guest: Lori Sommerfield

[CHRIS WILLIS]

Welcome to the Consumer Finance Podcast. I'm your host Chris Willis, the co-practice Leader of Troutman Pepper's Consumer Financial Services Regulatory group. We're going to be discussing a topic of great interest on today's podcast and that is website accessibility under the Americans with Disabilities Act, but before we jump into our interview for today, I want to remind you about our great Blog, ConsumerFinancialServicesLawMonitor.com, where you can see all kinds of news and developments about everything affecting consumer finance. And I also want to remind our listeners to check out our other podcast, Troutman Pepper's *FCRA Focus*, which is, as the name suggests focused on the Fair Credit Reporting Act and it's a podcast that's released monthly. And if you like our podcasts, please leave us a review on your podcast platform of choice, we're available on all the major ones, so just hit that review button and tell us what you think.

Now today, as I said we're going to be talking about website accessibility under the Americans with Disabilities Act and the event that really prompted this podcast was that the U.S. Department of Justice recently issued new web accessibility guidance for state and local governments and for public accommodations under Titles II and III of the Americans with Disabilities Act. Now, I don't think that DOJ has ever issued any website accessibility guidance in the past so just as a development, this seems to be pretty big news, and we have the perfect expert to discuss it with us today, which is my partner, Lori Sommerfield. She's a member of our Consumer Financial Services group and one of her many specialties is in regulatory compliance with anti-discrimination laws, all of them, the fair lending and fair housing laws, but also the Americans with Disabilities Act, and she's here to tell us all about this today. So, Lori, first of all welcome to the podcast and thanks for joining us.

[LORI SOMMERFIELD]

Thanks so much Chris, it's great to be here with you today.

[CHRIS WILLIS]

So, I mentioned this new Department of Justice guidance on website accessibility. Can you just give our audience an overview? What has DOJ said? What guidance has it given?

[LORI SOMMERFIELD]

So let me give you a relatively short overview of what the guidance states. So just to provide some specificity here, on March 18th the DOJ, unexpectedly issued this guidance on web accessibility and the ADA, and it pertains to both state and local governments as well as

public accommodations under Titles II and III of the Americans with Disabilities Act. And for those of you who are unfamiliar with it, Title II applies to state and local governments and Title III applies to public accommodations and that's basically businesses that offer goods or services to the public, either through brick and mortar structures or through websites – although websites are not exclusively addressed in the ADA and that's a topic we'll talk about here. The guidance seems to be geared toward business owners and government employees who are unfamiliar with the DOJ's prior positions on website accessibility and the legal basis for that position. In fact, the DOJ's press release explains that the guidance is designed to offer plain language and user-friendly explanations to ensure that it can be followed by people who don't have a legal or technical background. The guidance talks about the importance of website accessibility to individuals with disabilities and provides examples of common barriers on websites. The guidance explicitly states that it's designed to describe how state and local governments and businesses can make sure their websites are accessible to individuals with disabilities as required by the ADA, but quite honestly the guidelines aren't that prescriptive and they don't require specific use of a particular technical accessibility standard, like the international standard called the Web Content Accessibility Guidelines or Section 508 of the Rehabilitation Act. The DOJ does acknowledge this fact that the agency doesn't have a regulation that establishes any sort of technical accessibility standard, but insists that the department's long standing interpretation of the general non-discrimination and effective communication provisions of the ADA apply to website accessibility. So just as a point of background here, back in 1996, the attorney general at that point, Duval Patrick issued an interpretation stating that the ADA, even though it didn't on its face apply to the internet, which was relatively new at that time, did in fact apply to websites and that the ADA requires websites to be made accessible to individuals with disabilities. Since that point many federal and state courts have also taken that position, that the ADA applies to websites and that they are required to be accessible to individuals with disabilities. A couple of interesting observations about the guidance, Chris. First of all, it states that both businesses as well as state and local governments have flexibility in how they comply with the ADA's general requirements concerning non-discrimination and effective communication and in fact must comply with the ADA's requirements. But unfortunately, the DOJ doesn't elaborate upon what flexibility means. I might also reiterate that back in 2018 they also at that time, the agency underscored that point of flexibility, but there really has never been any guidance that's been provided by the DOJ about what that terminology means. Another interesting flexibility is that it states that businesses and state and local governments can choose how they will ensure that programs, services and goods they provide online are made accessible to individuals with disabilities, but again the DOJ doesn't specify what those options are, so I find the guidance relatively vague and not all that helpful. On the question of how to make a website technically accessible, the DOJ states that existing technical standards can provide helpful guidance concerning how to insure accessibility of website features. They do mention the web content accessibility guidelines, which are known as W-C-A-G or WCAG and they also mention Section 508 but it doesn't really specify any particular standard within those technical standards. For example, the current standard that is used by the industry on a voluntary basis is WCAG 2.1 level AA. That's not specified in these guidelines but the DOJ in recent settlements, this past fall of 2021 have specified that guidance, so it's a bit odd to me and it seems like a disconnect that the DOJ is requiring conformance with WCAG 2.1 AA in its enforcement actions and consent orders but isn't requiring it here in the guidance for public accommodations under Title III. And then finally the guidance goes on to basically remind the

