



Surf's Up! Don't Become The Next Victim Of A Surfing Suit

Insights

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The past few years have seen a steep increase in litigation brought against hospitality businesses under Title III of the Americans with Disabilities Act (ADA). These suits often contend that certain aspects of a building, bathroom, or parking lot do not comply with the ADA's detailed standards and regulations. With the goal of creating a physical environment that is navigable by all, Title III requires private businesses to accommodate guests with disabilities visiting their property by removing barriers to goods and services where such removal is "readily achievable" or "easily accomplishable and able to be carried out without much difficulty or expense." This is generally determined by examining the nature and cost of barrier removal in context of the business's financial resources.

Some plaintiffs' lawyers have found a lucrative niche by engaging the services of "testers" – private citizens who go from business to business looking for ADA violations. The law does not require claimants to notify a business of alleged violations so they might fix the problem prior to filing a lawsuit; hence, many businesses are caught off guard when served with the lawsuit. Worse, they will spend thousands of dollars in attorneys' fees to resolve a case when the cost of actual compliance is very low. In fact, after the costs of enforcing the technical requirements of the law are paid and the lawyers receive their fees, the plaintiff often receives no damages for the case.

A 21st-Century Twist On The ADA

A modern twist on these standard ADA cases is becoming increasingly prevalent. Now people are using this same section of the ADA to bring allegations that business websites are inaccessible to those with disabilities. No longer do testers need to actually visit a brick-and-mortar establishment, but can merely surf on the World Wide Web looking for those businesses with websites that are not accessible for those with disabilities.

In 2010, the U.S. Department of Justice (USDOJ) issued an Advance Notice of Proposed Rulemaking on the Accessibility of Web Information and Services. The purpose: "to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web), accessible to individuals with disabilities." Although the comment period closed in January 2011, the USDOJ has still not published clear guidance or final regulations for the private sector. The latest news suggests that will happen sometime in 2018. For now, though, the lack of clear policy has left the field wide open to unfettered litigation.

The bad news is that the delay in the regulatory process has not slowed the torrent of ADA lawsuits against businesses for alleged failure to provide equal access to web-based services. This means that your hospitality business can be sued by someone who is simply surfing for a lawsuit. You should take steps now to ensure your company's website is reasonably accommodating those with disabilities.

What You Can Do To Stop The Surfing Suits

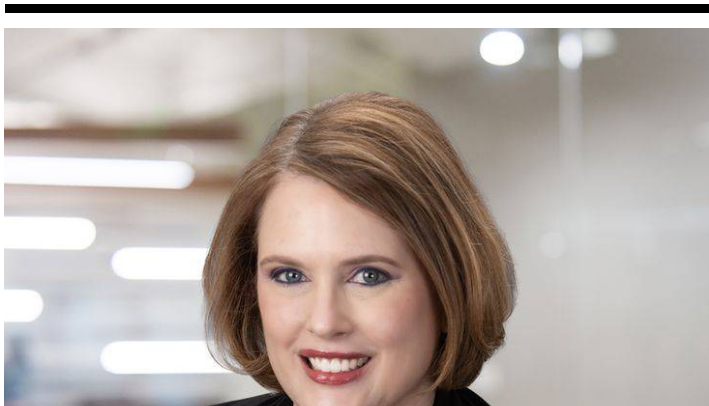
Some of the more common website accessibility issues affect individuals with vision or hearing impairments and those who are unable to use a mouse and must navigate with a keyboard, touchscreen, or voice recognition software. Those with visual impairments may need special software to magnify the content of a page, have it read aloud, or to display the text using a braille reader. For those with hearing impairments, the issue is often that audio content on the website does not include closed captioning, or that images do not include captions. You may need to build your website to properly interact with any adaptive software or technology designed for accessibility purposes.

Fortunately, the Web Content Accessibility Guidelines (WCAG) exist to provide web designers with standards for making digital content more accessible to those with disabilities. The USDOT has made it increasingly clear over the last several years that it considers a website "accessible" if it complies with the standards of the WCAG 2.0 AA. The agency has used this standard in settlement agreements and consent decrees with businesses it believes to have violated the ADA. There is speculation that this will be the standard adopted for the private sector in 2018.

If your company website posts menus, accepts orders, permits customer reviews and testimonials, takes reservations, provides addresses and directions to brick-and-mortar locations, accepts job applications, includes FAQs, has email or chat features, or your business has any other online presence, you should consult with your web designer about ways to make these aspects accessible to those with disabilities. It is both the right and the legal thing to do, and it could save your business the unwanted expense and stress of litigation.

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