

DON'T GET CAUGHT IN A WEB OF CLAIMS: ADA WEBSITE ACCESSIBILITY CLAIMS ON THE RISE

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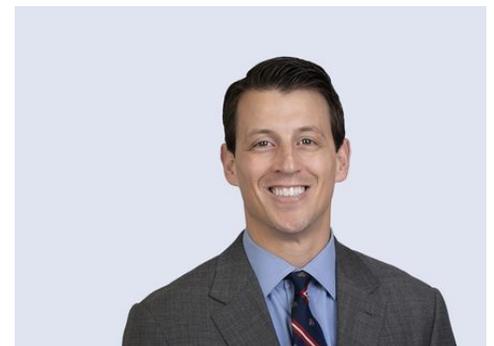
In today's technology-driven society, retailers are increasingly using the internet to provide information, goods, and services to the public. While having a website is almost a mandatory aspect of operating a retail business, it's important to ensure that the website does not also market the business to potential lawsuits. Websites have become the new hotbed of litigation brought under the Americans with Disabilities Act (ADA); retailers who are increasingly relying on their web presence need to take note.

WHAT DOES THE ADA REQUIRE?

Title III of the ADA prohibits disability discrimination by places of public accommodation. This category of businesses includes private entities whose operations affect commerce and that fall into one of 12 categories listed in the ADA. The list specifically includes retail stores and shopping centers, among other business types.

When Congress enacted the ADA in 1990, the existence of the internet and the pervasiveness it holds in today's society was all but unfathomable. As such, the ADA does not specifically address website accessibility. However, as Congress expressly stated when passing the ADA, "the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times" and technological advances "may require public accommodations to provide auxiliary aids and services in the future which today would not be required."

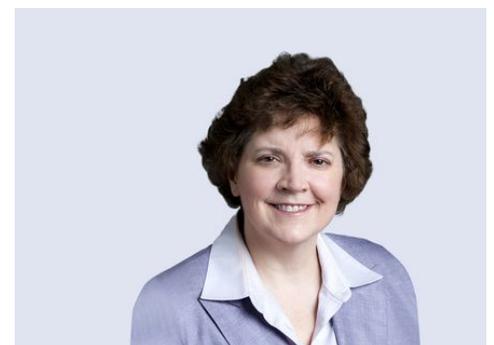
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Industry Focus

Retail

Increasingly, plaintiffs' lawyers are claiming that publicly available websites are inaccessible to users with disabilities, thereby disadvantaging individuals with disabilities in a modern society that is largely driven by an electronic marketplace. How can websites be inaccessible? Many people with disabilities use "assistive technology" to enable them to use computers and access the internet.

For example, individuals who are blind or have low vision may use screen readers – devices that speak the text on a monitor – to assist them in accessing a website's content. However, such users cannot fully access a site unless it is designed to work with the screen-reading software. Another example of an accessibility barrier that needs to be addressed is ensuring your individual website pages are coded so that users can navigate by means of a keyboard or single-switch access device alone, without need of a mouse. Users who cannot use a mouse with precision could find your website un navigable without this design. Websites that do not accommodate assistive technology can create unnecessary barriers for users with disabilities, and help fuel website accessibility claims.

RECENT LEGAL RULING PROVIDES WARNING

Recently, a California superior court judge ruled in favor of a blind plaintiff who sued luggage retailer Colorado Bag'n Baggage, claiming that he was unable to shop online for the retailer's products. His lawsuit centered on allegations that the website lacked features, such as screen-reading software, to assist customers with disabilities.

In its March 2016 ruling for the plaintiff, the court noted that the customer had "presented sufficient evidence and legal argument to conclude Title III of the ADA applies to plaintiff's use of a website." The court noted that he properly demonstrated he "sought goods and services from a place of public accommodation" because he demonstrated a sufficient connection exists between the retail store and its website that directly affects a customer's ability to access goods and services.

The court ordered the retailer to pay the plaintiff \$4,000 as a judgment for the ADA violation. While this amount may not seem like a great deal, the court also ordered the retailer to pay for the plaintiff's attorney's fees and costs, and of

course the retailer had to expend additional resources to pay for its own attorney's time and costs.

Further, the court ordered the retailer to take the necessary steps to make its website "readily accessible to and usable by visually impaired individuals." If it is unable or unwilling to do so, the court said that the company would need to terminate its website, which would be a death knell to most businesses.

