Never CLOSED

Developments in website accessibility under the ADA.

The Americans with Disabilities Act (ADA) prohibits places of public accommodation from discriminating against individuals with disabilities, including the blind and visually impaired. Since the ADA’s enactment, restaurants and retail establishments have grappled with ways to ensure that they are accessible to disabled individuals. The steady shift in our economy from physical brick-and-mortar locations to online web-based commerce, however, has led to an expanded interpretation of the ADA that encompasses not only a business’s physical location, but also its website. This expansion has, in turn, led to a large number of private lawsuits against businesses alleging violations of the ADA for failure to maintain websites that are accessible to the blind and visually impaired, with nearly 400 lawsuits filed over the last 2 years. These lawsuits predominantly target full-service restaurants, food chains and retail establishments. Given the large number of website accessibility lawsuits, businesses that maintain a web presence must understand the requirements of the ADA and ensure that their websites are ADA compliant.

ADA

Title III of the ADA, which was enacted in 1990, prohibits discrimination against the disabled, including the blind and visually impaired, in places of public accommodation:

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.

42 U.S.C. § 12182(a). Title III of the ADA does not provide civil penalties for violations of the act but does permit private rights of action and allows individuals to bring enforcement actions, seek injunctive relief, and recover attorneys’ fees and costs. 42 U.S.C. § 12188.

As originally enacted, the ADA did not expressly include websites as places of “public accommodation,” principally because the Internet was in its infancy at the time. Over the ensuing years, as the Internet has become ubiquitous and a seemingly unlimited number of goods and services are available online, courts have interpreted places of “public accommodation” to include websites.

PLACE OF PUBLIC ACCOMMODATION

Interpretations regarding when a website constitutes a place of public accommodation, or a service of a public accommodation, have varied among courts, resulting in a circuit split regarding whether a website must have a nexus with a “physical place of public accommodation,” to fall within the scope of the ADA.

Some courts (principally the U.S. Court of Appeals for the Seventh Circuit) have found that a nexus is not required, and websites without connections to physical commercial entities are nevertheless “places of public accommodation” for purposes of the ADA.

By contrast, other courts (principally the Ninth Circuit) have adopted a more restrictive definition of “place of public accommodation,” requiring a nexus between the website and the service of a physical “place of public accommodation” like
a restaurant.

Most recently a federal court in Florida (the U.S. District Court for the Southern District of Florida) issued a verdict in the first federal trial concerning website accessibility under the ADA, finding grocery store chain Winn-Dixie violated Title III by maintaining a website that was inaccessible to blind or visually impaired individuals. Although the court did not issue a bright line rule for when a website constitutes a place of public accommodation, the court’s holding is in line with the Ninth Circuit’s finding that a nexus must exist between the website and a physical storefront. The court found that Winn-Dixie violated the ADA because its website prevented plaintiff and other visually impaired individuals from being able to avail themselves of certain services related to Winn-Dixie’s stores, including the ability to download coupons, refill prescriptions or find store locations.

As demonstrated by the Winn-Dixie case, even when employing the more restrictive definition of place of public accommodation, a website inaccessible to visually impaired individuals may still violate the ADA if the website provides unequal access to the “services” that may be available at a physical location.

**WEBSITE ACCESSIBILITY STANDARDS**

The Department of Justice, the agency responsible for enforcement of the ADA, has not issued formal rules establishing standards for website compliance under the ADA. Proposed rulemaking issued by the DOJ indicates an intention to adopt the World Wide Web Consortium’s Web Content Accessibility Guidelines 2.0 (WCAG 2.0), independent guidelines developed by a private group of accessibility experts, as part of future rulemaking. Blind and visually impaired individuals use specialized software, including screen reader technology, that reads website content aloud to users allowing them to access and navigate websites. WCAG 2.0 provides three levels of guidelines (A, AA and AAA) that, if followed in the design of a website, provide the greatest degree of compatibility with screen reader software. However, the timeline for the DOJ to issue rules and adopt WCAG 2.0 is unknown and further complicated by uncertain support from the Trump administration.

Although the administration has not expressly stated an opinion on website accessibility, President Trump’s position of limiting regulation throughout the federal government makes it reasonable to predict that his administration may not pursue future rulemakings that would create greater requirements for small businesses. Similarly, the Trump administration may be wary of encouraging enforcement actions that expand beyond the requirements of existing regulations.

