

Does Your Website Need to be ADA Compliant?

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When businesses evaluate whether they are in compliance with the Americans with Disabilities Act of 1990 (ADA), they typically consider whether they have made appropriate accommodations at their brick and mortar locations, such as wheelchair ramps, bathroom handrails or acceptance of service animals. However, these same companies often fail to ask whether their websites accommodate disabled persons through use of speech recognition software, closed captioning or other assistive technologies that help make websites more accessible to the hearing and vision impaired. Although online shopping has become ubiquitous, businesses do not apply the same level of scrutiny to their virtual storefronts as they do to their physical locations.

In recent years, the Department of Justice (DOJ), which enforces the ADA, and numerous courts have determined that the ADA requires businesses to make their websites accessible to disabled persons. This development in the interpretation of the ADA has already spurred significant litigation and, in some instances, resulted in substantial settlements. Thus, any business that conducts business online but neglects to evaluate its website's accessibility to disabled persons does so at its own peril.

Background

Title III of the ADA prohibits discrimination on the basis of disability in "places of public accommodation." The ADA definition of "places of public accommodation" includes private entities whose operations affect commerce. Examples provided by the ADA include hotels, restaurants, movie theaters, retail stores and other service establishments—all of which are physical locations.

Historically, the DOJ's enforcement of Title III focused on businesses' physical, brick and mortar locations. Of course, at the time the ADA was enacted there was little need to consider whether websites were in compliance with Title III.

Nonetheless, the DOJ has long maintained that the language of the ADA requires businesses to apply the Act to technological advances. While the DOJ has yet to promulgate regulations explicitly applying Title III to websites, such regulation appears inevitable. In 2010, the DOJ issued an advance notice of rulemaking, which, among other things, sought input on how to ensure that websites are accessible to individuals with disabilities. Although repeated delays have all but guaranteed that the DOJ's

guidelines for website accessibility will not be implemented until at least 2019, this has not slowed the number of lawsuits filed on the basis of website accessibility issues.

ADA Website Compliance Cases

Over the years, perhaps because of the lack of regulatory guidance from the DOJ, the federal courts have offered inconsistent interpretations of how to apply Title III to websites. The U.S. Courts of Appeals for the Third, Sixth, Ninth and Eleventh Circuits have adopted a narrow view of Title III's reach. These Courts hold that there must be a "nexus" between the goods or services offered on a website and a physical location.

For example, courts within the Ninth Circuit have declined to apply the ADA to online businesses that lack corresponding brick and mortar locations, such as eBay, Facebook, and Netflix. In the case of *National Federation of the Blind v. Target Corporation*, the U.S. District Court for the Northern District of California found a "nexus" between Target's website and its retail stores because the website could be used to purchase items, locate stores, and order prescriptions and photos for pick up at retail locations. After the federal court refused to dismiss the case, Target agreed to a \$6 million settlement and pledged to make its website more accessible to disabled persons.

On the other hand, the U.S. Courts of Appeals for the First and Seventh Circuits have taken a broader view of Title III's applicability to websites. These Circuits have held that Title III is applicable to websites regardless of any "nexus" (or lack thereof) with a physical location.

The Risk of Litigation

Because neither the DOJ nor the federal courts have offered a consistent interpretation of Title III's application to websites, there continues to be significant litigation over the issue. Law firms have become increasingly aggressive in pursuing website accessibility claims. Throughout 2015 and 2016, law firms sent hundreds of demand letters to businesses large and small on behalf of disabled Internet users. The letters typically allege that the businesses' websites are not accessible to disabled individuals in violation of Title III of the ADA. Further, the demand letters often include lengthy settlement agreements proposing injunctive relief (including the plaintiff's interpretation of the steps necessary to bring the business' website into compliance with the ADA) and attorneys' fees and costs.

Given the increased incidence of ADA website accessibility litigation, businesses need to carefully evaluate the accessibility of their websites. Although there remains a lack of formal guidance as to how to best address website accessibility issues, businesses may look to settlements approved by the DOJ in civil litigation for direction.

DOJ Website Accessibility Settlements

The DOJ has repeatedly approved settlement agreements that require businesses to conform to the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG 2.0 AA). In some instances, these settlement agreements also reference accessibility standards drafted by the United States Access Board that apply to technology procured by the federal government. These guidelines and standards are readily available to businesses online.

Using WCAG 2.0 AA and the U.S. Access Board's standards as a guide, businesses conducting a significant amount of business online should, at a minimum, take the following steps to ensure their websites are in compliance with Title III of the ADA.

- Create an ADA website accessibility policy. The policy may be incorporated into a company's existing anti-discrimination policies.
- Designate a compliance officer to conduct web accessibility testing and assist impaired individuals with accessibility issues.
- Solicit feedback from impaired website users.

Conclusion

Companies that offer goods or services online should review their websites to determine how accessible they are to disabled persons. Businesses with the technical resources to address website accessibility issues should do so now. Being proactive with regard to website accessibility will not only help avoid litigation, it will also ensure that the business's products and services are available to the disabled population.

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