industry and of course state and local governments that DOJ considers website accessibility a top priority and lists some of these recent settlements that I just mentioned.

[CHRIS WILLIS]

Okay, so we have some guidance that's not super specific and doesn't incorporate any particular requirements for various forms of access for people with different kinds of disabilities or impairments, so does the guidance actually break any legal new ground or is it just a restatement of sort of general principles that we already knew?

[LORI SOMMERFIELD]

It really is just simply a restatement of existing principles. I think that the DOJ was seeking to sort of gather in one place prior statements that it has made concerning website accessibility requirements. But, you know, unfortunately it really doesn't plow any new territory. And, I think what is really needed here Chris, is that the industry needs clarity in terms of a technical website accessibility standard. And really that should be set through notice and comment rulemaking, because as I mentioned the DOJ made attempts at doing so between 2010, when it issued an Advanced Notice of Proposed Rulemaking, and then again in 2016, when DOJ issued a supplemental ANPR but unfortunately they ended up withdrawing both of those attempted rulemakings in 2017 under the Trump administration. As you know many Republican administrations issue executive orders that require agencies to go back and look at their regulations or rulemakings that are under development and eliminate them where possible to reduce regulatory burden on industry. And unfortunately this is one of the rulemakings that DOJ decided to table, even though both the business community as well as consumer advocacy groups were really clamoring for guidance and in particular a rulemaking in this arena to give clarity. But unfortunately there's really been no regulatory progress on that front so we are left with this guidance that basically just pulls together prior statements made by the DOJ in this arena.

[CHRIS WILLIS]

Well, I guess we just have to live with what we've got then because it doesn't sound like a rulemaking is in the immediate offing from DOJ on this issue. It looks like this guidance is what we're going to get. So, are there any key takeaways that members of the financial services industry need to take from the guidance that the DOJ came out with this past March?

[LORI SOMMERFIELD]

Yes, I think you know the fact that the DOJ is emphasizing both the fact that there is flexibility and options about how to comply does give the industry some wiggle room and some leeway to come up with reasonable solutions to try to make their websites and mobile applications accessible to individuals with disabilities. But by the same token that also cuts the other way, because if there's lack of clarity that gives more leeway for plaintiffs to bring litigation and also demand letters. So, it's both I would say a sword and a shield in that regard. But I think importantly the guidance emphasizes that a return to enforcement of the ADA is a top priority of the DOJ under the Biden administration. And it's key for the industry to know because we're already seeing evidence of that in terms of public enforcement actions and settlements against companies, and as I mentioned those consent orders have explicitly required compliance with the WCAG 2.1 AA standard. I'll just mention a couple of the consent orders that DOJ has entered into and they were primarily related to COVID-19 pharmaceutical sites

like Rite-Aid and the Hy-Vee grocery stores pharmacy, making certain that individuals with disabilities were able to make appointments to get the COVID-19 vaccine. I also want to comment though, that although it's somewhat unclear, the DOJ's unanticipated issuance of this guidance seems to be motivated by a letter that Assistant Attorney General Kristen Clarke recently received from 181 disability advocacy groups stressing the urgent need for DOJ to issue regulations on website accessibility. If you ask me, that is really what the motivation was for DOJ issuing this guidance because it strikes me as sort of a belt and suspenders approach. I believe the agency understands the need for an APA notice and rulemaking, notice and comment rulemaking approach that wanted to take quick action here. So their solution was basically to pull together all of this prior guidance in one place. So, you know again I certainly understand that the rulemaking process is very time consuming, it's very resource intensive, but ultimately I think that that is the type of guidance that is needed for the industry, rather than taking this sort of regulatory guidance light approach combined with an enforcement action sort of strategy, but it often can result in a gotcha approach.

