

Websites, Kiosks, and Other Self-Service Equipment in Franchising: Legal Pitfalls Posed by Title III of the Americans with Disabilities Act

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Websites, mobile applications, and electronic self-service machines provide exciting and efficient ways for franchised businesses to deliver information, goods, and services to customers, but they also present thorny compliance issues under the Americans with Disabilities Act (ADA). The ADA prohibits discrimination against individuals with disabilities public accommodations (i.e., private entities that do business with the public)¹ and requires them to take affirmative steps to ensure that individuals with disabilities have equal access to their goods and services. This article reviews the most common types of customer-facing electronic information technology (EIT) that franchisors and franchisees are using, the murky and evolving legal requirements that apply to them, the legal controversies that have arisen in connection with their use, and what can be done to ensure legal compliance.



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I. Customer-Facing EIT Used by Franchised Businesses and the Accessibility Challenges They Present for Individuals with Disabilities

Customer-facing EIT has become commonplace in many franchised businesses. The most common types of EIT are websites and mobile applications

1. The term “public accommodation” is a term of art defined in the ADA and the question of whether a private entity falls within the definition has been the subject of many lawsuits. The statute lists twelve categories of private entities that are covered, such as places of lodging, establishments serving food or drink, or sales or service establishments. 42 U.S.C. § 12181(7). Because most franchised businesses are likely to fall within the twelve categories, this article does not address the threshold question of coverage.

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(mobile apps). These websites and mobile apps allow customers to perform a variety of tasks, such as reserving hotel rooms, ordering food and beverages at quick service concepts, accessing loyalty accounts, paying for and re-searching goods and services, and finding store locations.

Once inside a place of business, customers are likely to encounter some type of electronic self-service machine, such as point of sale devices (POS), registration kiosks, ticket kiosks, self-checkout registers, iPads or tablet devices for placing orders, soda dispensers, vending/rental machines for various products, interactive facility directories, price scanning devices, coupon dispensers, water bottle return stations, and even key making machines. The possibilities are endless.

The use of electronic self-service machines can pose serious challenges for individuals with disabilities. People with certain types of disabilities find it difficult or even impossible to use websites or mobile apps that are not designed to be accessible to them. Blind individuals could access websites with screen reader software that translates on-screen text into audio that can be heard or Braille which appears on a refreshable Braille display. With audio or tactile cues, they could navigate the website using the tab key because they cannot simply point and click with the mouse. However, screen readers only work well (if at all) if the websites are designed to work with them, and most websites presently are not. As a result, blind users often have difficulty navigating sites, filling out forms, and identifying the function or significance of certain links or images. Individuals with low vision who do not use a screen reader may not be able to read text when there is insufficient contrast between the text and background. Color-blind individuals cannot see color cues often used by web designers to convey information (e.g., red for form fields with errors). Deaf individuals cannot perceive the audio content of videos without captioning. Individuals with limited manual dexterity may not be able to use a mouse and need to navigate websites using only a keyboard.

Like websites, mobile apps must also be designed with accessibility principles in mind to be usable by individuals with disabilities. All iOS and Android-based mobile devices have built-in screen reader capabilities that can be turned on by the user, but mobile apps will work only if they are designed to do so. Unfortunately, some, if not most, designers do not consider accessibility limitations when designing their mobile apps.

Like websites and mobile apps, most electronic self-service machines in the marketplace can be difficult or impossible to use by customers who are blind or have limited mobility. Smooth touch screens displaying virtual keys and information, which are commonly used as the customer interface for many types of electronic self-service machines without any tactile assistance, are barriers to blind people. Many self-service machines sell or rent products that can only be identified by sight, making them unusable by blind people. Self-service machines can also present accessibility barriers for individuals who use wheelchairs or scooters. Because they are seated in their mobility devices, these individuals typically cannot reach as high or

as low as a person who is in a standing position. They also cannot see display screens that are placed higher than their line of sight and often angled upwards for a standing user.

II. Legal Requirements for Customer-Facing EIT

A. *Statute and Regulations Applicable to EIT*

Title III of the ADA states that no person “who owns, leases (or leases to), or operates a place of public accommodation” may discriminate on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.² Although this non-discrimination mandate appears similar to those in other civil rights laws prohibiting discrimination based on other protected classes (i.e., race, gender, and national origin), it is actually much broader. The drafters of the ADA recognized that individuals with disabilities may need accommodations to have full and equal access to the goods and services offered by a public accommodation. Accordingly, the ADA requires public accommodations to provide at no additional cost “appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities,” unless the public accommodation “can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.”³

The principle underlying the “effective communication” requirement is that a person with a disability must be able to effectively communicate with a public accommodation in order to have equal access to all that a public accommodation offers to other members of the public. For example, a student who is deaf cannot understand what is being taught in class unless the aural information is translated into an accessible format such as sign language or text. Likewise, a blind customer who cannot read a menu will need to have the menu read aloud or translated into Braille.

In its first set of regulations issued in 1991 to implement Title III of the ADA, the U.S. Department of Justice (DOJ) provided a non-exclusive list of “auxiliary aids and services” that a public accommodation may need to provide to ensure effective communication with an individual with a disability.⁴ At that time, the Web was in its infancy and few electronic self-service machines existed. Thus, the list of auxiliary aids and services did not reference websites or other EIT. However, when the DOJ revised its ADA Title III regulations in 2010, it expanded the definition of the term “auxiliary aids and services” to include “accessible electronic and information technology.”⁵

2. 42 U.S.C. § 12182(a).

3. 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(a).

4. 28 C.F.R. § 36.303(b).

5. *Id.*

Websites, mobile apps, and other types of electronic self-service machines fall under this EIT umbrella.

Even with the 2010 revisions, the ADA Title III regulations still do not contain an explicit mandate that websites, mobile apps, or any other EIT machines must be accessible—other than automated teller machines (ATMs), fare vending machines (e.g., subway farecards), vending machines, and fuel dispensers for which there are technical legal standards. Moreover, the regulations do not provide any guidance on what accessibility features an accessible website, mobile app, or electronic self-service machine must have. Instead, the regulations simply require public accommodations to furnish “appropriate auxiliary aids and services” and provide a long menu of auxiliary aids and services that a public accommodation may provide after consulting with the individual with a disability about his or her preferred method of communication.⁶ In fact, the regulations state that

the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.⁷

B. *Recent Regulatory Developments Relating to Websites and Mobile Apps*

When it issued revised Title III regulations in 2010 to include accessible EIT in the long list of auxiliary aids and services that a public accommodation may need to provide, the DOJ also announced that it would be issuing regulations addressing the websites of public accommodations under Title III of the ADA as well as the websites of state and local governments under Title II of the ADA. The DOJ’s announcement came in the form of an Advanced Notice of Proposed Rulemaking (ANPRM).⁸ In it, the DOJ explained that

Although the Department has been clear that the ADA applies to websites of private entities that meet the definition of “public accommodations,” inconsistent court decisions, differing standards for determining Web accessibility, and repeated calls for Department action indicate remaining uncertainty regarding the applicability of the ADA to websites of entities covered by Title III. For these reasons, the Department is exploring what regulatory guidance it can propose to make clear to entities covered by the ADA their obligations to make their websites accessible.⁹

The DOJ explicitly recognized in this ANPRM that a public accommodation need not always make its website accessible in order to comply with Title III of the ADA. It stated,

The Department has taken the position that covered entities with inaccessible websites may comply with the ADA’s requirement for access by providing an acces-

6. 28 C.F.R. § 36.303(c)(1)(ii).

7. *Id.*

8. Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (July 26, 2010).