This case is a good reminder about the importance of ensuring you have a fully accessible website for your customers. But even if your website is not a public accommodation, you are not necessarily off the ADA hook. If you use it as a means of accepting applications, for example, you may also have obligations as an employer to make your website accessible to disabled individuals for purposes of applying for employment.

As a result of this recent decision, coupled with the remaining uncertainty in the law, many plaintiffs' lawyers are seizing on the opportunity by sending demand letters and filing lawsuits. You should therefore review your online activities for compliance with ADA accessibility.

WHAT DOES THE GOVERNMENT SAY?

The government is also weighing in on the issue. The U.S. Department of Justice (DOJ), the agency responsible for implementing Title III of the ADA, has taken the position that "the statute's broad and expansive nondiscrimination mandate reaches goods and services provided by covered entities on websites over the internet." In 2010, the DOJ issued an Advance Notice of Proposed Rulemaking, reaffirming its longstanding position that the ADA applies to websites of public accommodations, and reiterating that the ADA should be interpreted to keep pace with the developing technologies.

However, the DOJ recognized that further guidance was necessary due to inconsistent court decisions on website-related obligations. The agency therefore announced its intent to revise the regulations implementing Title III in order to establish specific requirements for making the goods and services offered by public accommodations via the internet more accessible to individuals with disabilities.

Unfortunately, the DOJ has delayed issuing regulations on website accessibility for several years. It is currently anticipated that formal guidance will not be provided until at least 2018. However, the DOJ's position can be surmised in two statements of interest that it filed in June 2015 in a federal lawsuit against two prominent academic institutions. The case involved an allegation that the universities failed to provide accurate and comprehensive captioning for online course materials.

DEPARTMENT OF JUSTICE TAKES STRONG STANCE

In its statements, the DOJ essentially argues that existing case law and the proposed rulemaking commentary that supplements the ADA are sufficient justifications to require the universities to make their websites more accessible by captioning their online videos. The DOJ said, "the ADA and the Title III regulation, since their enactment and promulgation, have always required that public accommodations provide effective communication to persons with disabilities through the provision of auxiliary aids and services, including, where appropriate, closed captioning." The agency also reminded us that it "has similarly enforced Title III's effective communication requirement, including, more recently, as to internet and web-based goods and services."

The DOJ rejected the universities' claim that the action should be delayed or dismissed until the regulations on website accessibility are finalized. Instead, the DOJ maintained that courts are "well-equipped" to resolve website accessibility claims through the "straightforward application of longstanding statutory and regulatory requirements." Thus, although the DOJ has yet to announce more specific requirements related to website accessibility, the ADA still applies without the pending regulations.

Over the past few years, the DOJ has also filed lawsuits against companies that used only websites to sell their goods and services. One example was a claim against peapod.com, a leading internet grocery retailer, for an allegedly deficient website. The company entered into a settlement agreement with the government in order to resolve the lawsuit, agreeing to modify its website, follow recommendations of an independent website consultant, adopt a compliance policy, and offer accessibility training to its workforce, among other things.

State attorneys general have also entered the fray and taken legal action against businesses they believe to be in violation of federal or state law. For example, the New York Attorney General has sued both Priceline.com and a national hotel chain because their websites were allegedly inaccessible to individuals with disabilities. The cases were ultimately settled once the companies agreed to make their websites accessible.

HOW CAN YOU MAKE YOUR WEBSITE MORE ACCESSIBLE?

In preparation for the DOJ's new regulations, all website owners and operators should begin making their websites accessible to individuals with disabilities through features that facilitate easier navigation and are compatible with assistive technologies.

The DOJ has emphasized its interest in adopting the Web Content Accessibility Guidelines (WCAG) 2.0, a set of international standards outlining methods to make websites more accessible for individuals with disabilities, which many plaintiffs' lawyers also rely on in their settlements. You should therefore review WCAG 2.0 for guidance on making your website accessible for a variety of ADA-covered disabilities.

CONCLUSION

The bottom line is that businesses should anticipate receiving increased ADA scrutiny and challenges to their online activities. Just as your typical brick-and-mortar business must be accessible to all customers, your website should also be accessible.

Taking the time to ensure that your website is accessible to individuals with disabilities will not only protect your business against the rising potential of lawsuits, but also open your doors to new customers and clients.

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