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THE AMERICANS WITH DISABILITIES ACT: ITS IMPACT ON AUTOMOTIVE AND MOBILITY COMPANIES

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Morgan Lewis Automotive Hour Webinar Series

Series of automotive industry focused webinars led by members of the Morgan Lewis global automotive team. The 10-part 2019 program is designed to provide a comprehensive overview on a variety of topics related to clients in the automotive industry. Upcoming sessions:

MARCH | Current EU Regulatory Developments and High-Profile Investigations in the EU Automotive Industry: The Future of Connected Cars, Diesel Cars, and Imported Cars

APRIL | Tax and Tariff Developments and Their Impact on the Automotive Industry

MAY | IP Issues with Emerging Automotive and Mobility Technologies

JUNE | Distribution of Vehicles in the United States and the Impact of State Law

SEPTEMBER | Venture Investing in the Automotive and Mobility Space

OCTOBER | Labor and Employment Issues in the Automotive and Mobility Space

NOVEMBER | Joint Ventures and Alliance Issues in the Automotive Space

DECEMBER | Privacy Considerations and the Use of Collected Data

SECTION 01

INTRODUCTIONS



Presenters



ANNE MARIE ESTEVEZ

Anne Marie Estevez defends clients in complex, class, and collective action employment, Americans with Disabilities Act (ADA), public accessibility, and consumer class action cases in US federal and state court. In addition to her litigation experience, Anne Marie regularly advises clients on compliance with the ADA Title II and Title III and comparable state and local accessibility laws in all areas, from “brick and mortar” to technology issues. Clients regularly seek her advice on class action avoidance programs, compensation programs and issues, wage and hour issues, and a host of other employment-related topics.

Anne Marie also serves as co-chair of Morgan Lewis’s Retail & eCommerce Industry Initiative.



BETH JOSEPH

Beth S. Joseph litigates Americans with Disabilities Act (ADA)-related cases across the United States, emphasizing Title II and III matters. She counsels and conducts training for clients on all aspects of federal and state public accommodations laws, including electronic information technology compliance. She also appears before administrative agencies and interfaces with the US Department of Justice on matters related to Titles II and III. Beth co-authored the 2003–2014 editions of *Public Accommodations under the Americans with Disabilities Act: Compliance and Litigation Manual*.

Beth also represents management facing employment and labor claims in US state and federal court, conducts investigations for clients, and drafts ADA- and employment-related policies and manuals.



STEPHANIE SCHUSTER

Stephanie Schuster focuses on complex appellate, class action, and regulatory matters across a range of legal subject matters. She has litigated high-profile and high-value issues in the areas of telecommunications, bankruptcy, tax, commercial, insurance, civil rights, and constitutional law.

Stephanie additionally counsels on the Americans with Disabilities Act, with particular focus on issues related to websites and mobile applications. Stephanie has also worked on trial-court litigation involving complex issues under the Americans with Disabilities Act, the Communications Act, the Digital Millennium Copyright Act, and various consumer protection laws.

Table of Contents

Section 01 – Introductions

Section 02 – Title I of the ADA (Online Job Applications)

Section 03 – Title I of the ADA (Emotional Support Animals)