9. *Id.* at 43464.

sible alternative, such as a staffed telephone line, for individuals to access the information, goods, and services of their website. *In order for an entity to meet its legal obligation under the ADA, an entity's alternative must provide an equal degree of access in terms of hours of operations and range of information, options, and services available.* For example, a department store that has an inaccessible website that allows customers to access their credit accounts 24 hours a day, 7 days a week in order to review their statements and make payments would need to provide access to the same information and provide the same payment options in its accessible alternative.¹⁰

The DOJ also clarified in the ANPRM that websites of businesses that have no brick-and-mortar locations but that provide the types of goods and services identified by Title III's definition of "place of public accommodation" are still covered under the ADA.¹¹ The DOJ went on to ask for public comment on key questions that the website regulation would have to address, such as how much time public accommodations should have to comply with any new website accessibility standard as well as what that accessibility standard should be.¹²

The DOJ's request for public comment on these questions naturally led most businesses to conclude that they would have time to make their websites conform to the accessibility standard that the DOJ ultimately adopts in a final rule. Most also decided that they should wait to see what that standard is before spending significant resources on redesigning their websites.

More than six years have now passed since the DOJ issued the ANPRM, and the DOJ has yet to issue even a proposed regulation, let alone a final rule on the websites of public accommodations or state and local governments. In its most recent regulatory agenda issued before the 2016 Presidential election, the DOJ announced that it would issue a proposed rule relating to accessible websites for public accommodations in 2018.¹³ It is highly unlikely that the DOJ will issue any proposed regulations during the Trump administration in light of the President's Executive Order imposing drastic limitations on new regulations.¹⁴

Disability rights advocates have become increasingly frustrated by the lack of regulatory progress and have turned to the courts in recent years to forge a different path to website accessibility, as discussed in Part III below. Likewise, DOJ attorneys responsible for enforcing Title III of the ADA during the Obama administration also aggressively pushed the website accessibility agenda by opening investigations into the accessibility of various websites and demanding that their owners make their websites accessible now, even in the absence of any regulations.

10. *Id.* at 43466 (emphasis added).

11. *Id.* at 43461–63.

12. *Id.* at 43464–67.

13. See Department of Justice, Fall 2015 Statement of Regulatory Priorities, *available at* http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html.

14. See Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), *available at* <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling>.

The first significant action by the DOJ concerning websites and mobile apps since the ANPRM was its 2013 intervention as a plaintiff in a lawsuit against tax return preparation company H&R Block.¹⁵ The National Association of the Blind of Massachusetts and several of its members had filed a federal lawsuit claiming that H&R Block's online tax preparation tool and website were not accessible to the blind and violated Title III of the ADA.¹⁶ The DOJ intervened in the lawsuit as an additional plaintiff and expanded the matter to include H&R Block's mobile app.¹⁷ In addition, the DOJ sought injunctive relief to make the website, mobile app, and online tax prep tool accessible to all persons with disabilities, not just those who are blind.¹⁸ Not surprisingly, H&R Block settled the matter shortly after the DOJ's intervention with a very detailed consent decree in which it agreed to make its website, mobile app, and online tax preparation tool accessible to individuals with disabilities, using a privately developed set of accessibility guidelines called the Web Content Accessibility Guidelines (WCAG) version 2.0 Level AA.¹⁹

The DOJ's intervention in the H&R Block matter was the earliest sign to businesses that the DOJ was not going to wait for its website regulations to be issued before it would pursue an enforcement agenda against businesses with inaccessible websites. Indeed, the H&R Block consent decree was the first in a string of many settlements and consent decrees where the DOJ secured commitments from public accommodations or state and local governments to make their websites and/or mobile apps accessible with an actual or threatened enforcement lawsuit. Massive online open course provider edX,²⁰ online grocer Peapod,²¹ Carnival Cruise Lines,²² the Museum of Crime and Punishment,²³

15. See United States of America Complaint in Intervention, Nat'l Fed'n of the Blind v. HRB Digital LLC, No. 1:13-cv-10799-GAO (D. Mass. Dec. 11, 2013), ECF No. 39.

16. See Class Action Complaint, Nat'l Fed'n of the Blind v. HRB Digital LLC, No. 1:13-cv-10799-GAO (D. Mass. Apr. 8, 2013), ECF No. 1.

17. See United States of America Complaint in Intervention, *supra* note 12, ¶¶ 15–36.

18. *Id.* ¶¶ 37–42.

19. Consent Decree, Nat'l Fed'n of the Blind v. HRB Digital LLC, No. 1:13-cv-10799-GAO (D. Mass. Mar. 25, 2014), ECF No. 60, *available at* <https://www.ada.gov/hrb-cd.htm>.

20. Settlement Agreement Between the United States of America and edX Inc., DJ No. 202-36-255 (Apr. 2, 2015), *available at* https://www.ada.gov/edx_sa.htm (edX commits to making website, mobile applications, and learning management system conform to WCAG 2.0 AA as a result of DOJ compliance review).

21. Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC, DJ No. 202-63-169 (Nov. 17, 2014), *available at* https://www.ada.gov/peapod_sa.htm (Peapod agrees to make website and mobile application conform to WCAG 2.0 AA to resolve DOJ investigation and compliance review).

22. Settlement Agreement Between the United States of America and Carnival Corp., DJ No. 202-17M-206 (July 23, 2015), *available at* https://www.ada.gov/carnival/carnival_sa.html (Carnival agrees to make websites and mobile applications for Carnival Cruise Lines, Holland America Line, and Princess Cruises conform to WCAG 2.0 in order to resolve DOJ investigation).

23. Settlement Agreement Between the United States of America and the National Museum of Crime and Punishment (Jan. 13, 2015), *available at* https://www.ada.gov/crime_punishment_museum/crime_punishment_sa.htm (agreement to make museum website conform to WCAG 2.0 following investigation and compliance review by DOJ).

Law School Admissions Council,²⁴ Florida State University,²⁵ and Miami University²⁶ are just some of the businesses that made commitments.

The DOJ's aggressive enforcement agenda signals its view—whether reasonable or not—that businesses need to make their websites accessible now, even before it issues a regulation containing technical standards defining an “accessible” website. The DOJ made this position clearer in June 2015 when it filed Statements of Interest in two lawsuits brought by the National Association of the Deaf (NAD) against Harvard University and the Massachusetts Institute of Technology (MIT).²⁷ The NAD brought suit under Title III of the ADA and Section 504 of the Rehabilitation Act, alleging that the schools had failed to caption thousands of videos that are posted to their various websites.²⁸ These are not videos that students enrolled in courses are required to view but free videos posted to university websites for the general interest and benefit of the public.²⁹

Both schools asked the U.S. District Court for the District of Massachusetts to stay their respective cases until the DOJ issued final website regulations for public accommodations websites or to dismiss the cases in their entirety on other grounds.³⁰ Although not a party in either case, the DOJ filed

24. Settlement Agreement Between the National Federation of the Blind & Law School Admission Council, Inc. (Apr. 25, 2011), *available at* <https://www.ada.gov/LSAC.htm> (Law School Admission Council agrees to make lsac.org website and law school application service conform to WCAG 2.0 AA in order to resolve multiple complaints from National Federation of the Blind and related investigations by DOJ).

25. Settlement Agreement Between the United States of America and Florida State Univ., DJ No. 205-17-13 (May 29, 2014), *available at* <https://www.ada.gov/floridastate-t1-sa.htm> (university agrees to make campus law enforcement website, including its employment opportunities website and mobile applications, conform to WCAG 2.0 AA in order to resolve compliance review and investigation by DOJ).

26. See Joint Motion for Entry of Consent Decree by Intervenor Plaintiff United States of America, *Dudley v. Miami Univ.*, No. 1:14-cv-00038-SJD (S.D. Ohio Oct. 17, 2016), ECF No. 63 (United States intervened in ADA Title II case brought by National Federation of the Blind regarding accessibility of university's web pages, web applications, and web content; university has tentatively agreed to make all web content and learning technology conform to WCAG 2.0 AA; hearing on Joint Motion for Entry of Consent Decree scheduled for Dec. 14, 2016 (ECF No. 64), proposed Consent Decree, *available at* https://www.ada.gov/miami_university_cd.html.

