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PANDEMIC SIDE EFFECT FOR RESTAURANTS: INCREASED DISABILITY ACCOMMODATION CLAIMS

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The restrictions placed on indoor occupancy in response to the COVID-19 pandemic have forced businesses to think creatively in order to stay open. Businesses across all sectors have turned to technology in adapting to their respective locality's regulations, including implementing remote work, holding meetings through videoconference, and offering online methods of commerce.

One sector that had to be especially creative is the restaurant and eatery sector, a sector that relies heavily on in-person dining. Throughout the COVID-19 pandemic, restaurants that implemented robust online resources, such as easy online or mobile ordering, have seen a significant uptick in customer engagement. Not only is this because most restaurants are limited when it comes to indoor dining options during the pandemic, but also because demand for delivery and takeout services has skyrocketed due to more individuals working and entertaining more at home. Therefore, the restaurants that have seen the most success are those that increased their digital presence.

However, restaurants have not gone unscathed by doing this. Rather, by offering more ways to access their services online, restaurants have opened themselves up to potential liability under federal and state access discrimination laws. Below we discuss how litigants have expanded the scope of their access discrimination lawsuits to now include website accessibility and how courts determine which websites are subject to these laws.

Americans With Disabilities Act and State Laws

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Under the ADA, businesses are prohibited from discriminating against an individual based on that individual's disability. The ADA entitles disabled individuals to the same "full and equal enjoyment" of the business's facilities and services as individuals that are not disabled.

Many states have their own versions of the ADA requiring similar – if not greater – protections. For example, the California derivative of the ADA, the Unruh Civil Rights Act, prohibits "places of public accommodation" from discriminating against individuals based on factors like age, gender, sex, race, religion, ancestry, and disability. With respect to people with disabilities, the Unruh Act was originally enacted to ensure that businesses provided sufficient options for "full and equal enjoyment" to that business's facilities, such as installing wheelchair ramps or providing braille reading materials. However, as businesses began expanding the services they offered on their website, more and more patrons preferred visiting that businesses website before going to the physical location. This includes disabled individuals, who require the use of assistive technology to efficiently use online services.

The corollary to businesses increasing their online presence is that individuals will likely run across issues with accessing their website similarly to how they would at the business's physical location. Therefore, disabled individuals began filing lawsuits alleging that a company website is not equally accessible to them in violation of the ADA.

What do the Courts Say?

In 2018, the U.S. Department of Justice opined that access discrimination laws apply to a business's website. However, because the DOJ did not provide guidelines for how to enforce or adjudicate these laws in the website context, this issue has been left to the courts to decide.

The first issue that courts addressed is how to determine which websites were subject to the ADA. Courts have been split on this issue, and rather than come up with uniform criteria, some courts have conditioned the applicability of the ADA on whether a nexus exists between the website and access to a physical place of public of accommodation.

This approach was applied by the Ninth Circuit Court of Appeals after a blind man alleged he was not able to order food from a restaurant through its website and mobile app

despite using screen-reading software. Initially, the trial court dismissed the claims, citing that the ADA does not apply to the company website because it is not a “place of public accommodation.” On appeal, the Ninth Circuit reversed the lower court’s decision, reasoning that “the alleged inaccessibility...impedes access to the goods and services – which are places of public accommodation.”

California courts have used a similar framework for ADA website cases as well. The California Court of Appeal for the Fourth Appellate District reversed a lower court’s ruling and held that a website can be considered a “place of public accommodation” where the website “connects customers to the goods and services” of the business’ physical space.

As indicated above, restaurants are implementing new ways for patrons to safely access their services during the COVID-19 pandemic by offering online ordering for pick-up and delivery. According to a study performed by Technomic Ignite, online orders placed through a mobile app have increased from 3% to 11% during the COVID-19 pandemic.

With this increased reliance on online services, restaurants could inadvertently be creating a more substantial nexus between their website and physical locations. For instance, the California Court of Appeal for the Second Appellate District recently found a nexus where a restaurant’s website included an online menu and reservation feature. Therefore, it appears that the more robust a restaurant’s website becomes, the more likely a court is to find that a nexus exists with that restaurant’s physical location.

Web Content Accessibility Guidelines

While courts have opined at length over which business websites are subject to the ADA, courts have provided little guidance as to how a business can ensure their website is ADA compliant. In fact, courts have expressly refused to adopt a standard for determining website compliance. However, different court decisions have opined that other courts can use compliance with the Web Content Accessibility Guidelines (WCAG) as an appropriate equitable remedy for plaintiffs to request.

The WCAG 2.1 are a set of standards issued by the World Wide Web Consortium to make web content accessible for disabled individuals by offering text alternatives, such as large print, braille, speech, symbols or simpler language.

WCAG 2.1 is primarily used by web developers as a resource to identify areas of improvement to make content more accessible to individuals with disabilities. Therefore, business owners and companies assisting with website compliance typically use the WCAG as a guideline to minimize potential exposure to ADA lawsuits.

Preventing and Responding to Website Accessibility Lawsuits

With restaurants expanding their website to offer more options to order off the menu or reserve a table online, courts are more likely to find that the nexus requirement is satisfied. Therefore, if you receive a lawsuit alleging that your website does not comply with the ADA, you should consider retaining experienced counsel. In terms of preventive measures, restaurant owners should do the following to best position themselves in avoiding a discrimination lawsuit against their website:

1. Hire an in-house website maintenance technician

Because developing and maintaining a website requires technical knowledge of web design, it can be beneficial to hire an individual or team to perform regular upkeep of your restaurant's website and mobile app.

2. Consult with an independent compliance organization

Many companies and nonprofit organizations provide consulting services to assist businesses in evaluating the deficiencies in their website and offering solutions to bring their website into compliance with the WCAG.

3. Solicit user feedback

By including an option on the website to allow patrons to provide instant feedback on the website's accessibility, you can minimize deficiencies and quickly remedy any potential accessibility issues.

4. Include an accessibility statement

By including a page or statement that discuss the standards followed in making the website more accessible, businesses show their patrons that they put forth an effort in ensuring that every individual can equally access their websites contents.

Conclusion

The pandemic has caused many hospitality businesses to pivot online to maintain and attract business. As restaurants continue to offer more and more services through their websites, you must be conscious of the need to ensure your incorporate accessibility into your site construction.