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HR Connection

A new lesson in ADA compliance

Something that I believe sets me apart from others in the HR consulting arena is my ability to relate to the business challenges my clients face. In addition to the HR and regulatory compliance challenges, I know the difficulties of managing everything from accounting, insurance, payroll, taxes, marketing, websites, sales and so much more. I also understand how these challenges can be interrelated, sometimes in surprising ways.

In a recent very unscientific poll, I asked business owners and HR professionals if the Americans with Disabilities Act (ADA), and specifically the nondiscrimination requirements of the Act's Title III, applies to their organization's website. More than 80 percent said no, or they had no idea. Of the rest, few understood how the ADA applied or knew if their organization's website was in compliance.

So, what exactly does the ADA have to do with website accessibility? Title III of the ADA prohibits discrimination against individuals with disabilities, including blind and visually impaired individuals, in places of "public accommodation." Although not explicitly identified as such, the Department of Justice (DOJ) and the courts have interpreted websites to be places of public accommodation and therefore covered under Title III. With the theory proven, the natural consequence ensued: a growing number of lawsuits alleging various websites are inaccessible to blind and visually impaired individuals in violation of Title III.

In 2017 there were 814 Title III website accessibility lawsuits filed in federal court. In 2018 that number rose to 2,258

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lawsuits, a 177 percent increase in one year! The top three states for federal website accessibility lawsuits? New York leads the pack with 69 percent (1,564), with Florida a distant second with 26 percent (576), and Pennsylvania coming in third with 2 percent (42). (Surprised California isn't in the top three? I'll explain in a minute.) Those may seem like insignificant numbers now, but if these trends continue, in just five years we could see approximately 40,000 Title III website accessibility lawsuits filed, with more than 27,000 of those in New York State.

As for California, although the federal courts there saw plaintiffs file only 10 Title III website accessibility lawsuits in 2018, the trend may be short-lived. On Jan. 15, 2019, the Court of Appeals for the Ninth Circuit revived a 2017 Title III website accessibility case against Dominos' that had been dismissed by a federal district court judge. With that reversal, California federal courts will likely become an attractive venue for these cases, resulting in a dramatic increase in Title III website accessibility lawsuits in California in 2019.

So why don't businesses just address the issue, follow the rules and ensure their websites comply with the ADA? Because to date there are no rules or required standards to follow. Believe it or not, this is where things get complicated, so let's take a small step back.

Enacted in 1990, the Americans with Disabilities Act prohibits discrimination and ensures equal opportunity to people with disabilities. This applies to state and local government services, employment, commercial facilities, transportation, and *places of public accommodation*. These laws can be enforced by the DOJ and through private lawsuits.

In June of 2003, the DOJ issued a guidance document on ADA compliance for state and local government websites. In 2010 the DOJ issued an Advance Notice of Proposed Rulemaking (ANPR) regarding website accessibility for the disabled, which indicated the Web Content Accessibility Guidelines 2.0 Level AA Success Criteria (WCAG 2.0 AA) — set by the World Wide Web Consortium (W3C), an organization devoted to the development of WWW protocols and guidelines — as the "well-established industry guidelines" for accessible web content. In 2016 the DOJ crushed the can when it withdrew the ANPR replaced it with a notice seeking additional input.

Fast forward to June 2018, when 103 bipartisan members of the House of Representatives delivered a letter to the attorney general requesting the DOJ provide "guidance and clarity with regard to website accessibility under the … ADA." Then in September, six senators, responding to the surge of ADA website lawsuits, wrote to the attorney general also requesting the DOJ clarify the obligations of businesses regarding ADA website accessibility. Arguing that "[c]

larity in the law will encourage private investment in technology and other measures that will improve conditions for the disabled," the senators added, "[b]usinesses would rather invest in making sure they can serve their disabled customers, instead of pay[ing] money to avoid a shakedown by trial lawyers who do not have the interests of the disabled at heart." (My trial lawyer friends not included.)

In its Sept. 25 response, the DOJ stated that it continues to evaluate whether issuing specific web accessibility standards is necessary and appropriate. However, the DOJ may have tipped its hand by indicating that rather than issuing specific technical requirements, it may promulgate a standard based on "flexibility." "Absent the adoption of specific technical requirements for websites through rulemaking…[businesses] have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication … noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

Seldom a proponent of additional regulatory requirements, it's excruciatingly difficult for me to say this: The need for the DOJ to promulgate regulations identifying specific technical standards for ADA website compliance is unequivocal. Simply stating that businesses "have flexibility in how to comply" with the ADA's Title III requirements website accessibility helps no one. I think the District Court said it best in the Dominos case: "regulations and technical assistance [are] necessary…to determine what obligations a regulated individual or institution must abide by in order to comply with [the ADA]." Anything less simply perpetuates the absurdity of the situation for businesses.

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