27. Statement of Interest of the United States of America, Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM (D. Mass. June 25, 2015), *available at* https://www.ada.gov/briefs/harvard_soi.pdf; Statement of Interest of the United States of America, Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., No. 3:15-CV-30024-MGM (D. Mass. June 25, 2015), *available at* https://www.ada.gov/briefs/mit_soi.pdf.

28. See Complaint, Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM (D. Mass. Feb. 12, 2015), ECF No. 1; Complaint, Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., No. 3:15-CV-30024-MGM (D. Mass. Feb. 12, 2015), ECF No. 1.

29. See Complaint, Nat'l Ass'n of the Deaf v. Harvard Univ., *supra* note 28; Complaint, Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., *supra* note 28.

30. See Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM, 2016 WL 3561622 (D. Mass. Feb. 9, 2016) (denying Harvard's motion to dismiss and/or stay pending enactment of website regulations by DOJ), *report and recommendation adopted*, No. CV 15-30023-MGM, 2016 WL 6540446 (D. Mass. Nov. 3, 2016); Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., No. 3:15-CV-30024-MGM, 2016 WL 3561631 (D. Mass. Feb. 9, 2016) (same), *report and recommendation adopted*, No. CV 15-30024-MGM, 2016 WL 6652471 (D. Mass. Nov. 4, 2016).

a brief in both cases against the schools.³¹ The most notable statement in these two Statements of Interest was the DOJ's assertion that the obligation to make websites accessible exists in the current law and regulations, even in the absence of any new regulations. The DOJ made this point indirectly by stating that when it issued the ANPRM in 2010, it was seeking "to explore whether rulemaking would be helpful in providing guidance as to how covered entities could meet *their pre-existing obligations* to make their websites accessible."³² This position conflicted with the DOJ's statement in the 2010 ANPRM that public accommodations with inaccessible websites can still comply with the ADA by providing an equal degree of access through alternative means (e.g., the telephone).³³

In May 2016, the DOJ made another surprise announcement in connection with its rulemaking for state and local government websites under Title II of the ADA. This rulemaking began as part of the 2010 ANPRM, but the DOJ later decided to place the state and local website rulemaking on a separate and faster track. In May 2016, the DOJ issued a Supplemental Advanced Notice of Proposed Rulemaking for the state and local government websites (SANPRM) where it previewed its position on numerous issues without actually providing a formal draft of a proposed rule for public comment.³⁴ The DOJ stated that, once issued, the regulations for state and local government websites would become a model for the public accommodations website regulation.³⁵

The SANPRM is rich in content and questions, but among the more important statements made by the DOJ was its position that the privately developed WCAG 2.0 AA should be the accessibility standard for Web content.³⁶ Furthermore, the DOJ said it was considering giving public entities "two years after the publication of a final rule to make their Web sites and Web content accessible in conformance with WCAG 2.0 AA, unless compliance with the requirements would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."³⁷ The SANPRM position about a possible two-year compliance period cannot be reconciled with the DOJ's more recent October

31. Statement of Interest of the United States of America, *Nat'l Ass'n of the Deaf v. Harvard Univ.*, *supra* note 27; Statement of Interest of the United States of America, *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, *supra* note 27.

32. Statement of Interest of the United States of America, *Nat'l Ass'n of the Deaf v. Harvard Univ.*, *supra* note 27, at 4–5 (emphasis added).

33. See Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (July 26, 2010).

34. See Supplemental Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 81 Fed. Reg. 49908 (May 9, 2016), available at <https://www.ada.gov/regs2016/sanprm.html>.

35. See *id.* at 31.

36. *Id.* at 11–14.

37. *Id.* at 16.

2016 Letter of Findings to the University of California at Berkeley in which the DOJ charged that the university had violated Title II of the ADA by failing to provide closed captioning for thousands of online videos of general interest and benefit to the public.³⁸

C. Recent Regulatory Developments Relating to Self-Service Machines

Neither the law nor the regulations contain specific requirements for self-service EIT machines other than ATMs, fare vending machines, vending machines, and fuel dispensers.³⁹ ATMs and fare vending machines must meet specific requirements designed to ensure that they are accessible to the blind and to those with mobility disabilities.⁴⁰ For vending machines and fuel dispensers, the regulations specifically require only that they be accessible to individuals with mobility disabilities and contain no requirements for accessibility to the blind.⁴¹ The DOJ has explained that it did not issue specific regulations about equipment in 1991 because “the requirements could be addressed under other sections of the regulation and because there were no appropriate accessibility standards applicable to many types of equipment at that time.”⁴² However, in 2010, the DOJ announced in an Advanced Notice of Proposed Rulemaking that it was starting the rulemaking process for equipment and furniture.⁴³ The DOJ has not issued a proposed rule or taken any other action on this rulemaking since that time.

In 2014, the DOJ announced in a Statement of Interest filed in *New v. Lucky Brand Dungarees Stores* that the absence of specific requirements for electronic self-service machines does not mean that the machines do not have to be accessible.⁴⁴ The blind plaintiff in that case sued a retailer that had POS devices that only had touchscreen interfaces. As a result, the plaintiff could not enter his PIN independently when paying with a debit card. The retailer argued that it was not required to have an accessible POS device

38. See Department of Justice, The United States’ Findings and Conclusions Based on its Investigation Under Title II of the Americans with Disabilities Act of the University of California at Berkeley, DJ No. 204-11-309 (Aug. 30, 2016), available at https://www.ada.gov/briefs/uc_berkeley_lof.pdf.

39. See sections 220 and 228 of the 2010 ADA Standards for Accessible Design set forth at 28 C.F.R. Part 36, Subpart D (2011) and 36 C.F.R. Part 1191, Appendices B and D (2009).

40. See sections 707 and 811 of the 2010 ADA Standards for Accessible Design set forth at 28 C.F.R. Part 36, Subpart D (2011) and 36 C.F.R. Part 1191, Appendices B and D (2009).

41. See section 309 of the 2010 ADA Standards for Accessible Design set forth at 28 C.F.R. Part 36, Subpart D (2011) and 36 C.F.R. Part 1191, Appendices B and D (2009).

42. See 28 C.F.R. Pt. 36, App. A, available at https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm#a2010guidance.

43. See Advance Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation; Equipment and Furniture, 75 Fed. Reg. 43452 (July 29, 2010), available at https://www.ada.gov/anprm2010/equipment_anprm_2010.htm.

44. Statement of Interest of the United States, *New v. Lucky Brand Dungarees Stores, Inc.*, No. 1:14-cv-20574-UU (Apr. 10, 2014 S.D. Fla.), ECF No. 19, available at https://www.ada.gov/briefs/lucky_brand_soi.pdf.

because the regulations contained no standards for POS devices.⁴⁵ The DOJ intervened, arguing that

Title III of the ADA requires that public accommodations provide appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities (citations omitted). Mr. New's complaint alleges a valid claim of discrimination under Title III of the ADA—specifically, Lucky Brand discriminates on the basis of disability when it fails to afford individuals who are blind with the same ability to independently access the debit card payment option provided to others, thus failing to ensure effective communication with its blind customers during transactions for its goods and services. Contrary to Lucky Brand's assertions, neither the absence of specific technical requirements for POS devices nor the availability of other payment options defeats Mr. New's ADA claim. Mr. New's factual allegations—that he was unable to independently complete a debit card transaction because the POS device Lucky Brand provided was inaccessible and that Lucky Brand failed to provide an appropriate auxiliary aid or service to ensure effective communication during this transaction—fall squarely within Title III's statutory and regulatory protections.⁴⁶

The DOJ did acknowledge that “[u]ntil the process of establishing specific technical requirements for POS devices is complete, public accommodations have a degree of flexibility in complying with Title III’s more general requirements of nondiscrimination and effective communication—but they still must comply.” As described below, those requirements include, absent a fundamental alteration or undue burden defense, providing auxiliary aids and services in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.⁴⁷ The DOJ went on to explain that providing assistance to a blind customer who needs help entering his or her PIN is not an appropriate auxiliary aid or service given the highly sensitive and confidential nature of the PIN and the fact that sighted customers are able to do so independently.⁴⁸ The DOJ's discussion suggests that providing assistance to a customer can be acceptable when the electronic self-service equipment is not accessible, but only when doing so does not compromise a person's confidential information. As discussed in Part III.B below, several courts have also taken this position.

