Surf the Next Wave in Workplace Accommodation

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Introduction

This White Paper explores the cases and the real-world data collected on the topic of employment and accommodations for American workers with disabilities, along with the development and rise of assistive technology and its use in providing better creativity for employers in accommodating an under-utilized sector of the workforce, people with disabilities.

According to the U.S. Census Bureau, one in five Americans will experience a disability during their lifetime. These individuals face significant obstacles in their pursuit of jobs and careers, as U.S. Department of Labor statistics show that only 20 percent of people with disabilities participate in today's workforce compared to 69 percent of people without disabilities
While the trend for corporate America's HR departments to include a VP of Diversity & Inclusion is on the rise, only 7% of corporate diversity and inclusion programs emphasize disability in their workforce inclusion efforts.[1] Of those companies with disability related diversity & inclusion initiatives, many focus only on sensitivity and awareness or a targeted bring to work "special program" with few companies stating a robust employee accommodations protocol in place.[2]

Meanwhile, the Data suggests that people with disabilities are the Largest group of unemployed Americans.[3] A full 60% of people with a disability do not have a college degree (but can be trained/accommodated to do in-demand jobs per a Sierra Group field survey).[4] And even less are corporately well trained in the use of technology. Indeed, statistically, 23% of people with disabilities say they never go online because of the digital divide issue and/or they don't have the assistive technology they need to go online; or they have Assistive technology but websites, and Customer

[1] PWC18th Annual CEO Survey 2015 :A marketplace without boundaries? Responding to disruption https://www.pwc.com/gx/en/ceo-survey/2015/assets/pwc-18th-annual-global-ceo-survey-jan-2015.pdf
[2] Research conducted by the Sierra Group on Corporate D&I initiatives
[3] Bureau of Labor Statistics- News Release 2019 https://www.bls.gov/news.release/pdf/disable.
[4] Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Almost 60% of people with a disability age 25 and older had a high school education or less in 2013 on the Internet at https://www.bls.gov/opub/ted/2014/ted_20141010.htm

Relationship Management (CRMs) tools are not built for digital accessibility.[5]

Although the practical reasons for companies to train, hire and reasonably accommodate people with disabilities are obvious; a diverse workforce, ability to attract talent with an expanded labor pool and greater visibility as a socially responsible employer and companies that hire people with disabilities are rewarded with loyalty and market success,[6] to name a few. However, one of the greatest areas of legal exposure for employers continues to emanate from the Americans with Disabilities Act of 1990[7] (ADA) and its amendments. This includes cases involving lack of digital accessibility (see discussion of Domino's Pizza *infra*) under Title 1 Employment and Title III (public accommodations) when:

- Online application process is not accessible
- Online application process is not accessible
- Online testing and pre-hire forms are not accessible
- IT tools required for the job are not digitally accessible

Beginning with the Rehabilitation Act[8] of 1973 ("Rehabilitation Act" or "Rehab Act"), laws like the ADA have been in place for almost 50 years now, yet the seamless accommodations and inclusion of workers with disabilities continues to be the slowest growth numbers in the tracked employment demographics of the US Department of Labor (DOL).[9] Will the next wave of technologically based tools be the game changer? To answer that is to understand the history.

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[5] Anderson, Monica and Perrin, Andrew; Pew Research Center April 7, 2017 "Disabled Americans are less likely to use technology" https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/

[6] https://www.forbes.com/sites/forbescoachescouncil/2018/09/13/why-you-should-hire-someone-with-a-disability/#7476a73b1039

[7] 42 U.S.C. §12101 et seq.

[8] 29 U.S.C. §701 et seq

[9] https://www.bls.gov/news.release/disabl.nr0.htm).

