ADA Website Accessibility Litigation Presents High Risk to Retailers

In the last few years, there has been an explosion in the number of cases filed in the United States in which visually impaired or other disabled individuals claim that a business’s website violates the Americans with Disabilities Act (ADA). Recent court rulings have emboldened plaintiff’s attorneys which resulted in a significant uptick in litigation in 2018. New York has proven particularly welcoming to these cases, with more than 1,500 ADA website lawsuits targeting retail, food, entertainment and media, and financial institutions filed in New York’s federal courts in 2018. This is about 65% of all ADA law suits nationwide.

Despite this activity, many businesses are still unaware of the legal risk and continue to operate websites that fall short of accepted website accessibility standards, risking ADA claims. Although monetary damages are unavailable under the ADA, these cases are not easily dismissed and the defense costs can be significant. To help minimize the lawsuit risk, businesses should consider proactive measures to ensure their websites meet the current standard for accessibility.

The Americans with Disabilities Act

The ADA is a 1990 federal law prohibiting discrimination against individuals with disabilities. Title III of the ADA applies to private sector businesses that are “places of public accommodations” and requires the removal of any “access barriers” that hinder a disabled person’s access to business’ goods and services. To promote compliance with its requirements, the ADA permits aggrieved persons to bring a lawsuit to remedy the violation. The ADA does not permit the recovery of monetary damages, but it does permit winning plaintiffs to recover reasonable attorneys’ fees and costs. Traditionally, ADA lawsuits have addressed physical access barriers (e.g., service counter heights, wheelchair ramps, bathroom layout) in physical “places of public accommodation” such as stores, restaurants, bars, theaters, and other businesses that serve the public.

Over the past decade, thousands of lawsuits have been brought by visually impaired, hearing impaired, and other disabled individuals on the theory that (i) a website offering goods and services is a public accommodation and subject to the ADA’s accessibility mandate and (ii) deficiencies of the website serve as access barriers and prevent full utilization of the site. The typical allegation is that the plaintiff tried to complete a transaction on the business’s website, but was prevented from doing so by some feature of the website that presents an access barrier. Examples of such access barriers include:

* Lack of Alt‐Text on Graphics ‐ Alt‐text is the textual alternative to image content and is read by screen readers in place of images, allowing the content and function of the image to be accessible to those with visual or certain cognitive disabilities.
* Improper Labels on Form Controls ‐ Proper labeling on form controls, such as text boxes, checkboxes, and radio buttons, allow forms to be read by screen readers and used by those relying upon screen readers.
* Improper Table Markup ‐ Proper table markup allows data provided in a tabular format to be comprehensible to those relying upon screen readers.
* Lack of Adequate Keyboard Accessibility ‐ Many users with motor disabilities rely on a keyboard. Visually impaired users frequently use a keyboard for navigation.
* Inaccessible Image Maps – Special coding on image maps, i.e., images that provide different links to other web pages depending on where a user clicks the image, allow image maps to be read by screen readers.
* Lack of captions – Captions allow the spoken word content audio and video to be accessible to those with hearing impairment.

The ADA’s Application to Websites

The ADA was passed before the internet as we know it today, and as such, makes no mention of website accessibility. The U.S. Department of Justice, charged with implementing the ADA, has offered informal guidance that the ADA should extend to commercial websites, but no federal regulations specifically address the issue. In the absence of official guidance, litigation has been rampant, and the question of whether a website is “a place of public accommodation” subject to the ADA has been thrown to the courts. The answers have been inconsistent. Some courts have concluded that “public accommodations” are limited to physical accommodations” and the ADA does not extend to websites. Other courts are less restrictive, and have found that the ADA can apply to a website when it operates in close tandem with a conventional “place of public accommodation,” like a brick‐and mortar store, that access barriers to the website serve as access barriers to that place of public accommodation. And finally, other courts have taken an expansive approach, concluding that the ADA extends to private commercial website independent of any connection to a physical place.

Recently, New York federal courts have endorsed the expansive approach, even stating in one case that it would be “perverse” to require a business to operate a brick‐and‐mortar location for the ADA to apply to its website. These New York rulings, together with the fact the that New York State and New York City versions of the ADA allow a plaintiff to recover compensatory and punitive damages, have established the Eastern and Southern Districts of New York as the preferred venues for ADA website litigation.

Website Accessibility Standards

There are no official measures businesses must take to ensure their websites meet any accessibility requirement. Yet ADA advocacy organizations, plaintiffs, and some courts take the position that to be accessible a website must comply with the Web Content Accessibility Guidelines 2.0 Level AA (WCAG 2.0 AA). Developed by World Wide Web Consortium’s Web Accessibility Initiative, WCAG 2.0 AA has become the de facto international standard for website accessibility among web developers, as well as the accessibility standard for federal agency websites. These de facto standards for website accessibility focus on four categories:

* Is the content perceivable?
* Is the content operable?
* Is the content understandable?
* Is the content robust?

Online tools are available to screen compliance with WCAG 2.0, and many vendors offer auditing and web development services to help businesses comply with these standards.

Conclusion

Traditional ADA accessibility lawsuits required a visit to the business location to identify barriers. By contrast, web accessibility lawsuits can be based on simply visiting a company’s website and, since tools are available to check websites’ compliance with WCAG 2.0, it is easy for plaintiff’s attorneys to spot problems. It is impossible to avoid getting targeted by a lawsuit, but a business can minimize the risk and achieve the best possible position to defend itself against an ADA web accessibility claim by taking these steps:

* Conducting an ADA compliance audit of its website and digital content.
* Engaging a reputable vendor to help bring its website into compliance with WCAG 2.0 AA.
* Posting an accessibility statement on its website advising of the standard the business is committed to following and advising people with disabilities how to contact the organization if barriers are encountered.
* Locating competent counsel to assist with any ADA demand letters or complaints.

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