III. Legal Controversies About the Use of EIT

A. Website Lawsuits and Settlements

The number of lawsuits concerning the accessibility of websites has increased dramatically in the past few years, driven in large part by a few plaintiffs' firms in Pennsylvania, New York, California, and Florida.⁴⁹ Although the

45. *Id.* at 2.

46. *Id.* at 5–6.

47. *Id.* at 8–9.

48. *Id.* at 2–3.

49. Minh Vu, *Federal Website Lawsuits Spike; Community Banks Get Demand Letters*, Seyfarth Shaw LLP (Oct. 31, 2016), available at <http://www.adatitleiii.com/2016/10/federal-website-lawsuits-spike-community-banks-get-demand-letters/>; Minh Vu, *ADA Title III Lawsuits Increase*

numbers are hard to track, Seyfarth Shaw's research team determined that plaintiffs have filed at least 300 such suits in federal court in 2015 and 2016.⁵⁰

Despite the increase in lawsuits, there are still very few court decisions in cases alleging that an inaccessible website violates Title III of the ADA because the cases tend to settle early. There has only been one case where a court has held on the merits that a public accommodation engaged in disability discrimination by having an inaccessible website. In *Davis v. BMI/BNB Travelware Co.*, the blind plaintiff sued a retailer under the California Unruh Civil Rights Act for having an allegedly inaccessible website.⁵¹ Ruling on summary judgment, a California state trial court found that the blind plaintiff had demonstrated that he sought goods and services from the retailer but could not use its website, www.ColoradoBaggage.com.⁵² The very short decision contains very little insight or guidance and merely referenced the plaintiff's expert report for the actions that must be taken to make the website accessible.⁵³ It seems that the retailer did not offer any opposition to the plaintiff's report nor did it attempt to argue that the plaintiff could access the information in some equivalent manner, such as a staffed 24-hour toll free telephone line.⁵⁴ No court has considered the question of whether such a phone line would be a lawful alternative to having an accessible website.

The appropriate technical standard for determining whether a website is "accessible" also has not been decided by any court; until such a standard is adopted by the DOJ, courts may be inclined to take a more pragmatic approach and examine whether a plaintiff is able to use the website. The court took this approach in the *Davis* case where it concluded that "the undisputed evidence is that Plaintiff's access to the website was prevented by the Defendant at the time the website was designed."⁵⁵ Likewise, in the lawsuits brought against Harvard and MIT about the alleged lack of closed captioning for the tens of thousands of videos on their websites, the court stated that the plaintiffs had sufficiently stated a claim where they had "pleaded a lack of meaningful access and have identified captioning as the reasonable accommodation they require to gain that access."⁵⁶

Another issue that the courts have yet to consider is a business' use of social media outlets to communicate with the public. Does a franchisee violate

by 37 Percent in 2016, Seyfarth Shaw LLP (Jan. 23, 2017), available at <http://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/>.

50. *Id.*

51. *Davis v. BMI/BNB Travelware Co.*, 2016 WL 2935482, at *1-2 (Cal. Super. Ct. Mar. 21, 2016).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM, 2016 WL 3561622, at *9 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, No. CV 15-30023-MGM, 2016 WL 6540446 (D. Mass. Nov. 3, 2016); Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., No. 3:15-CV-30024-MGM, 2016 WL 3561631, at *1 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, No. CV 15-30024-MGM, 2016 WL 6652471 (D. Mass. Nov. 4, 2016).

the ADA when it posts special offers, videos, or other information on a social media website that is not accessible? The DOJ has yet to address this question for public accommodations covered by Title III of the ADA, but said that a state or local government entity that uses

third-party social media Web site to implement its services, programs, or activities . . . is required to ensure access to that content for individuals with disabilities through other means. For example, if a public entity publishes information about an upcoming event on a third-party social media Web site, it must ensure that the same information about the event is also available to individuals with disabilities elsewhere, such as on the public entity's accessible Web site. Likewise, if a public entity solicits public feedback on an issue via a social media platform, the public entity must provide an alternative way to invite and receive feedback from person with disabilities on that topic.⁵⁷

This statement suggests that the DOJ would expect public accommodations to ensure that any information conveyed to the public on an inaccessible social media website would also be available through some other accessible means.

Other issues pertaining to website accessibility are more settled. For example, all courts to have addressed the issue agree that if there is a nexus between a business's website and a physical location where customers are served, the website is covered under the law.⁵⁸ However, courts disagree over whether a website belonging to a business with no physical location is covered under Title III of the ADA. The Ninth Circuit is the only federal appellate court to have addressed this question *in cases involving websites*. In

57. See Supplemental Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 81 Fed. Reg. 49908 (May 9, 2016), *available at* <https://www.ada.gov/regs2016/sanprm.html>.

58. See, e.g. Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., No. 3:15-CV-30024-MGM, 2016 WL 3561631 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, No. CV 15-30024-MGM, 2016 WL 6652471 (D. Mass. Nov. 4, 2016) and Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM, 2016 WL 3561622 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, No. CV 15-30023-MGM, 2016 WL 6540446 (D. Mass. Nov. 3, 2016) (motions by Harvard and MIT to dismiss or stay website accessibility class action lawsuits denied because existing law and regulations provide a basis for the deaf advocates' claim that the universities violated Title III of the ADA and Section 504 of the Rehabilitation Act by failing to provide closed captioning for thousands of videos on their websites); *Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529 (C.D. Cal. 2011) (certifying class of blind and partially sighted persons seeking declaratory and injunctive relief against resorts' owner-operator and purported owner-operator of websites associated with entertainment facilities); *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1191 (N.D. Cal. 2007) (holding that there was a sufficient nexus between Target's website and its stores to be covered under Title III of the ADA); *Davis v. BMI/BNB Travelware Co.*, 2016 WL 2935482, at *1 (Cal. Super. Ct. Mar. 21, 2016) (plaintiff presented sufficient evidence and legal argument to conclude Title III of the ADA applied to the use of a website where plaintiff has demonstrated he sought goods and services from a place of public accommodation because he "demonstrated a sufficient nexus exists between defendant's retail store and its website that directly affects plaintiff's ability to access good and services.").

companion cases *Cullen v. Netflix*⁵⁹ and *Earl v. eBay*,⁶⁰ the Ninth Circuit held that Netflix's video streaming service, and eBay's web-based auction business, are not subject to the ADA's non-discrimination mandate because their services are not connected to any "actual, physical place."⁶¹ The court held that the phrase "place of public accommodation" requires "some connection between the good or service complained of and an actual physical place," citing to its prior decision in *Weyer v. Twentieth Century Fox Film Corp.*⁶² The district courts in the Ninth Circuit have consistently applied these precedents to dismiss lawsuits involving websites that have no nexus to a physical location where customers are served.⁶³ The Third and Sixth Circuits have also taken the position that only goods and services offered by a physical place of public accommodation are covered by Title III of the ADA, but have not considered cases involving websites.⁶⁴ District courts in Montana and Florida have held that websites are not places of public accommodation when they have no nexus to a physical place where customers are served.⁶⁵ The Second Circuit has yet to address the question, but has held that Title III of the ADA does

59. *Cullen v. Netflix, Inc.*, Docket No. 13-15092 (9th Cir. Apr. 1, 2015), available at <http://cdn.ca9.uscourts.gov/datastore/memoranda/2015/04/01/13-15092.pdf> (affirming district court's decision to grant defendant's motion to dismiss plaintiff's disability discrimination claims under two California state laws predicated on the ADA).