ADA Historic Pivot Points

Rehabilitation Act of 1973

President Richard M. Nixon signed the Rehab Act into law on September 26, 1973. Considered the predecessor to the ADA, the Rehab Act ushered in a new age of activism and accomplishment in the pursuit of rights for individuals with disabilities in higher education, government, and private industry.[10] It was the first legislation to address the notion of equal access for individuals with disabilities through the removal of architectural, employment, and transportation barriers. It also created rights of persons with disabilities through affirmative action programs. In addition, the legislation attempted to address some of the societal barriers faced by individuals with disabilities, including isolation by placement in institutions, limited access to buildings, and discrimination in education and employment.

1986 National Council on Disability

Under the original name of the National Council on the Handicapped, the agency was created as an advisory body to the Department of Health, Education, and Welfare Rehabilitation by the Comprehensive Services and Disability Amendments Act of 1978 as an amendment to the Rehab. Act. The Council was transferred to the Department of Education by the Department of Education Organization Act of 1979, and later became an independent agency in 1984 through the Rehabilitation Act Amendments of 1984 (PL 98-22).

In 1986, the agency recommended enactment of what became known as the ADA with the publication of "Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities" and drafted the first version of the bill which was introduced in the House and Senate in 1988. The name of the agency was changed to the National Council on Disability ("NCD") through the Handicapped Programs Technical Amendment Act of 1988 (PL 100-630) on November 7, 1988.[11]

Since enactment of the ADA, NCD has continued to shape the course of disability policy in the United States from within the federal government by advising the President, Congress and other federal agencies on current and emerging issues affecting the lives of people with disabilities.

1990 Americans with Disabilities Act

After the Rehabilitation Act provided for the removal of barriers, the next step was to define what non-discrimination meant in the context of disability. How was it the same or different from race and sex discrimination? The Department of Health, Education and Welfare (HEW) had been given the task of promulgating regulations to implement Section 504 of the Rehab Act,[12] which would serve as guidelines for all other federal agencies. These regulations became the focus of attention for the disability rights movement and what would ultimately lead to the NDC recommending new legislation. a draft bill prepared by the NDC. Senator Lowell Weicker (R-CT) and Representative Tony Coelho (D-CA) introduced the first version of the ADA in April 1988 in the 100th Congress. The ADA, as we know it today, went through numerous drafts, revisions, negotiations, and amendments since the first

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[10] Efforts to promote vocational rehabilitation services began in the early 20th century through the enactment of the Vocational Education Act of 1917 and the Soldier's Rehabilitation Act of 1918 but never addressed discrimination or access. Wilcher, Shirley, *The Rehabilitation Act of 1973: Years of Activism and Progress* (2018)

[11] *Equality of Opportunity: The Making of the Americans with Disabilities Act*, National Council on Disability (19917)

[12] Section 504 prohibited discrimination on the basis of disability in programs receiving federal financial assistance. 29 USC §780

version was introduced. It was signed into law in 1990 by President George Herbert Walker Bush.[13] At its core the ADA prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public. The simple purpose of the law is to ensure that people with disabilities have the same rights and opportunities as everyone else. The ADA is divided into five titles that relate to different areas of public life. For purposes of this Paper, we address two of those titles:

Title I

Prohibits Discrimination against a "qualified individual with a disability" including hiring, firing, pay, job assignments, promotion, layoff, training, benefits, and any other condition of employment. It requires employers to provide reasonable accommodations to job applicants with disabilities unless doing so would result in an undue hardship. It further protects people from discrimination based on their relationship with a person with a disability (even if they themselves do not have a disability).

Title III

Title III provides that "No individual shall be discriminated against 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 by any person who owns, leases (or leases to) or operates a place of public accommodation"

(Examples of public accommodations include stores and shops, restaurants and bars, service establishments, theaters, hotels, recreation facilities, private museums and schools).[14]

In order to comply with the ADA accessibility guidelines, places of public accommodations must:

- not impose special eligibility criteria;
- make reasonable modifications in policies, practices or procedures;
- provide auxiliary aids and services;
- remove physical barriers and communication barriers where readily achievable to do so; and, must not retaliate.[15]

The ADA's laudable objectives were to ban employment discrimination against the disabled and eliminate unnecessary physical barriers to access in commercial and government buildings. But in the ensuing years, not surprisingly, the measure spawned countless court cases as advocates for the disabled and the business community struggled with definitions of what constitutes a physical or mental "disability," reasonable accommodations, undue hardships, adequate compliance and costs as well as "accessibility."

