ADA WEBSITE COMPLIANCE

Continued Uncertainty for Businesses

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In the last several years, there have been unprecedented numbers of website accessibility lawsuits filed against both governmental and private entities for alleged violations of the Americans with Disabilities Act of 1990, as amended, ("the ADA"), especially in New York, Florida, Pennsylvania, Massachusetts, and California. Any entity with a website or smart device application ("app") is vulnerable to litigation if its website or app contains inaccessible content; thus, businesses should proactively take measures to ensure the accessibility of any content they choose to disseminate.

ADA website lawsuits are primarily being filed by visually impaired individuals who access the internet by utilizing screen reading software, such as JAWS or NVDA, which translates written text and images into spoken words. While less prevalent, ADA website lawsuits are also filed by hearing impaired individuals who are able to access video content on the internet by utilizing closed captioning. Plaintiffs filing such claims typically seek declaratory and injunctive relief, as well as attorney's fees under the ADA.

Several unique characteristics of ADA website lawsuits are fueling this seemingly indomitable tide of litigation: (1) a form-based practice that allows use of serial litigants or "testers," (2) the potential for attorneys' fee awards, (3) the uncertainty plaguing this area of the law, and (4) the absence of clear rules or guidance for entities publishing content on a website or app. Unfortunately, a law intended as a means for redress for disabled individuals has morphed into a cottage industry for plaintiffs' attorneys attempting to capitalize on the juxtaposition of the lack of governing regulations and the fear of attorneys' fees

awards. As a result, the staggering rise of ADA website lawsuits has sparked tremendous controversy among businesses, attorneys, the courts, and the disabled alike. This windfall of litigation will likely only be thwarted by unequivocal governmental intervention, either in the form of binding legal precedent or clear guidelines promulgated by the Department of Justice ("DOJ").

STEPS TOWARDS REGULATORY GUIDANCE

Since 2003, the DOJ has promulgated and receded from various levels of agency guidance on ADA website accessibility issues. On several occasions, the DOJ has issued notices expressing an intent to promulgate specific website accessibility guidelines and noted the absence of clear guidance on what the ADA requires. In 2018, nearly one hundred members of Congress sent letters to Attorney General Jeff Sessions urging the DOJ to intervene and resolve the uncertainty plaguing website accessibility obligations under the ADA. The senators emphasized that clarity in the law would encourage private investment in technology that would improve conditions for the disabled.

On September 25, 2018, the assistant attorney general responded to these letters and reaffirmed the DOJ's earlier position that the ADA applies to the websites of places of public accommodation (https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf). In the letter, he stated that the DOJ's "interpretation is consistent with the ADA's Title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities." He further explained that "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication" and that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

To date, the DOJ has not implemented mandatory rules or guidelines for website accessibility, but it has encouraged people to reference the Web Content Accessibility Guidelines (WCAG). WCAG are voluntary international guidelines or recommendations for web accessibility promulgated by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) as an accessibility resource. Thus, businesses should look to WCAG 2.0 AA or WCAG 2.1 AA for guidance on making their websites or apps more accessible and enjoyable for all users.

GUIDANCE FROM THE COURTS

The key issue before courts grappling with ADA website lawsuits against private businesses is whether Title III applies to businesses' websites and apps. Currently, there is not a clear consensus among the courts as to whether the ADA limits the definition of places of public accommodation to physical spaces. As one court recently noted, "[t]he spate of these cases has outpaced any regulations from the Department of Justice on what businesses must do to have ADA compliant websites, and courts have reached no consensus." *Price v. Escalante - Black Diamond Golf Club, LLC*, 2019 U.S. Dist. LEXIS 76288, *1-2 (M.D. Fla. April 29, 2019) (Moody, J.). While some courts have held that the definition of places of public accommodation is limited to physical, brick and mortar locations, others have held that websites or apps may be public accommodations under the ADA. Some courts have taken a middle ground, focusing on whether the alleged inaccessibility of the businesses' website or app impedes access to the goods and services of the businesses' physical location(s). *See e.g. Robles v. Domino's Pizza, LLC*, 913 F. 3d 898 (9th Cir. 2019); *Haynes v. Dunkin' Donuts*, LLC, 741 Fed. Appx. 752, 754 (11th Cir. 2018).

In many cases, the parties agree to a settlement without adjudicating the legal issues, often in the form of a payment and the entry of a consent decree. In Florida, the settlements are typically in the $10,000-20,000 range. Additionally, the defendant business will agree to ensure that it(s) website(s) and/or app(s) substantially conform to WCAG 2.0 AA within 12-24 months. Many such agreements specifically state that the business is not responsible for ensuring compliance of third-party content or plug-ins whose coding is not solely controlled by the business, even if such content is located on the business's website or linked therefrom.

In other cases, businesses are successfully defending against such claims by raising arguments based on lack of Article III standing. In such cases, the defendant business typically files a dispositive motion claiming that the plaintiff failed to satisfy Article III standing requirements due to the lack of an immediate threat of future injury based on three factors: plaintiff's connection with the defendant business, the type of information that is inaccessible, and the relationship between the inaccessible information and plaintiff's alleged future harm. The availability of such a defense is extremely fact specific, and while it may be a meritorious defense in certain cases, especially involving "testers," this is a short term solution at best since it does not address the underlying issue of the website's alleged inaccessibility. Thus, while businesses may want to raise such defenses to allow them additional time to get their websites and apps into compliance, working with professionals to improve the accessibility of all content is the best practice.

CONCLUSION

Currently, any business with a website or app displaying content that is not equally accessible to individuals with disabilities using adaptive technology is vulnerable to ADA website accessibility litigation. Website accessibility lawsuits are extremely daunting due to plaintiffs' potential for attorneys' fees awards and the threat of multiple, repeat lawsuits. While some businesses have successfully defended against these types of claims, the future of these lawsuits remains ominous and daunting for businesses navigating in the absence of legislative intervention and clear guidance for compliance.

Businesses have some flexibility in implementing accessibility measures. The best practice is to work with website accessibility professionals to satisfy WCAG 2.0/2.1 AA success criteria to ensure businesses' websites and apps can be accessed and enjoyed by audiences with disabilities.

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