60. *Earl v. eBay Inc.*, 599 F. App'x 695, 696 (9th Cir. 2015) (affirming district court's decision to grant defendant's motion to dismiss with prejudice plaintiff's ADA and California Unruh Civil Rights Act claims).

61. *Cullen*, Docket No. 13-15092, at 2; *Earl*, 599 F. App'x, at 696.

62. *Cullen*, Docket No. 13-15092, at 2; *Earl*, 599 F. App'x, at 696 ("We have previously interpreted the term 'place of public accommodation' to require 'some connection between the good or service complained of and an actual physical place.'") (both quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)).

63. See, e.g. *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011) (social networking website not a place of public accommodation, even though defendant's headquarters were located in a physical space and defendant sold its gift cards in various brick-and-mortar retail stores across country); *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC, 2014 WL 1920751 (C.D. Cal. May 14, 2014) (website with videos not covered by Title III of the ADA because a website is not a place of public accommodation under Title III).

64. See *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3rd Cir. 1998) (disparity in employer's insurance benefits for employees' mental and physical disabilities did not violate ADA because disability benefits do not qualify as a public accommodation under Title III of the ADA ("The plain meaning of Title III is that a public accommodation is a place, leading to the conclusion that it is all of the services which the public accommodation offers, not all services which the lessor of the public accommodation offers, which fall within the scope of Title III.")). (internal citations and quotations omitted); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010-14 (6th Cir. 1997) (employee benefit plan not a public accommodation under Title III of the ADA ("Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation.")).

65. See *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1317-21 (S.D. Fla. 2002) (district court holds that a web-only travel website is not a place of public accommodation); *Kidwell v. Florida Comm'n on Human Relations*, No. 2:16-CV-403-FTM-99CM, 2017 WL 176897, at *1 (M.D. Fla. Jan. 17, 2017) (federal magistrate judge holds that SeaWorld's website is not a place of public accommodation covered by Title III of the ADA because "[p]laintiff is unable to demonstrate that either Busch Gardens' or SeaWorld's online website prevents his access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency"); *Ouellette v. Viacom*, No. CV 10-133-M-DWM-JCL, 2011 WL 1882780 (D. Mont.

cover products and services that are purchased in a physical place of public accommodation but used offsite (i.e., an insurance policy purchased from an insurance office).⁶⁶

In contrast, the First and Seventh Circuits have held that Title III of the ADA applies to businesses with no physical locations.⁶⁷ None of these appellate decisions involved websites. District courts in the First and Seventh Circuits held that websites that have no nexus to a physical location are still covered by Title III of the ADA.⁶⁸

Public accommodations defending website accessibility lawsuits do have some defenses available to them. The law does not require the provision of any auxiliary aids and services that would impose an undue burden or cause a fundamental alteration of the goods and services provided by the public accommodation.⁶⁹ No court has yet to consider the applications of these defenses in a website accessibility case, and they have been difficult to prove for entities with resources in other contexts. For example, in *Innes v. Board of Regents*, the University of Maryland argued that the purchase and installation of captioning boards for deaf spectators at athletic events would cost a total of \$3.75 million and be an undue burden.⁷⁰ The U.S. District Court for the District of Maryland rejected this argument, holding that this amount did not establish undue burden as a matter of law. The court stated that other factors would have to be considered and refused to decide the issue on a motion to dismiss.⁷¹ The undue burden and fundamental alteration defenses will feature prominently in the *Harvard* and *MIT* video captioning cases discussed earlier if these cases do not settle.

Some defendants in recent website accessibility lawsuits have argued that the court should stay the cases until the DOJ issues final rules for public accommodations websites. The courts have uniformly rejected this argument. In *Sipe v. Huntington National Bank*, the defendant moved to dismiss the lawsuit, arguing that the DOJ had not issued regulations.⁷² The district court judge in the U.S. District Court for the Western District of Pennsylvania summarily denied the motion with no explanation.⁷³ The court in the *Harvard* and

Mar. 31, 2011) (impeding access to an “online theater” is not an injury within the scope of the ADA).

66. See *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 2000).

67. See *Carparts Distrib. Ctr. v. Auto. Wholesalers’ Ass’n of New England*, 37 F.3d 12, 19–20 (1st Cir. 1994); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

68. See *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015) (online-only website and mobile applications providing a reading subscription service covered by Title III of the ADA); *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (online-only web-based subscription service for television and other programming covered by Title III of the ADA).

69. See 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(a).

70. *Innes v. Bd of Regents*, 121 F. Supp. 3d 504 (D. Md. 2015).

71. *Id.* at 513.

72. See Defendant’s Brief in Support of Motion to Dismiss or, Alternatively, to Stay, *Sipe v. Huntington Nat’l Bank*, No. 2:15-cv-01083 (W.D. Penn. Oct. 26, 2015), ECF Nos. 14–15.

73. See Order Denying Motion to Dismiss or, Alternatively, to Stay, *Sipe v. Huntington Nat’l Bank*, No. 2:15-cv-01083 (W.D. Penn. Nov. 18, 2015), ECF No. 21.

MIT cases also rejected the argument, stating that the DOJ's pending development of website regulations did not impact the court's determination in those cases as to whether the two schools had discriminated against the deaf or hard of hearing by not providing closed captioning for its videos.⁷⁴

ADA Title III plaintiffs' firms have seized upon the unfavorable litigation landscape to send out hundreds, possibly thousands, of demand letters about inaccessible websites in an effort to obtain settlements. Some have filed dozens of lawsuits. Most of the targeted businesses have chosen to settle these cases confidentially. Advocacy groups have also placed intense pressure on businesses to make their websites accessible. These efforts have resulted in dozens of public settlements over the past few years with businesses such as Netflix,⁷⁵ Scribd,⁷⁶ Charles Schwab,⁷⁷ Weight Watchers,⁷⁸ Major League Baseball,⁷⁹ CVS,⁸⁰ Wellpoint,⁸¹ and Safeway.⁸²

74. Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM, 2016 WL 3561622, at *15 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, No. CV 15-30023-MGM, 2016 WL 6540446 (D. Mass. Nov. 3, 2016); Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., No. 3:15-CV-30024-MGM, 2016 WL 3561631, at *1-2 (D. Mass. Feb. 9, 2016), *report and recommendation adopted*, No. CV 15-30024-MGM, 2016 WL 6652471 (D. Mass. Nov. 4, 2016).

75. Netflix Website Accessibility Agreement (2016), *available at* http://www.adatitleiii.com/wp-content/uploads/sites/121/2016/04/Settlement_Agreement_FOR_WEBSITEv2.pdf (Netflix agrees to provide audio captioning for movies and videos offered through Netflix video streaming and DVD rental subscriptions).

76. Press Release, Nat'l Fed'n of the Blind, National Federation of the Blind and Scribd Agree to Collaborate to Make Reading Subscription Service Accessible to the Blind (Nov. 19, 2015), *available at* <https://nfb.org/national-federation-blind-and-scribd-agree-collaborate-make-reading-subscription-service-accessible> and <https://nfb.org/images/photos/scribd%20settlement%20agreement%20and%20release.pdf> (Scribd agrees to make ebooks, audiobooks and other published content accessible to blind users pursuant to WCAG 2.0 AA standards).