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[13] Mayerson, Arlene, *The History of the Americans with Disabilities Act: A Movement Perspective* (1992).

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[14] 28 CFR Part 36; Title III Regulations; Public Accommodations and Commercial Facilities; Information and Technical Assistance on the Americans with Disabilities Act.

[15] Auxiliary aides not part of physical structure. There are communications devices, such as TTYs, telephone handset amplifiers, assistive listening devices, and digital check-out displays. *Id*

Notable Supreme Court Cases:

***Sutton et al. v. United Airlines, Inc.*, 527 U.S. 471 (1999) –** In a 7-2 decision, the Supreme Court determined that a disability under the ADA should be made in reference to an individual's ability to mitigate his or her impairment through corrective measures. The Court found that this was in harmony with the statutory language and history of the ADA because (1) the phrase "substantially limits" requires consideration of present, not future or hypothetical, impairment; (2) the ADA calls for individualized assessments of impairment; and (3) Congress found that approximately 43 million Americans were disabled, a number that would be far too low if Congress had meant to include all those with correctable impairments. Also, assuming without deciding that working is a major life activity for purposes of the ADA, poor vision was not to be regarded as a substantially limiting impairment because it has only foreclosed the Suttons from pursuing work as "global airline pilots," not from numerous other positions in the aviation industry.

***Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)** – Here, the Court in a unanimous decision, held that in order for individuals to be considered disable under the ADA, they must show that they are substantially limited in performing activities that are of central importance to most peoples' daily lives (here the lower Court found Williams to be disabled under the Act because her carpal tunnel syndrome prevented her from performing the activity of work) and that impairments impact must be permanent or long term. The Court suggested that Congress intended to create a demanding standard to meet the definition of "disabled" in the ADA and suggested that people must be visibly and functionally unable to perform in specific, socially expected ways to be entitled to ADA protection.

***U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)** – An employer's showing that a requested accommodation conflicts with seniority rules is ordinarily sufficient to show, as a matter of law, that an "accommodation" is not "reasonable." However, the employee remains free to present evidence of special circumstances that makes a seniority rule exception reasonable in the particular case. Critics of this decision suggested this case gave the Court's characterization of "reasonable accommodations" as special and preferential, which fueled misconceptions that the ADA gave people with disabilities some type of advantage over those without disabilities.

***Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002)** – In a unanimous opinion, the Court held that the ADA did not preclude the EEOC's regulation allowing the harm-to-self or others defense in denying an accommodation. The Court reasoned that deference applied to the regulation because it made sense of the statutory defense for qualification standards that are job-related and consistent with business necessity. The Court also found that the risk of violating the Occupational Safety and Health Act of 1970 (OSHA) was enough to show that the regulation was permissible. " Criticism of this case this case was that it did nothing to prevent the paternalistic conjecturing by employers and their physicians about perceived dangers to individuals with disabilities, often based on ignorance and misconceptions about particular conditions that the ADA was designed to prevent.

***Barnes v. Gorman*, 536 U.S. 181 (2002)** – The Court unanimously determined that punitive damages are not available in an ADA case.

2008 ADA Amendments Act ("ADAAA")

In response to the above cited decisions of the Supreme Court and those of lower courts that had interpreted the original text of the ADA, The ADA Amendments Act of 2008[16] (ADAAA) was passed by Congress, amending the ADA and other disability discrimination laws at the federal level. In its introduction, the ADAA states that those Supreme Court decisions limited the rights of persons with disabilities, so the ADAAA effectively expanded the law. Specifically, the ADAAA changed the definition of the term "disability" by clarifying and broadening it - which, in turn, increased the number and types of persons protected under the ADA and other federal anti-discrimination laws focused on people with disabilities. The ADAAA was designed to strike a balance between employer and employee interests, as it was felt that employer interests had been favored too much previous to the amendments.

