Can Your Company's Website Lead To A Lawsuit?

By Myra Creighton (Atlanta)

If your business is a place of public accommodation, you are probably already familiar with the rules from Title III of the Americans with Disabilities Act (ADA) that require you to make services and physical locations accessible to individuals with disabilities. Places of public accommodation include restaurants, hotels, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers, but not private clubs or religious organizations.

However, are you aware that some courts have recently concluded that a company's website, standing alone, is also considered a public accommodation? Which means that, depending on the jurisdictions in which your company does business, you may need to ensure Title III compliance for your website or run the risk of a legal violation.

Legal Threats Can Come From Several Angles

Businesses can face danger from various sources if they run afoul of the law. The federal government was the first governing body to take action against businesses it believed to be in violation of the ADA. As early as 1996, the U.S. Department of Justice (DOJ) took the position that Title III required websites to be accessible.

Over the past few years, the DOJ has filed lawsuits against companies that used only websites to sell their goods and services. One example was a claim against peapod.com, a leading internet grocery retailer, for an allegedly deficient website. The company entered into a settlement agreement with the government in order to resolve the lawsuit, agreeing to modify its website, follow recommendations of an independent website consultant, adopt a compliance policy, and offer accessibility training to its workforce, among other things.

The risk of a lawsuit does not just come from the DOJ. State attorneys general have also entered the fray and taken legal action against businesses they believe to be in violation of federal or state law. For example, the New York Attorney General has sued both Priceline.com and a national hotel chain because their websites were allegedly inaccessible to individuals with disabilities. The cases were ultimately settled once the companies agreed to make their websites accessible.

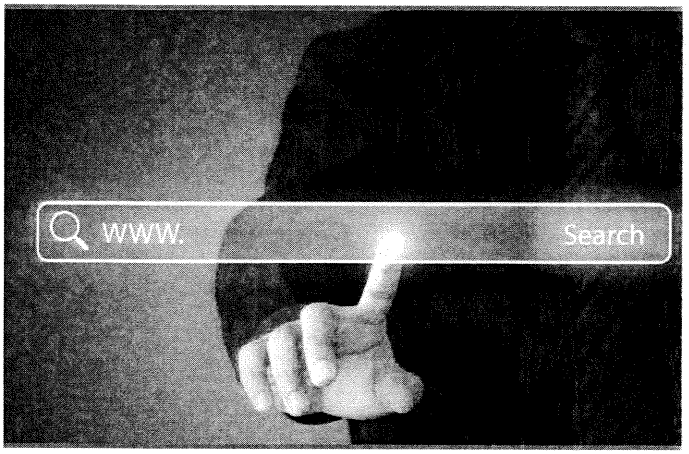
Another threat can come from aggressive plaintiffs' law firms. A number of such law firms have started sending demand letters and filing lawsuits against companies, alleging that the companies' websites are inaccessible to disabled individuals. At least one of these firms graciously offers its own expert to help the accused companies come into compliance.

Importantly, Title III of the ADA does not allow plaintiffs to recover monetary damages against companies in violation of the law. Rather, plaintiffs are entitled only to injunctive relief, while the DOJ can assess monetary penalties of up to $50,000 for the first violation.

When a business is on the receiving end of a demand letter or threatened lawsuit, those advancing the claim will generally assert that websites must comply with website accessibility regulations that are imposed on governmental entities and entities that receive federal funding. That's because the status of regulations governing private businesses is currently murky at best.

Rules For Private Companies Remain Uncertain

Back in 2010, the DOJ issued a Notice of Proposed Rulemaking Concerning Proposed Accessibility Standards. The proposed rule, however, simply asked which standards in the Web Content Accessibility Guidelines 2.0 (WCAG 2.0), which has three different levels of accessibility, the DOJ should adopt.



Every year since 2010 the DOJ has said it would finalize the rule. And every year since then, including 2015, it has failed to do so. Thus, there are currently no regulations that set explicit accessibility standards for the websites of public accommodations that do not receive federal funds.

Although the standards therein do not currently bind public accommodations, they are instructive on the standards the DOJ ultimately will adopt for public accommodations. The settlement agreements in cases where the DOJ has sued have required the entity to comply with the Web Content Accessibility Guidelines Level AA. To date, however, no court has held that a public accommodation's website must actually comply with the Web Content Accessibility Guidelines.

What Should Your Business Do?

The bottom line is that your business should determine whether you want to offer an accessible website. Remember, there are courts across the country that have ruled that not all business websites need to comply with Title III rules. Rather, they held that a website must have a nexus to a physical brick-and-mortar site to be considered a public accommodation. Thus, for example, a retail store's website generally will have a sufficient nexus to the physical site to be part of the public accommodation.

In trying to determine the risk of not having an accessible website, keep in mind that even though compliance may not yet be mandatory, and compliance may be expensive, you also may be losing business from individuals with visual or hearing impairments if you offer limited-access websites.

Also, there are only a limited number of website designers conversant with the WCAG 2.0 standards. Therefore, if regulations are passed in the near future, it may be some time before you can retain competent services and come into full compliance.

Finally, even if your website is not a public accommodation, you may have obligations as an employer to accommodate employees and applicants with disabilities, which may mean your website should be accessible both for purposes of applying for employment and for existing employees.

Because this area of law is quickly evolving, and the standards for compliance are complex, we suggest you seek counsel to determine your immediate obligations and options.

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