77. Charles Schwab Website Accessibility Settlement Agreement (Oct. 20, 2011), *available at* <http://www.lflegal.com/2012/05/schwab-agreement/> (Charles Schwab agrees to enhance website accessibility using WCAG 2.0 Level AA).

78. Weight Watchers Print and Digital Accessibility Settlement Agreement (Apr. 15, 2013), *available at* <http://www.lflegal.com/2013/06/weight-watchers-agreement/> (Weight Watchers agrees to use WCAG 2.0 Level AA as the standard for its online and mobile application content and to provide print material in accessible formats for persons with visual impairments who cannot read standard print).

79. Major League Baseball Accessible Website Agreement (Dec. 31, 2009), *available at* <http://www.lflegal.com/2010/02/mlb-agreement/> (MLB agrees to make mlb.com and all Major League Baseball club websites accessible pursuant to WCAG 2.0 guidelines); First Addendum to MLB Settlement Agreement (Feb. 1, 2012), *available at* <http://www.lflegal.com/2012/06/mlb-addendum/> (extending original agreement and expanding MLB's accessibility obligations regarding mobile applications).

80. CVS Accessible Website and Point of Sale Settlement Agreement (Apr. 15, 2009), *available at* <http://www.lflegal.com/2009/07/cvs-agreement/> (CVS agrees to install accessible POS in every CVS store nationwide and to upgrade website to comply with WCAG).

81. WellPoint Accessible Information Agreement (Jan. 1, 2014), *available at* <http://www.lflegal.com/2014/02/wellpoint-agreement/> (agreement to increase the accessibility of WellPoint websites, mobile applications and print materials for health plan members who are blind and visually impaired, applying WCAG 2.0).

82. Safeway Web Accessibility Agreement (Dec. 6, 2013), *available at* <http://www.lflegal.com/2013/12/safeway-web/> (agreement to increase the accessibility of Safeway's online grocery delivery website using WCAG 2.0 AA as legal standard).

B. Mobile Apps

There have been far fewer controversies relating to the accessibility of mobile apps than websites, but they are likely to increase in number in the future. The legal theory for holding a business liable under Title III of the ADA for having a mobile app that is not accessible would be the same as for a website. The lack of lawsuits and judicial decisions addressing mobile apps does not mean that advocacy groups and the DOJ are not pushing businesses to make their mobile apps accessible. Over the past several years, businesses such as H&R Block,⁸³ edX,⁸⁴ Peapod,⁸⁵ Square,⁸⁶ Weight Watchers,⁸⁷ Carnival Cruise Lines,⁸⁸ Wellpoint,⁸⁹ Bank of America,⁹⁰ and Major League Baseball⁹¹ have all agreed to make their mobile apps accessible by making coding and design changes.

C. Point of Sale Devices/Self-Service Equipment

Point of sale devices and other types of electronic self-service equipment have also been the subject of a number of lawsuits and controversies in recent years. In 2014, plaintiffs sued many retailers and even cab companies about touchscreen POS devices that did not have tactile keypads that would allow

83. Consent Decree, Nat'l Fed'n of the Blind v. HRB Digital LLC, No. 1:13-cv-10799-GAO (D. Mass. Mar. 24, 2014), ECF No. 60, *available at* <https://www.ada.gov/hrb-cd.htm> (agreement to make H&R Block's website and mobile applications conform to WCAG 2.0 AA).

84. Settlement Agreement Between the United States of America and edX Inc., DJ No. 202-36-255 (Apr. 2, 2015), *available at* https://www.ada.gov/edx_sa.htm (agreement to make edX website, mobile applications, and learning management system conform to WCAG 2.0 AA).

85. Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC, DJ No. 202-63-169 (Nov. 17, 2014), *available at* https://www.ada.gov/peapod_sa.htm (agreement to make Peapod's website and mobile application accessible in conformance with WCAG 2.0 AA).

86. Square, Inc. Mobile Application Agreement (2013), *available at* <http://www.trelegal.com/wp-content/uploads/2013/07/Final-Public-Accessibility-Agreement-Accessible.pdf> (Square agrees to improve accessibility of Square Wallet and Square Register mobile applications in agreement with National Federation of the Blind of Massachusetts).

87. Weight Watchers Print and Digital Accessibility Settlement Agreement (Apr. 15, 2013), *available at* <http://www.lflegal.com/2013/06/weight-watchers-agreement/> (Weight Watchers agrees to use WCAG 2.0 Level AA as the standard for its online and mobile application content).

88. Settlement Agreement Between the United States of America and Carnival Corp., DJ No. 202-17M-206 (July 23, 2015), *available at* https://www.ada.gov/carnival/carnival_sa.html (Carnival Cruise Lines commits to making its website and mobile applications conform to WCAG 2.0 after being investigated by DOJ).

89. WellPoint Accessible Information Agreement (Jan. 1, 2014), *available at* <http://www.lflegal.com/2014/02/wellpoint-agreement/> (agreement to increase the accessibility of WellPoint websites, mobile applications and print materials for health plan members who are blind and visually impaired, applying WCAG 2.0).

90. Bank of America Accessible Information Agreement (Mar. 21, 2016), *available at* <http://www.lflegal.com/2016/05/bankofamerica-mortgage-agreement/> (agreement to make online banking mobile application and website conform with WCAG 2.0 AA).

91. First Addendum to MLB Settlement Agreement (Feb. 1, 2012), *available at* <http://www.lflegal.com/2012/06/mlb-addendum/> (extending original MLB website accessibility agreement and expanding MLB's obligations regarding its At Bat mobile application).

blind users to independently input their PINs,⁹² including the suit that resulted in the filing of a Statement of Interest by the DOJ in the *Lucky Brands* case discussed earlier. Advocates have also approached businesses and proposed “structured negotiations” to ensure that they install accessible POS devices. Walmart,⁹³ Target,⁹⁴ Safeway,⁹⁵ Trader Joe’s,⁹⁶ Rite Aid,⁹⁷ Raley’s,⁹⁸ Radio Shack,⁹⁹ Dollar General,¹⁰⁰ CVS,¹⁰¹ Best Buy,¹⁰² and 7-Eleven¹⁰³ are some of the businesses that agreed to install accessible POS devices as a result

92. See, e.g., Complaint, *Jahoda v. Signet Jewelers Limited, d/b/a Kay Jewelers*, No. 2:13-cv-01729-LPL (W.D. Penn. Dec. 4, 2013), ECF No. 1; First Amended Complaint, *Nat’l Fed’n of the Blind v. RideCharge, Inc.*, No. 2:14-cv-2490 (C.D. Cal. Sept. 9, 2014), ECF No. 25; Complaint, *New v. Lululemon USA, Inc.*, No. 1:14-cv-20589-DPG (S.D. Fla. Feb. 17, 2014), ECF No. 1; Complaint, *New v. Apple, Inc.*, No. 1:14-cv-20767-MGC (S.D. Fla. Feb. 28, 2014), ECF No. 1; Complaint, *Thurston v. J. Crew Group, Inc.*, No. 5:15-cv-01331-JAK-MRW (C.D. Cal. July 6, 2015), ECF No. 1-1; Complaint, *Smith v. J. Crew Group, Inc.*, No. 2:15-cv-0375 (C.D. Cal. May 18, 2015), ECF No. 1; Complaint, *Gomez v. J. Crew Group, Inc.*, No. 2:15-cv-03808 (C.D. Cal. May 20, 2015), ECF No. 1; Complaint, *Gomez v. J. Crew Group, Inc. d/b/a Madewell*, No. 2:15-cv-04161-JAK-MRW (C.D. Cal. June 3, 2016), ECF No. 1; Complaint, *Nat’l Fed’n of the Blind v. Build-a-Bear Workshop, Inc.*, No. 1:15-cv-01724-KMT (D. Colo. Aug. 11, 2015), ECF No. 1; Complaint, *Nat’l Fed’n of the Blind v. Container Store, Inc.*, No. 15-12984-NMG (D. Mass. July 20, 2015), ECF No. 1.

