

# Management Alert

## Justice Department Targets Websites, Mobile Apps, and POS Devices

By Minh N. Vu

Only four months into 2014, the Department of Justice (DOJ) has already made clear that it is pursuing an aggressive enforcement agenda when it comes to the obligation of public accommodations to ensure effective communication with individuals with disabilities. On March 3, the DOJ entered into a [consent decree](#) with H&R Block that requires the company's website, tax preparation tool, and mobile applications to be accessible. On April 10, the DOJ filed a [Statement of Interest](#) in a pending case to support the plaintiff's position that retailers must provide a means for blind customers to independently input their personal identification numbers (PIN) at point of sale devices (POS) when making purchases using a debit card. The clear message is that DOJ will get involved in private litigation when it does not like the positions or arguments made by defendants. As these and other businesses know, a DOJ intervention can be a game changer in a pending case. The DOJ brings its expertise and agency authority to the table which some judges may find persuasive even if they are not required to defer to the agency's interpretation of its own regulations.

### Website and Mobile Application Accessibility

The H&R Block lawsuit was originally filed by the National Federation of the Blind of Massachusetts and two of its members. The plaintiffs alleged that H&R Block's website is not accessible to the blind. In December 2013, the DOJ filed a motion to intervene in the case with a broader complaint alleging that H&R Block had violated the ADA by having a website that was inaccessible to people with various disabilities, not just the blind. The lawsuit was a bold move considering that DOJ had not issued (and still has not issued) proposed regulations defining the standard for what constitutes an "accessible" website.

In March, DOJ and H&R Block entered into a consent decree in which the latter agreed to make its website, mobile applications, and tax preparation tool comply with the Website Content Accessibility Guidelines (WCAG) 2.0 AA. The WCAG 2.0 is a privately developed set of guidelines for website accessibility which can also be adapted for mobile applications. H&R Block also agreed to pay damages to the named plaintiffs and the maximum civil penalty. The decree contains stringent monitoring and testing obligations.

### Point of Sale Device Accessibility

This month, the DOJ filed a Statement of Interest in support of a private plaintiff who sued a retailer over an inaccessible POS device. The plaintiff could not make a purchase using his debit card because he could not input his PIN into the POS device's smooth touchscreen keypad. The DOJ intervened to counter two arguments the retailer made: (1) POS devices are not required to be accessible because the ADA Standards for Accessible Design do not specify standards for them; and (2) the plaintiff was not denied access because he could make his purchase using the alternative methods of cash, credit cards, and debit card payment that is processed as a credit card charge and requires no PIN.

In response to the first argument, the DOJ emphatically stated that the lack of specific technical standards for POS devices does not mean that they are not required to be accessible. In the absence of such specific standards, DOJ argued, the more general obligation for public accommodations to provide auxiliary aids and services to ensure effective communication would

still apply and it would be up to the public accommodation to come up with a way to meet the obligation. The DOJ noted that while providing POS devices with tactile keypads would be one approach, there could be other technologies that could provide accessibility as well.

In response to the second argument that the blind plaintiff had other payment options besides a debit from his account which would require the input of a PIN, the DOJ stated that the ADA prohibits differential treatment — not just complete exclusion. The fact that blind individuals do not have the full range of payment options available to sighted individuals, in DOJ's view, constitutes such differential treatment.

(After the DOJ's filing, the district court dismissed the case without prejudice because the plaintiff had not alleged enough facts to establish that he had standing to bring the lawsuit, but since court granted the plaintiff permission to amend his complaint, the lawsuit is not likely to go away).

What do these recent DOJ actions mean for businesses that have websites, POS devices, or other self-service equipment?

- DOJ is not waiting for its proposed rule on accessible websites to come out to bring enforcement actions against public accommodations with websites and mobile applications that it deems to be inaccessible.
- By using the WCAG 2.0 AA as the access standard in the H&R Block consent decree, DOJ is sending a clear signal that it views this to be the accessibility standard to apply.
- Because the DOJ has made its position clear on the need for accessible POS devices, retailers now know that they are risk of a DOJ enforcement action if they do not provide at least one such device in each store.

The DOJ argument that a POS device has to be accessible even though there are no technical standards could be extended to all manner of self-service equipment found in public accommodation establishments, such as coupon machines, beverage dispensers, and kiosks used for ticketing, rental, and check in. (Indeed, there have been lawsuits about DVD rental kiosks and beverage dispensing machines not being accessible to the blind.) Thus, public accommodations with such equipment should carefully consider how accessibility will be ensured for these machines at their place(s) of business (e.g. additional customer service, technology, etc.).

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