The ADAAA required that courts interpreting the ADA and other federal disability laws focus on whether the covered entity had discriminated, rather than whether the individual seeking the law's protection had an impairment that fit within the technical definition of the term "disability." The Act retained the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities. It also retained the need for a record of such an impairment or being regarded as having such an impairment. However, the ADAAA changed the way that the statutory terms should be interpreted, again in the interest of broadening the interpretation, rather than accepting the previous narrow interpretations.[17]

The ADAAA's clarification of the definition of disability caused a spike in requests for accommodations and in candidate recruitment for service providers. This spike was repeated in 2013 when the Office of Federal Contractor Compliance issued its 7% aspirational goals for the hiring of people with disabilities, across all job categories. This also changed the dynamic of disability disclosure/identification by requiring employers who are federal government contractors to track their recruitment efforts.[18]

When the ADA passed in 1990 approximately 70% of those with disabilities were reported to be unemployed.[19]Yet even today after the passage of the ADAAA and the renewed effort by HR/Recruitment looking more assertively at how to offer accommodations in the workplace, and with overall national unemployment rates at record lows (3.5 - 4%), the rate of unemployment for those with disabilities remains highest and hardest to shift among diverse workers. Furthermore, cases involving workers with disabilities brought before the EEOC have consistently risen[20] and, nearly 30 years later and despite passage of the ADAA, people with disabilities remain among the largest group of unemployed and/or underemployed Americans.[21]

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[16] 42 U.S.C. § 12101 et seq.

[17] Amy Albright, *The ADA Amendments Act and the EEOC's Implementing Regulations: Questions and Answers*, KF3469.A3282008 A2 2013; Americans with Disabilities: Practice & Compliance Manual; BNA Disabilities Law Database

[18] https://www.dol.gov/ofccp/regs/compliance/sec503/self_id_forms/selfidforms.htm

[19] https://www.dol.gov/odep/topics/disabilityemploymentstatistics.htm,

[20] In FY 2008, there were 19, 253 charges of discrimination alleging violations of the ADA brought at the EEOC. In FY 2019 that number was 24,238 albeit down from a peak of 26,968 in FY 2015.

[21] https://www.dol.gov/odep/topics/DisabilityEmploymentStatistics.htm

Early Technology Wave and the Rise of Assistive Technology

The ADA and the 1992 amendments to the Rehab Act[22] coincided with the launch of the field of assistive technology – products like speech input (Dragon Dictate, now Dragon Naturally Speaking) and speech output (JAWS & ZoomText) were enabling those with quadriplegia or individuals who are sight impaired to use and benefit from computers to learn and to work.
Government funding for vocational rehabilitation programs changed in 1992 to include the most severely disabled first – a group who had previously been denied job training or accommodations "if their disability made them unemployable" and further federal government initiatives were funded to assist businesses. Programs such as the Job Accommodation Network (JAN) and the US Business Leadership Network (USBLN) were created and offered a wealth of resources to assist in finding and implementing a "reasonable accommodation" under the ADA. These programs and more have expanded and evolved over the years as technological advances have occurred and as technology has been become a more ubiquitous presence in daily life both at and away from the workplace.

The Next Wave

Once specialized, expensive and little-known products like, "Sooth Sayer for word prediction" when typing, and voice activated Environmental Control units like the old, costly Butler-in-a-Box have been replaced with popular and affordable technologies such as Siri to control your smart phone, or Alexa to help around the house; all via the sound of your voice and services such as "Be My Eyes" and AIRA use smart phone cameras to literally guide a person who is blind or cognitively challenged through airports, drug stores or just someone who can't find the proper file on their desk.