93. Wal-Mart Point of Sale Device Settlement Agreement (Oct. 15, 2005), available at <http://www.lflegal.com/2005/10/walmart-pos-agreement/> (agreement to install tactile POS devices at Wal-Mart stores nationwide).

94. Target Point of Sale Device Settlement Agreement (Mar. 31, 2009), available at <http://www.lflegal.com/2005/10/walmart-pos-agreement/> (agreement to install tactile POS devices at Target stores nationwide).

95. Safeway Point of Sale Device Settlement Agreement (Sept. 30, 2006), available at <http://www.lflegal.com/2006/09/safeway-agreement/> (agreement to install tactile POS devices at all Safeway owned stores in the United States, including include Safeway, Vons, Randalls, Tom Thumb, Genuardi’s, Pavilions, Dominick’s, Pak’n Save Foods, and Carrs).

96. Trader Joe’s Point of Sale Device Settlement Agreement (June 30, 2006), available at <http://www.lflegal.com/2009/08/trader-joes-pos-agreement/> (agreement to install tactile POS devices at all Trader Joe’s stores nationwide).

97. Rite Aid Point of Sale Device Agreement (Mar. 31, 2008), available at <http://www.lflegal.com/2008/04/rite-aid-pos-agreement/> (agreement to install tactile POS devices at all Rite Aid stores nationwide).

98. Raley’s Point of Sale Device Agreement (Jan. 15, 2015), available at <http://www.lflegal.com/2015/04/raleys-agreement/> (agreement to install tactile POS devices at all California stores owned by Raley’s, including Raley’s, Aisle 1, Beverage Market, Food Source, Nob Hill, and Bel Air stores).

99. RadioShack Point of Sale Device Agreement (May 31, 2015), available at <http://www.lflegal.com/2007/05/radio-shack-agreement/> (agreement to install tactile point of sale devices at every RadioShack store nationwide).

100. Dollar General Point of Sale Device Agreement (Oct. 15, 2008), available at <http://www.lflegal.com/2008/12/dollar-general-settlement-agreement/> (agreement to install tactile point of sale devices at every Dollar General store nationwide).

101. CVS Point of Sale Device Agreement (Apr. 15, 2009), available at <http://www.lflegal.com/2009/07/cvs-agreement/> (agreement to install tactile point of sale devices at every CVS store nationwide).

102. Best Buy Point of Sale Device Agreement (Jan. 15, 2010), available at <http://www.lflegal.com/2010/03/best-buy-agreement/> (agreement to install tactile point of sale devices at every Best Buy store nationwide).

103. 7-Eleven Point of Sale Device Agreement (Oct. 31, 2007), available at <http://www.lflegal.com/2007/10/7-eleven-pos-agreement/> (agreement to install tactile point of sale devices at every 7-Eleven store nationwide).

of structured negotiations. The wave of POS controversies has abated, however, because most businesses have replaced their POS devices in the past year to upgrade to new technology required by credit card companies. The new devices all have tactile keypads that can be used by the blind.

Other electronic self-service machines, however, continue to generate legal controversy. DVD rental kiosk company Redbox faced two class actions alleging that its DVD rental kiosks are not accessible to the blind. The first lawsuit was filed in 2012 in the U.S. District Court for the Northern District of California by several blind individuals and an advocacy group.¹⁰⁴ After two years of litigation and mediation, the parties entered into a California-wide class settlement under which Redbox agreed to incorporate audio guidance technology, a tactile keypad, and other accessibility features into its DVD rental kiosks in California; provide 24-hour telephone assistance at each kiosk; and pay \$1.2 million in damages, \$85,000 for kiosk testing, \$10,000 to each named plaintiff in damages, and \$800,000 for plaintiffs' attorney fees and costs.¹⁰⁵

The second class action lawsuit was filed in 2014 in the U.S. District Court for the Western District of Pennsylvania¹⁰⁶ and resulted in a proposed nationwide class action settlement under which the company would agree to provide at least one kiosk per retail location that is accessible to the blind, pay damages, and pay \$397,000 in attorney fees and costs to class counsel.¹⁰⁷ Although the proposed settlement was approved by the court,¹⁰⁸ the National Federation of the Blind, American Council of the Blind, and seven class members filed objections on the basis that the proposed relief was insufficient.¹⁰⁹ The parties are presently negotiating a revised settlement that has not yet been submitted to the court for preliminary approval.

104. Complaint, *Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail, LLC*, No. 4:12-cv-00195-PJH (N.D. Cal. Jan. 12, 2012), ECF No. 1.

105. Joint Motion for Preliminary Approval of Settlement and Order and Order Granting Final Approval of Class Settlement and Dismissing Claims, *Lighthouse for the Blind and Visually Impaired v. Redbox Automated Retail, LLC*, No. C12-00195 PJH (N.D. Cal. 2014), ECF Nos. 73 and 85.

106. Complaint, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Sept. 17, 2014), ECF No. 1.

107. Joint Motion for Preliminary Approval of Class Action Settlement, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Nov. 23, 2015), ECF Nos. 29 and 30.

108. Order Granting Motion for Preliminary Approval of Proposed Class Settlement, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Nov. 24, 2015), ECF No. 31.

109. Objections to Proposed Class Settlement by Kelly Josef Pierce, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Mar. 7, 2016), ECF No. 34; Objections to Proposed Class Settlement by Christian D. Hofstader, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Mar. 9, 2016), ECF No. 36; Objections to Proposed Class Settlement by Jason Meddaugh, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Mar. 15, 2016), ECF No. 37; Objections to Proposed Class Settlement by Am. Council of the Blind, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Mar. 15, 2016), ECF No. 38; Objections to Proposed Class Settlement by Nat'l Fed'n of the Blind, *Jahoda v. Redbox Automated Retail, LLC*, No. 2:14-cv-01278-LPL (W.D. Penn. Mar. 15, 2016), ECF No. 39.

In 2015, blind plaintiffs represented by the same firm brought three separate class actions in the U.S. District Court for the Southern District of New York against Moe's, Walgreens, and Five Guys for having inaccessible drink dispensers (the Freestyle machine) in their establishments.¹¹⁰ Although the specific restaurant locations identified in the *Moe's* and the *Five Guys* complaints were franchises, the plaintiffs did not name the franchisees as defendants in the lawsuits. Instead, the plaintiffs based their claims on Moe's and Five Guys' alleged nationwide policies for installing Freestyle machines at all of their restaurant locations, whether franchised or not, and argued that these dispensers should have had technology to allow the plaintiffs to use the machines independently. In the first case to be decided, the district court held that "under the ADA, effective assistance from Moe's employees acting as 'qualified readers' is sufficient" and that the restaurant was not obligated to provide blind accessible drink dispensers.¹¹¹ The court also held that the restaurant's failure to provide assistance on one occasion was an isolated incident that could not be the basis for an ADA claim.¹¹² The court said that to state a claim that Moe's failed to adopt policies and procedures to provide assistance to blind customers, the plaintiff would have had to allege that he did not receive assistance on multiple occasions.¹¹³

Undeterred, the same plaintiffs in May 2016 filed a class action lawsuit against McDonald's Corporation and several franchisees alleging that the Freestyle machines are not accessible and that the restaurants failed to provide effective assistance to them *on many occasions*.¹¹⁴ After McDonald's filed a motion for judgment on the pleadings in May 2016,¹¹⁵ the plaintiffs voluntarily dismissed the lawsuit without prejudice even though no settlement was reached.¹¹⁶

The Freestyle machine cases illustrate that franchisors can face potential ADA Title III liability at franchisee locations when their brand standards re-

110. Complaint, *West v. Moe's Franchisor, LLC*, No. 15-CV-2846 (S.D.N.Y. Apr. 13, 2015), ECF No. 1; Complaint, *Dicarolo v. Walgreens Boot Alliance, Inc.*, No. 15-CV-2919-JPO (S.D.N.Y. Apr. 15, 2015), ECF No. 1; Complaint, *West v. Five Guys Enters., LLC*, 1:15-CV-02845 (S.D.N.Y. Apr. 13, 2015), ECF No. 1.