Section 04 – Public accommodations under Title III of the ADA

Section 05 – Significant recent developments

Section 06 – Automotive industry as a target

SECTION 02

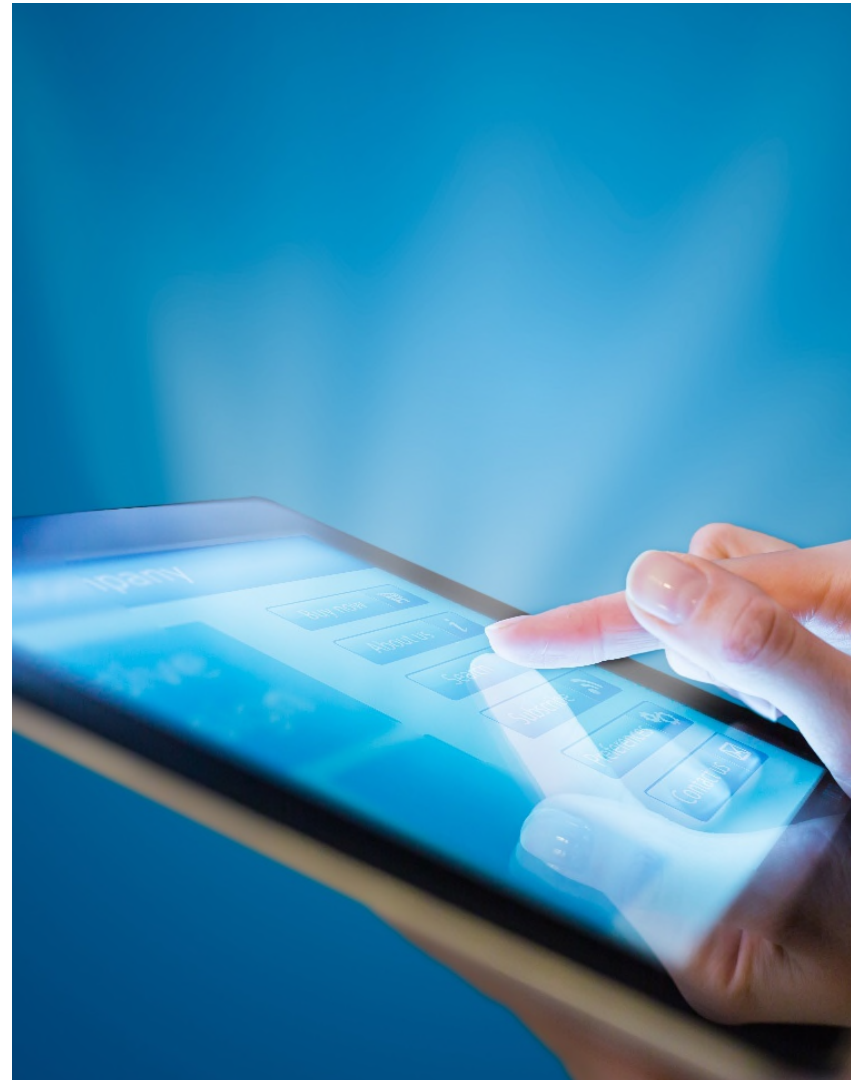
TITLE I OF THE ADA



Title I of the ADA

- As website accessibility lawsuits increase, ADA Title I issues may arise for companies requiring or permitting employment applications to be completed and/or submitted online.
- Employers should provide reasonable accommodations in connection with the submission of applications for employment, including online applications.
- Employers should include language in the footer of the Careers section of their websites that advises applicants about how to request a reasonable accommodation.
- Application pages of websites should have the same accessibility features and should be screen-readable like other website pages used by customers.
- Employers may also consider having alternative methods for individuals to submit applications.

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SECTION 03

EMOTIONAL SUPPORT ANIMALS





Emotional Support Animals

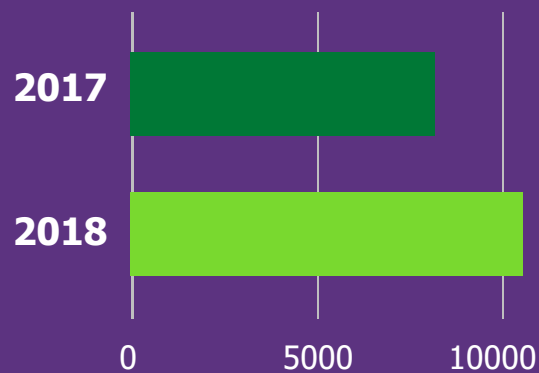
- Title I of the ADA, unlike Titles II and III, does not define “service animal.” So it is not clear whether an emotional support animal requested by an employee to accompany the employee at work would be a reasonable accommodation.
- Practical considerations for considering such a request include:
 - Consider applicable policies, such as no animals, and whether they can be modified
 - Request medical documentation of the need for the emotional support animal and whether the employee has a disability that requires an accommodation
 - Confer with the employee about training of the support animal, how it will be controlled in the workplace, and whether it would create an undue hardship
 - Use a trial period to determine if the accommodation of permitting the emotional support animal at work is disruptive to employees or the business

SECTION 04

PUBLIC ACCOMMODATIONS UNDER TITLE III OF THE ADA



FEDERAL ADA TITLE III LAWSUITS FILED



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Title III ADA Litigation Trends

- Approximately 10,100 federal ADA Title III lawsuits filed in 2018, as compared to 7,663 total in 2017, an increase of more than 30%.
- Three main areas of litigation:
 - Accessibility of websites / mobile applications
 - Accessibility of in-store technologies
 - Accessible parking
- Other ongoing litigation issues:
 - Restrooms
 - Store entrances
 - Service Animals
- Claims under similar state public accommodations laws likewise are increasing.

Website Accessibility

- Continuing trends from the past couple of years, private litigants have filed over 2200 website accessibility lawsuits in the past year, including class actions, tripling the number from the previous year.
- It is likely that hundreds of other companies have received demand letters threatening lawsuits over website accessibility as well as mobile applications.
- More website lawsuits were filed in New York than in any other state, followed by Florida, California, Pennsylvania, and Virginia.