Most of these applications are not expensive and while the US Department of Labor reports popular statistics such as the fact that most workplace accommodations cost less than $600.00, it is irrelevant given how few companies are actually offering robust accommodations to their existing or potential employees with disabilities.[23]

This gap in actual cost versus availability of technology to assist people with disabilities at work, is further skewed by the fact that people with disabilities are more likely to fall victim to the Digital Divide with 23% reporting that they never go online**.**[24] Because poverty rates are reported in high numbers for those with disabilities, it is difficult to quantify how much effort/money it would take to train,

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[22] The 1992 amendments mandated those with the most severe disabilities would be served first. This affected the number ad degree of accommodations and assistive technology accommodations that would be required to do so. This led to the rise of companies such as the Sierra Group. Prior to the 1992 amendment vocational under the Rehab Act a counselor could deem someone too disabled to work. This is exemplified in the story of a young quadriplegic man denied vocational services three times before the law changed. He found his way to the Sierra Group in 1993 where he was finally able to receive vocational rehabilitation training, attend school and secure employment as a programmer at Rohm & Haas, as a direct result of the 1992 amendments. Rehabilitation Act Amendments of 1992; Congress.gov. Summary of H.R 5482 – 102nd Congress (1991-1992).

[23] JAN studies found that typically, accommodations will be a one-time cost of $500 or less; however, most employers reported paying less or paying nothing at all for the accommodations they provided to their employees. https://askjan.org/topics/costs.cfm Today, only 1 in 10 people in need have access to assistive technology due to high costs and a lack of awareness, availability, trained personnel, policy, and financing. https://www.who.int/news-room/fact-sheets/detail/assistive-technology.

[24] Anderson and Perrin,https://www.pewresearch.org/fact-tank/2017/04/07/disabled-are-less-likely-to-use-technology/

accommodate and employee individuals with disabilities who are currently not participating in the workforce because of these limits? The reality is that with creativity, accommodations can easily become a reality.[25]

Trends in attitude and technological advancements are driving change and evolution. Indeed, 68 percent of millennials (age 18 to 34) believe it's very to extremely important to work for a company that fosters a diverse and inclusive workplace, compared to 61 percent of Gen Xers (age 35 to 54), and 45 percent of baby boomers (age 55+).[26]

Furthermore, litigation involving digital accessibility is increasing.[27] Given the current levels of technology and the rapid growth of technology use the future of ADA cases for failure to accommodate will likely arise in the following areas:[28]

- class actions for lack of digital accessibility in employment application process;
- businesses will be held to higher expectation for offering accommodations during recruitment, onboarding and day to day employee performance.

Title III and Digital Accessibility

"…Must remove physical barriers and communication barriers where readily achievable to do so." The ADA and its regulations make clear that barriers include not only the physical (steps and curbs that prevent access by people who use wheelchairs, drinking fountains etc) but also related to communications (conventional signage, alarm systems) which is inaccessible to people who have impairments.[29]

And readily achievable is defined as "easily accomplishable and able to be carried out without much difficulty or expense."[30] This standard requires a lesser degree of effort on the part of a public accommodation than the "undue burden" limitation on the auxiliary aids requirements of the ADA. In that sense, it can be characterized as a lower standard. The readily achievable standard is also less demanding than the "undue hardship" standard in title I, which limits the obligation to make reasonable accommodation in employment. With the growth of web traffic, the next logical area of inquiry impacting people with disabilities was and is websites, as an extension of physical and communications barriers and public accessibility.

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[25] *Id*

[26] Source: USBLN - US Business Leadership Network, *July 10, 2018*

[27] Plaintiffs filed 4965 federal ADA Title III lawsuits in just the first six months of 2018, as compared to 7,663 *for all of 2017*. Plaintiffs filed more website accessibility lawsuits in federal court for the first six months of 2018 than in all of 2017. There were at least 1053 of such lawsuits in the first six months of 2018, compared to 814 in all of 2017. Source: EEOC

[28] The population of people who use assistive technology to navigate the web is a market that is over $350 billion in size, according to U.S. Census data, and that number is growing. https://www.accessibilityassociation.org/files/Deque_Company_Overview_9_15; https://www.boia.org/blog/assistive-technology-market-estimates-rapid-growth-ahead.