111. *West v. Moe's Franchisor, LLC*, No. 15-CV-2846, 2015 WL 8484567, at *3 (S.D.N.Y. Dec. 9, 2015).

112. *Id.* at *4.

113. *Id.* The dismissal of plaintiffs' claims in *West v. Moe's Franchisor, LLC* quickly led to the dismissal of the two other Freestyle cases brought in the Southern District of New York. See *Dicarolo v. Walgreens Boot Alliance, Inc.*, No. 15-CV-2919-JPO, 2016 WL 482982 (S.D.N.Y. Feb. 5, 2016) (granting defendant's motion to dismiss, relying on *West v. Moe's Franchisor, LLC*); *West v. Five Guys Enters., LLC*, No. 1:15-CV-02845, 2016 WL 482981 (S.D.N.Y. Feb. 5, 2016) (same).

114. Complaint, *Dicarolo v. McDonald's Corp.*, No. 1:15-cv-02273-ALC-BCM (S.D.N.Y. Mar. 26, 2015), ECF No. 1.

115. Defendant's Notice of Motion and Memorandum of Law in Support of Judgment on the Pleadings, *Dicarolo v. McDonald's Corp.*, No. 1:15-cv-02273-ALC-BCM (S.D.N.Y. May 24, 2016), ECF Nos. 57-58.

116. Stipulation of Voluntary Dismissal, *Dicarolo v. McDonald's Corp.*, No. 1:15-cv-02273-ALC-BCM (S.D.N.Y. June 9, 2016), ECF No. 63.

quire franchisees to use of inaccessible customer-facing EIT. Depending on their franchise agreements, franchisees may look to franchisors for indemnification for such ADA liability. Consequently, franchisors should carefully consider accessibility when developing such EIT for use in their franchised systems. Manufacturers of customer-facing EIT cannot be expected to consider accessibility because they are not public accommodations and have no liability under Title III of the ADA. Case in point: vending-machine manufacturer Coca-Cola in 2016 defeated an ADA Title III class action lawsuit about its drink vending machine, which is not accessible to blind users. The Fifth Circuit upheld the district court's dismissal of the lawsuit, holding that the vending machine itself is not a "place of public accommodation."¹¹⁷ The plaintiff had argued that the vending machine is a "sales establishment" that would place it within the statute's definition of a "place of public accommodation." The Fifth Circuit disagreed, finding that the term "establishment" includes "not only a business but also the physical space it occupies."¹¹⁸ The court did note, however, that having an inaccessible vending machine could have legal implications for the owners and operators of the space in which the vending machine are located because that space could be a place of public accommodation.¹¹⁹ The plaintiffs have petitioned the U.S. Supreme Court for review.¹²⁰

Other types of self-service kiosks have been the subjects of lawsuits as well. In 2015, a blind plaintiff sued Sears for having price scanners in its stores that are not accessible to the blind.¹²¹ That case resolved very quickly with no judicial determination or guidance because the parties agreed to settle the case without litigation.¹²² In 2016, blind plaintiffs sued Panera for having iPad touchscreen kiosks for self-ordering in cafes that were allegedly not accessible to the blind.¹²³ That case also settled quickly, once again without providing us with more insight into the public accommodations requirements courts may seek to impose.¹²⁴ As a final example, in July 2016, the National Federation of the Blind and the Massachusetts attorney general announced that they had reached an agreement with Pursuant Health to en-

117. *Magee v. Coca-Cola Refreshments USA*, 833 F.3d 530 (5th Cir. 2016) *petition for cert. filed* (U.S. Nov. 11, 2016) (No. 16-668) (pending).

118. *Id.* at 534.

119. *Id.* at 536.

120. *Id.*

121. Complaint, *Gomez v. Sears, Roebuck & Co.*, No. 1:15-cv-22749-KMW (S.D. Fla. July 23, 2015), ECF No. 1.

122. Notice of Settlement, *Gomez v. Sears, Roebuck & Co.*, No. 1:15-cv-22749-KMW (S.D. Fla. Aug. 27, 2015), ECF No. 13; Order Dismissing Case, *Gomez v. Sears, Roebuck & Co.*, No. 1:15-cv-22749-KMW (S.D. Fla. Oct. 5, 2015), ECF No. 18.

123. Complaint, *Gomez v. Panera, LLC*, No. 1:16-CV-21421-FAM (S.D. Fla. Apr. 21, 2016), ECF No. 1.

124. Notice of Settlement, *Gomez v. Panera, LLC*, No. 1:16-CV-21421-FAM (S.D. Fla. July 13, 2016), ECF No. 18.

sure that the company's self-service health care kiosk would be accessible to blind users.¹²⁵

IV. Conclusion

The survey in this article of the legal landscape concerning customer-facing EIT shows that the use of technology to deliver goods and services to consumers can expose franchisors and franchisees to lawsuits and DOJ enforcement actions. To mitigate that exposure, businesses must ensure that accessibility is a factor in evaluating new customer-facing EIT in the procurement process. The question to ask is straightforward: will a person with a sight, hearing, speech, or mobility disability be able to use this new EIT? If the answer is no, then companies need to figure out how they are going to provide individuals with disabilities equal access to the goods, services, and information provided by the inaccessible EIT. Employee assistance with inaccessible EIT can be an option where a customer's privacy would not be implicated, but employees will need to be trained to provide assistance consistently and effectively. Procurement contracts for customer-facing EIT should contain specific provisions concerning accessibility and the standards to be met because general provisions requiring vendors to comply with applicable law will not ensure that the deliverable will be accessible. Franchisors and franchisees should seek to include indemnity provisions against vendors for ADA claims resulting from EIT that does not meet a contract's accessibility requirements.

These foregoing principles apply to all EIT, but websites and mobile apps require an even more robust process to ensure accessibility because making them accessible and keeping them that way can be very challenging due to a host of factors. The initial remediation/development work can be very time consuming and expensive. Changes made to websites and mobile apps take place daily and can impact accessibility. Many people and departments within an organization have the ability to change content on a website or mobile app, further increasing the risk that accessibility will be negatively affected. In short, developing and maintaining an accessible website or mobile app is a constant ongoing effort requiring the full commitment of the entire organization.

Franchisors should take special care to review any technological changes to their franchise system for accessibility issues. They may face liability claims for the use of a non-compliant website and/or mobile app as well as for non-compliant EIT imposed on their franchisees through a system requirement. Franchisees may be liable for claims by disabled customers as the

125. Press Release, Nat'l Fed'n of the Blind, AG Healey and National Federation of the Blind Announce Agreement to Make Health Care Kiosks Accessible to Blind Consumers (July 27, 2016), *available at* <https://nfb.org/ag-healey-and-national-federation-blind-announce-agreement-make-health-care-kiosks-accessible-blind>.

owner and operator of the business establishment, especially when the majority of franchise agreements shift the burden of ADA-compliance to the franchisee.

Ensuring that customer-facing EIT is accessible to individuals with disabilities requires commitment, awareness, and resources, but there are benefits, not the least of which are happier customers and fewer lawsuits.