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W3C Web Content Accessibility Guidelines

- The W3C's Web Content Accessibility Guidelines ("WCAG") 2.0 became an International Organization for Standardization ("ISO") standard in October 2012.
- WCAG provides three levels of compliance, in increasing order of accessibility and usability for people with disabilities: A, AA, and AAA.
- Levels A and AA are considered mandatory, while AAA covers many "nice to have" practices that enhance usability.
- For some time, the DOJ was widely expected to issue new regulations requiring websites and mobile applications to comply with the WCAG 2.0, Level AA.
- However, in July 2017, the government indefinitely postponed issuing website accessibility regulations.

W3C Web Content Accessibility Guidelines

- Several courts have required defendants to comply with WCAG 2.0:
 - In *Gil v. Winn Dixie Stores, Inc.* (June 2017), the Southern District of Florida issued an injunction requiring the defendant to ensure that its website conforms to the WCAG 2.0.
 - In *Andrews v. Blick Art Materials, LLC* (Dec. 2017), the Eastern District of New York approved of a website accessibility settlement agreement and stated that it determined that WCAG 2.0, Level AA was the appropriate standard to determine compliance with the ADA's accessibility requirements.
 - In *Frazier v. E.L.I. Trading Inc.* (Jan. 2018), the Western District of Pennsylvania issued an injunction requiring the defendant to retain a consultant to make its website compliant with the WCAG 2.0, Level AA standards, conduct training, and conduct monthly testing for two years; and allowing plaintiff's counsel to monitor the website for two years and recover monitoring costs.

WCAG 2.1

- In June 2018, the guidelines were updated, and the new prevailing standard is WCAG 2.1.
- WCAG 2.1 tracks and builds upon WCAG 2.0.
- Most of the new requirements under WCAG 2.1 concern the accessibility of mobile applications.

Courts Continue to be Divided on the Effect of the Absence of Website Regulations

- Several litigants have argued that there is no requirement that websites comply with the ADA in the absence of any regulations on accessibility standards for websites from any agency.
- Most courts have rejected this argument, including courts in Massachusetts, New York, Pennsylvania, and California, stating that the ADA requires that websites be accessible, regardless of whether there are any regulations.
- **The Ninth Circuit recently rejected that argument.** A court in California had accepted the argument, holding that the defendant's due process rights would be violated if its website was found to be in violation of the ADA in the absence of applicable regulations and technical assistance from the DOJ. The Ninth Circuit reversed, and held that requiring the defendant to make its website accessible did not violate due process, even in the absence of regulations and guidance from the DOJ.

Voluntary Action Plan Recommendations

- Develop a plan for making your existing Web content more accessible. Encourage input on improvements, including which pages should be given high priority for change. Consider making the more popular Web pages a priority. (This has generally been interpreted as a minimum of the 20 most-popular Web pages.)
- Ensure that in-house staff and contractors responsible for Web page and content development are properly trained. This can include IT, Marketing, and others.
- Provide a way for visitors to request accessible information or services by posting a telephone number, chat room, or email address on your home page. Establish procedures to ensure a quick response to users with disabilities who are trying to obtain information or services in this way.
- Caption videos or link videos to an accessible format, i.e. youtube

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SECTION 05

SIGNIFICANT RECENT DEVELOPMENTS



Recent Significant Decisions

- The Ninth Circuit recently held in *Robles v. Domino's Pizza, LLC* (Jan. 2019) that the ADA applies to Domino's website and mobile app even in the absence of formal regulations adopted by the DOJ, finding that there was no due process violation as Domino's had received fair notice of its legal duties.
- In a Southern District of Florida decision, *Gomez v. GNC* (Aug. 2018), a judge granted a plaintiff's motion for summary judgment in part finding that the defendant's website remained inaccessible and finding highly persuasive use of the WCAG 2.0 guidelines to meet compliance standards
- In another recent case, *Kidwell v. Fla. Comm'n on Human Relations* (Jan. 2017), the Middle District of Florida held that the plaintiff could not assert a Title III website accessibility claim, and that the websites of defendants with physical locations were not "physical or public accommodation[s] under the ADA."



Increased scrutiny of Emotional Support Animals

- Title III of the ADA requires public accommodations to permit the use of service animals—*i.e.*, dogs and miniature horses trained to do work or perform tasks for the benefit of individuals with disabilities.
- “Emotional support animals” are not considered service animals under Title III.
- Delta has increased its vetting of purported emotional support animals, requiring customers to show proof of the animal’s health or vaccinations 48 hours before a flight, present a doctor’s statement declaring a mental health disability, and sign a form attesting that the animal can behave.