[CHRIS WILLIS]

Speaking of guidance to the industry Lori, I mean you give advice to industry participants about how to avoid ADA litigation and regulatory enforcement at the hands of the DOJ and so now we have this new guidance document, you know what's your message to the industry in terms of what steps they should take with respect to this issue more generally or particularly with respect to, in reaction to this guidance?

[LORI SOMMERFIELD]

Well first of all I would like to reiterate a point that I made about the fact that, you know website accessibility demand letters and lawsuits are going to continue to increase, while there's know rulemaking in play by DOJ that sets an appropriate technical standard for website accessibility compliance. Also, we're going to continue to see increased regulatory enforcement risks from the DOJ. So, knowing those two factors are in play with this increasing and heightened risk, plus the fact that congress has been asked to weigh in on this and to create either a technical standard for accessibility or more importantly, a safe harbor from litigation and hasn't taken steps to do so yet through any legislation that's been passed. Businesses need to be ever vigilant about making their websites and mobile applications accessible to individuals with disabilities. So as a practical matter, you need to do the work. There really is no silver bullet or a quick fix to achieving website accessibility compliance without doing a full assessment and remediation of your consumer facing websites and mobile applications and you need to do that using a qualified website accessibility technical consultant. Typically, you know you could hire a website accessibility consultant either on your own or more advisedly through legal counsel, so that you can protect the results under attorney-client privilege, they can assess your websites, they can give you a road map to remediation, or they can do it for you, but it's critical to do that so that you are actually testing your website in such a way that involves not only automated scanning software but also a manual review of the code and most importantly, these website consultants use actual individuals with disabilities who are employees, who can kind of test drive your websites from a customer experience perspective so that you are attacking website accessibility from those three angles: automated scanning, manual review of code, and the customer experience. So that's issue number one, you need to do the homework. Secondly, proceed with caution if you're considering purchasing any sort of accessibility widgets or overlays that can promise quick technical accessibility fixes, sometimes through use of artificial intelligence. Widgets

and overlays are designed to create a separate accessibility experience that creates the perception of accessibility for individuals with disabilities, but they don't really remediate the underlying website code, so in affect they create like a two-tiered website experience. One is that the website that all of us see, who do not have disabilities, where the code has not been fixed or remediated. Then you have a second tier of a website that gives this perception of accessibility. So, in my view this approach doesn't comply with the ADA and in fact could result in disparate treatment. In fact, the DOJ even warned about these in its guidance. The guidance explicitly says, "Automated accessibility checkers and overlays that identify or fix problems with your website can be helpful tools, but like other automated tools such as spelling or grammar checkers, they need to be used carefully. A "clean" report does not necessarily mean everything is accessible." So really take that advice to heart, there's just really no quick route here to fix your websites or your mobile apps. And then third, I would just like to comment, that you know what you're thinking about actually going through the practical work of auditing and remediating your websites and mobile apps, you also need to on a concurrent basis start strongly considering developing an ADA risk management program to ensure that your organization is properly compliant with the ADA and addressing those accessibility risks. Several key elements of an ADA risk management program should be implemented including posting an accessibility statement on your websites and mobile apps, and also developing an internal digital accessibility policy. Elements of an ADA risk management program are pretty well developed from DOJ enforcement actions and consent orders that have been issued in the past, but you know knowledgeable legal counsel can provide helpful assistance in helping you develop an effective ADA risk management program. So those are the three takeaways that I would really focus on. You know, no silver bullet or quick fix to achieve website accessibility compliance, you really gotta do the homework. Secondly, proceed with caution about using accessibility widgets or overlays. And third, really give strong consideration to developing an effective ADA risk management program, Chris.

[CHRIS WILLIS]

Lori, thanks very much for sharing that, for being on the podcast today and for sharing your obviously self-evident experience and expertise with respect to this issue. And I'd also like to thank our audience for tuning in today. Be sure to subscribe to the podcast so you'll get our episodes every Thursday when they come out and don't forget we have lots and lots of content that we're pushing out all the time on our Blog, ConsumerFinancialServicesLawMonitor.com, and don't forget also to sign up for our email list, you can sign up on the blog or at Troutman.com so that you can get copies of our webinar invitations and our client alerts that we put out about notable events that happen in the Consumer Financial Services world. Thanks very much for listening.

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