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The ADA and Your Website – A Guide to Website Accessibility Claims

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Most employers know the Americans with Disabilities Act (ADA) as the law that prohibits discrimination on the basis of disability and requires reasonable accommodations of employees' disabilities. However, this prohibition is only one segment of the ADA, which is split into three large segments. One of the other large sections focuses on making sure that "places of public accommodation" are equally accessible to those living with disabilities. As we previously reported, a recent trend in this area focuses on websites.

As we explore this issue, we'll take deeper dive into the details surrounding website accessibility. Are websites places of public accommodation? If so, what do businesses need to consider? What changes should be made to websites? Courts do not all agree on the answers to these questions. So, employers beware -- it may be time to take a look at your websites and make sure they are equally accessible, just like your workplaces.

ADA Background

The ADA is split into three large parts called "titles." Title I of the ADA prohibits employers from discriminating against employees on the basis of disability and requires that employers grant reasonable accommodations to certain employees in certain circumstances. This is the title with which employers are generally most familiar. Title II of the ADA covers state and local governments, and Title III of the ADA covers "places of public accommodation." Under Title III, places of public accommodation must be equally accessible to those living with disabilities. The overlap between Title I (employment) and Title III (places of public accommodation) is vast, largely because the physical locations of many employers are considered places of public accommodation.

The ADA does not define a "place of public accommodation," but it is generally a private business or organization that provides goods, services, facilities, privileges, or accommodations to the public. The ADA lists a number of examples of places of public accommodation, ranging from restaurants, bars, and bakeries to healthcare providers, schools, and social service centers. The examples make clear that a business's brick-and-mortar locations are nearly always considered places of public accommodation. As the internet has expanded and become an integral part of most business

operations, there has been robust debate over whether a business's *website* is a place of public accommodation. If it is, then it must be equally accessible to those living with disabilities.

Website Accessibility Suits

Courts have seen a substantial increase in the number of website accessibility suits. Generally, these suits claim that a personal living with a disability (often a vision impairment) was unable to use a business's website to purchase certain goods or learn about certain products, services, or other information. Thus, the argument is they were denied equal access to the goods and services of a business, i.e., a place of public accommodation.

These suits can generally be filed in any federal court, as the ADA is a federal law. However, many of these suits are filed in states that have similar laws regarding places of public accommodation. This way, the plaintiff can allege that the business's website violates not only the ADA but also the state law. For example, a number of these suits have been filed in the Southern District of New York, presumably because both New York State and New York City have enacted laws that require equal access to public places of accommodation.

As we discussed in an earlier article, courts have not all agreed on whether a website should be considered a place of public accommodation. For example, the Eleventh Circuit Court of Appeals recently held that websites are not places of public accommodation. The court noted that the ADA "describes twelve types of locations that are public accommodations. All of these listed types of locations are tangible, physical places. No intangible places or spaces, such as websites, are listed. Thus, we conclude that, pursuant to the plain language of Title III of the ADA, public accommodations are limited to actual, physical places." On the other hand, some courts, including the First Circuit Court of Appeals, have held the opposite. Specifically, that court held that, because "travel services" was included in the list of examples in Title III, and because many travel services do not require customers to enter a physical office in order to receive services, Congress had "clearly contemplated" that the ADA would apply to places without a physical location. Still, other circuit courts have not addressed the issue, and the district courts underneath them are split. This is the case in the Second Circuit Court of Appeals and the New York district courts.

Common Trends and Defenses

While each website accessibility lawsuit comes with its own set of particular facts and circumstances, there are common trends within them. As noted above, plaintiffs generally argue that they were unable to use a business's website and that they were thereby denied equal access to the goods and services of a place of public accommodation. Specifically, they tend to allege that the website was not compatible with the plaintiff's "screen reader," the software typically used to navigate the website, and that the screen reader was not able to "read" the website because of some inadequacy of the website itself.

A common demand by plaintiffs is that the website should be compliant with the Web Content Accessibility Guidelines (WCAG), of which there are a few versions. The most recent version is WCAG 2.1. However, businesses are not *required* to comply with the WCAG under the ADA. In fact, the Department of Justice has not issued any specific standards that businesses are required to meet.

There are a number of things you and your legal team can do to both protect from these types of suits and respond to them. The most obvious is to make your website inarguably accessible and

become WCAG 2.1 compliant. You can hire an auditing firm that specializes in website accessibility to determine which areas of your website are non-compliant and how you can fix them. This process can take time, so it is prudent to begin this process promptly.

In terms of legal responses to these types of suits, you will (as always) want to consult with your lawyer. There are some common defenses to these suits that may apply to you. First, you may be able to argue mootness. A claim is moot when the problem alleged by the plaintiff no longer exists. This comes up in website accessibility suits if you are able to completely remedy the points of inaccessibility that the plaintiff alleges. Again, there are website auditing firms that can help you pinpoint any issues and remedy them. Second, you may be able to argue that the plaintiff lacks *constitutional* standing. To properly bring a claim in federal court, a plaintiff must allege a "concrete, particularized injury." Simply alleging that a website is inaccessible is not enough. Courts have held that a plaintiff must identify the product or service that he or she was unable to access and how it caused harm. Third, depending on what courts in your jurisdiction have held on whether a website is a place of public accommodation, you may be able to argue that the plaintiff lacks *statutory* standing.

Takeaways

Since we last wrote on this issue, it has become clear that website accessibility lawsuits are not going away. As such, it may be time to take a look at your website and consider the pros and cons of coming in to compliance with WCAG guidelines. It may also be time to consult with your lawyers to see what the law is in your jurisdiction on this issue. We will keep you updated with any major developments.

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