Emotional Support Animals (cont.)

- In January 2018, United Airlines barred a passenger from bringing a purported “emotional support peacock” onto a flight.



Challenges to In-Store Technology

- As new technologies emerge, plaintiffs are challenging the accessibility of that technology and trying to extend the ADA to cover it.
- Many of the challenges are from blind or visually impaired customers or advocacy groups.
- Affected technologies include:
 - In-store kiosks, iPads, price check machines
 - POS devices



Recent DOJ ADA Title III Activity

- Recent Title III activity by the DOJ includes investigations (and related settlements) of architectural barriers; policies, practices and procedures to ensure equal access for customers with service animals; accessible audio and written communications to customers; and wheelchair accessible transportation services.
- DOJ has been less active in the Title III ADA area in the last two years

Developments in Accessible Parking Cases

- Lawsuits alleging accessible parking violations under the ADA and state laws continue to be filed for both single-location claims and class action claims following a class action ruling that favored plaintiffs.
- In *Heinzl v. Cracker Barrel Old Country Store, Inc.* (W.D. Pa. 2016), the court certified a class of all persons with mobility disabilities who encountered barriers in Cracker Barrel's parking areas and paths of travel at stores throughout the United States. The decision found that Cracker Barrel's alleged lack of a companywide ADA compliance policy that effectively finds and remedies ADA violations was a classwide violation warranting certification of the class under Rule 23.
 - This followed a decision rejecting class certification out of the same court in *Mielo v. Bob Evans Farms, Inc.* (W.D. Pa. 2015), primarily because the differences in parking conditions from one store to another across the country failed to meet Rule 23 requirements.

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State Laws

- Many states have enacted accessibility laws, some of which allow for civil penalties and the recovery of monetary damages by plaintiffs.
- Example: California's Unruh Act provides for a minimum of \$4,000 in damages per access violation, plus costs and fees (Cal. Civ. Code § 52). California's Disabled Persons Act authorizes minimum damages of \$1,000 per violation (Cal. Civ. Code § 54.3).
- Also broader language in California's statute increases the risk of website accessibility being included in the statute.
- Other states with similar laws authorizing individual damages include New York, Colorado, Hawaii, Massachusetts, South Carolina, and Texas.

Florida's Accessibility of Places of Public Accommodation Act ("APPAA") (Fla. Stat. § 553.5141)

- Pursuant to a law that went into effect in Florida in July 2017, a business that hires a "qualified expert" to inspect its premises to either verify conformity with ADA accessibility requirements, or to develop a compliance plan, can have that information considered in Florida state court if the certification of conformity or remediation plan has been filed with the Department of Business and Professional Regulation.
- The court "must consider" any such remediation plan or certification of conformity when the court "determines if the plaintiff's complaint was filed in good faith and if the plaintiff is entitled to attorney fees and costs."
- California has similar legislation.

Update- ADA Education and Reform Act of 2017

- The U.S. House of Representatives passed a bill on February 15, 2018, that would have limited the proliferation of potentially abusive lawsuits alleging failure to remove architectural barriers to access in violation of Title III.
- It did not pass the Senate by the end of the last legislative session.
- No current bills pending to address ADA issues in this context

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SECTION 05

AUTOMOTIVE INDUSTRY AS A TARGET



Suits Against Automotive Industry

- Over 40 lawsuits targeting automotive manufacturers and individual dealerships filed in the last 18 months under Title III
- Mainly filed in New York, California & Florida
- Website accessibility issues continue to dominate the vast majority of the Title III ADA litigation



Test Drive Vehicles

- *Karczewski v. DCH Mission Valley LLC* (9th Cir. 2017) holding that plaintiff stated a claim by alleging that defendant discriminated by failing to install hand controls in test drive vehicles, where plaintiff also alleged that doing so would be inexpensive and easy, and would not disable safety features or cause damage
- *Funches v. Barra*, (S.D. N.Y. 2016) car manufacturers were not “required to alter the mix of goods they sell by manufacturing a set portion of their vehicles with hand controls,” but that “car dealerships must install hand controls for individuals who wish to rent or test drive their vehicles if doing so is ‘readily achievable’”

TTY/Relay Service

- Roadside assistance
 - May get requests for instant messaging as an option. There are instant messaging applications will allow customers to text/instant message or email a message (which will use less data) to a relay service operator. The relay service operator will then place a telephone call and verbally communicate the text or email.
- Dealership
 - Must accept relay service calls like any other telephone call

QUESTIONS?



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