[29] 28 CFR Part 36; Title III Regulations; Public Accommodations and Commercial Facilities; Information and Technical Assistance on the Americans with Disabilities Act.

[30] *Id*

Websites as Places of Public Accommodation

The Department of Justice (DOJ) has taken the position for years that websites are covered under the public accommodation laws of the ADA and has taken action against numerous businesses around the country, intervened in existing private litigation, and entered into consent decrees with businesses to cure alleged violations.[31] The DOJ has historically made it clear that it considers a website "accessible" if it complies with the standards of the WCAG 2.0[32] and has used this standard in settlement agreements and consent decrees with businesses it believes to have violated the ADA.

Private Lawsuits

As indicated *supra,* Last year, more than 2,200 private suits were filed in federal courts, according to the accessible technology firm UsableNet. There are several factors that make Title III lawsuits attractive to plaintiffs:

- Title III requires no advance review of claims by the EEOC like Title I, so plaintiffs can proceed directly to court;
- Title III requires no prior warning to, or "interactive dialogue" with, the business to trigger a violation—plaintiffs can simply "ambush" an unsuspecting business with a lawsuit;
- Finally, in contrast to Title I, which limits claims to actual employees and applicants for employment, courts have held that any member of the public can bring Title III claims, including "testers" who aren't even patrons of the allegedly noncompliant businesses.

Common Allegations in Website Accessibility Cases

There are a number of allegations that are common to website accessibility cases; specifically:

- Websites fail to accommodate those with hearing, visual or kinesthetic impairments;
- Users are unable to use a mouse and must navigate with a keyboard, touchscreen, or voice recognition software;
- Users are unable to use screen reader or specialized software to magnify the content of a page, have it read aloud, or to display the text using a braille reader;
- Users are unable to hear information on the website, audio content does not include closed captioning, or images do not include captions; and,
- Due to discriminatory barriers users cannot:
    - Utilize online services
    - Determine locations for brick and mortar facilities

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[31] DOJ is the federal agency responsible for administering and enforcing Title III of the ADA. Both private parties subject to discrimination due to a disability and DOJ may bring a legal action.
The DOJ is responsible for investigating alleged violations of Title III and conducting periodic compliance reviews of covered facilities. If DOJ fully investigates a complaint, the agency may undertake a **compliance review**, a detailed look at how a business is meeting the 2010 Standards' requirements. A DOJ investigation can result in a settlement negotiation or a **lawsuit**. If a DOJ lawsuit stems from a private party's complaint, DOJ does not act as the complainant's attorney or representative. DOJ is authorized to bring a civil case in the appropriate federal district court if: (1) a place of public accommodation or commercial facility covered by Title III has a "pattern or practice" of violating Title III or (2) the Title III discrimination "raises an issue of general public importance."

[32] The **Web Content Accessibility Guidelines (WCAG)** are part of a series of web accessibility guidelines published by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C), the main international standards organization for the Internet. They are a set of recommendations for making Web content more accessible, primarily for people with disabilities. The current version, WCAG 2.0, was published in December 2008 and became an ISO standard in Oct. 2012. WCAG 2.1 is a proposed recommendation as of now. Unknown when/if DOL will adopt it.

- Determine whether ADA compliant services are available at brick and mortar facilities
- Determine whether there are alternative ways to obtain information about goods and services

An increase in litigation is foreseeable because non-accessible career websites are keeping applicants with disabilities from being able to find or apply for job openings. This is keeping Assistive Technology users from ever getting to the position of interview, let alone being hired and ultimately accommodated because of an inability to even find openings on a non-accessible career site. When the openings can be found, non-accessible application portals interrupt the disabled person from applying. If they get through the online application, the next request for information or pre-employment testing must also be accessible, or they are once again screened out before being considered as a job candidate.[33] It is clear that the law is rapidly evolving and as this issue gets more public exposure, companies can expect to be challenged as it becomes clear that websites and other forms of electronic media (facebook, Instagram etc) come under increasing legal scrutiny.