In the absence of a uniform compliance standard, courts have engaged in fact-based inquiries into whether a website is accessible to blind or visually impaired individuals, and therefore in compliance with the ADA. For example, in the Winn-Dixie case, the court’s finding that the website was inaccessible was based on testimony from the plaintiff that 90% of the site could not be accessed while using JAWS, a common screen reader software, and on expert testimony confirming the alleged inaccessibility following an audit of the site. Similarly in a recent Northern District of California case, the court rejected plaintiff’s arguments that the Domino’s Pizza website violated the ADA because it did not meet WCAG 2.0. Instead the court found that Domino’s satisfied the ADA by including a banner on its website, which was readable by screen reader software and directed blind users to a 1-800 number where they could receive assistance from an operator to navigate the website and obtain goods and services available there.

The absence of uniform guidelines and the fact-intensive nature of accessibility inquiries make it difficult to dispose of these suits at an early stage of litigation, and has emboldened plaintiffs to pursue relatively quick settlements.

**RESTAURANT AND RETAIL WEBSITES**

Restaurant and retail websites have been a specific target of lawsuits alleging violations of the ADA under both the Seventh and Ninth Circuit views by virtue of the services they offer and, in many instances, their necessary connection to a brick-and-mortar location. For example, a restaurant website allowing a customer to place-to-go orders or order delivery could be in violation of the ADA if the site is inaccessible to the blind or visually impaired. In that situation, the website could be in violation of the ADA because the goods or services offered on the website are inaccessible and because the “nexus” between the challenged service and the physical place of public accommodation would make the website subject to the ADA. Even websites that do not offer goods for sale, but instead offer services like online job postings, reservations, coupons or store hours could be in violation of the ADA if inaccessible to blind and visually impaired individuals.

In the last year alone, lawsuits have been filed against a number of restaurant and retail establishments including, among others, Capital Grille, Del Frisco’s Grille, Outback Steakhouse, Home Depot, Ford Motor Company, Warby Parker and Five Guys, alleging that some or all of the companies’ websites are inaccessible to the blind and visually impaired. Smaller restaurants and retailers, such as Peter Luger Steakhouse and Momofuku Milk Bar, have been targeted in lawsuits filed in the last few months.

These suits expose companies to damages, potentially costly litigation and injunctive actions. Accord-
ingly, it is important for restaurants and retailers of all sizes to be cognizant of the need for ADA compliance.

**ADA COMPLIANCE TIPS**

- **Build it Right:** Blind and visually impaired individuals typically use specialized software, including screen reader technology, that reads website content aloud allowing users to access and navigate websites. Private lawsuits have highlighted that not all publicly available websites are ADA compliant because they, among other things, fail to incorporate screen reader technology. Building the website right, to ensure that the website is designed and constructed so that it is compatible with screen reader technology, is the first step in ensuring compliance with the ADA. Although, not currently required under the law, incorporation of WCAG 2.0 into website design may minimize accessibility issues.

- **Audit New Features:** Even websites that may have been designed initially to be compatible with screen reader software may become inaccessible when new features are added or the website is updated. In the case of a recent suit against Domino’s, the addition of a buy one, get one free feature to its online ordering system rendered Domino’s otherwise compliant website inaccessible to blind and visually impaired users. Ensuring that new features are designed to be compatible with screen reader software and that users can seamlessly navigate between old and new features on the website without issue will minimize the risks that updates can present to otherwise compliant websites.

- **Is This Necessary?** While it is difficult to conceive of running any business this day and age without a web presence, the type of website a company maintains may limit its risk under the ADA. Websites that are strictly informational in nature are unlikely to violate the ADA because they do not offer goods or services. For small businesses, one important question is whether to maintain a website that simply provides information, or one that offers additional services, like online ordering, which could also create liability under the ADA. Because the Internet does not discern between big and small businesses, everyone is at risk under the ADA. Choosing a website design that is less likely to violate the ADA may be a prudent way for smaller businesses to minimize risk.

**LAWSUITS LIKELY TO CONTINUE**

The large number of ADA website accessibility lawsuits recently filed illustrates the potential risks faced by restaurants and retailers offering “a place of public accommodation” online. The steady source of attorneys’ fees these suits provide to plaintiffs’ counsel, and the relative ease with which allegedly offending sites can be identified, make it likely that these actions will continue to be filed. Recent victories, like the plaintiff verdict in the Winn-Dixie case, may only further embolden plaintiffs. As large companies bring their websites into compliance, either voluntarily or following legal action, plaintiffs may begin to focus on smaller establishments. Accordingly, it is important to understand the need for ADA compliance and the pitfalls posed by non-compliance in an effort to limit the risk of potential litigation.

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