Current State of The Law

Supreme Court Rejects Chance to Weigh In

The United States Supreme Court denied a petition from pizza giant Domino's[34] to hear whether its website is required to be accessible to the disabled, leaving in place a lower court decision against the company. A panel of the 9th U.S. Circuit Court of Appeals sided with a sight-impaired individual Guillermo Robles, writing that the "alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation."[35]

Attorneys for Domino's, backed by a range of business groups, had argued that the ADA does not apply to online platforms that were not envisioned when the law was passed in 1990. And, they said, no clear rules exist for how to make their platforms properly accessible. The Domino's case was remanded to the trial Court where it will be decided whether the Pizza Company's website was accessible. The law is clear however, that websites are public accommodations and as such are subject to the ADA. What remains is how the Courts and/or legislative bodies will determine what is considered accessible at it related to public websites.

Improving Accessibility Now

At this juncture, with the law still in flux, it is important that companies of all sizes take steps to review their websites to assess whether they comply with the ADA and/or state and local law.[36] While there are no official laws or regulations issued by a governmental agency, there are certain widely-accepted industry standards (WCAG issued by the World Wide Web Consortium referenced in fn14 *supra*.) that do provide some guidance on how to make websites accessible to the visually impaired

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[33] Sierra Group Field Survey 2019

[34] Domino's Pizza v. Guillermo Robles, No. 18-1539.

[35] *Robles v. Domino's Pizza, LLC,* No. 17-55504 (9th Cir. 2019).

[36] Some states allow for damages under state law (CA, FL, NY.) Target case: $6 million in damages plus $4 in attorneys' fees over lawsuit from National Federation for the Blind in 2006 regarding website. CA's law provides for damages.

and other disabled individuals. There are a myriad of tools and assistance available for companies to cost effectively provide accessibility and new technology is advancing rapidly.

An outside vendor can be hired, or internal IT people can be employed to code or re-code various portions of a website so that it is, for example, accessible to those using JAWS or other screen reading devices or software. Companies may also be able to purchase or license software that provides website compliance as an alternative to re-coding. The simple introduction of awareness training for IT workers, can teach protocols to include/avoid during programming. It is often as easy as the inclusion of an "alt tag", or the exclusion of a Serif font in a low contract color that can make or break the accessibility of an electronic document or website.[37] Until those who write and post job descriptions for online posting, and those who do the programming for the website are trained in basic awareness of this issue, and the steps needed to comply, electronic content will continue to grow rapidly, day by day that in essence closes many lanes of the information highway for those with disabilities.

Companies that are in the food industry (think Domino's) and that use Instagram to post pictures of food items on your menu or samples of prior orders, add alt text; describe what the picture shows. Adding text to photos will help provide a visual description of the photo to anyone using a screen reader. Providing closed captions for videos will not only provide a better experience who are watching those videos with a screen reader, but also for anyone who has the sound off as their default on their computer or mobile device. Links to other pages: follow the guidelines for linking just as would appear on a formal website. Consider Providing captions and/or full text transcript of the video or a version of the video with a text description along with a mechanism to stop, pause, mute, or adjust volume for audio that automatically plays on a page for more than 3 seconds. This technology is available now and is relatively cost effective; particularly given the alternative of costly litigation and the poor public perception that comes along with it.

At the end of the day companies must make the decision to fight or fix. The momentum toward more accessibility for more individuals will continue to build and the law as well as societal norms will continue to evolve. Ensuring digital and other accessibility utilizing assistive technology and other means for people with disabilities will reduce potential legal exposure, help improve a business' goodwill with its customers, and in turn, increase customers' loyalty to and appreciation of the business and, hopefully, its revenues with the result that the market rewards you.

[37] In 1998 when the Revised Section 508 of the Rehab Act mandated that electronic and information technology (EIT) be accessible to individuals with disabilities in the Federal Government and to members of the public seeking information from the Federal Government. DOC EIT accessibility policy the Government Services Administration (GSA) used consultants to provide this type of awareness training to their Procurement Officers. Source: Sierra Group Field Work and Survey.