DAVIS GILBERT

Lawsuits by the Disabled Against Websites Spike

6th Edition: Trends in Marketing Communications Law

2018 saw a nearly 200% increase in the number of lawsuits targeting websites and mobile apps for their alleged failure to comply with Title III of the Americans with Disabilities Act (ADA), which prohibits "places of public accommodation" from discriminating against persons with physical and other disabilities on the basis of those disabilities. (A majority of federal courts and the Department of Justice (DOJ) consider consumer-facing websites to constitute "places of public accommodation.")

This rise in website ADA claims has prodded companies to attempt to make their websites ADA compliant, but that effort has been stymied by the lack of a definitive legal standard for compliance. Under the Obama administration, the DOJ had proposed support for the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0 Level AA Guidelines (WCAG 2.0 AA) as the minimum standard for website accessibility. However, under the current administration, the DOJ has changed course by stating that websites "have flexibility in how to comply with the ADA[.] . . . [N]oncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

Despite the uncertainty as to whether WCAG 2.0 AA is the official legal standard for website accessibility, courts consistently look to it as a benchmark. (Even though the updated WCAG 2.1 standards were issued in 2018, courts generally have continued to reference WCAG 2.0 AA in their website assessments.)

WCAG 2.0 AA requires, among other things, that websites provide (1) captions for audio and video content, (2) machine-readable text and audio descriptions for onscreen content, (3) operability entirely through a keyboard, (4) minimum contrast ratios for text and images, and (5) the ability to change background colors, font colors and font sizes.

Companies with websites that are not substantially compliant with WCAG 2.0 AA may be less vulnerable to a website ADA claim and liability if they take these measures:

Begin Compliance Efforts

Three recent website ADA cases were dismissed on the basis that the defendants had entered into settlement agreements or consent decrees requiring WCAG 2.0 AA compliance, and were in the process of meeting that obligation, prior to receiving the plaintiffs' claims. These cases suggest that a court may look favorably upon a defendant that has independently initiated bona fide website ADA compliance efforts.

Provide Alternative Means of Access

The DOJ and at least one court have taken the position that website ADA compliance can be satisfied through an accessible website alternative, "such as a staffed telephone line, for individuals to access the information, goods, and services" offered by the website.

Understand Insurance Coverage

Some commercial general liability, cyber liability and employment practice liability policies may cover the costs of defense and settlement of a website ADA claim (but, notably, not the costs of website remediation). Businesses, particularly those that are high-profile or whose websites are highly ADA non-compliant, should consider adding website ADA insurance coverage.

Key Takeaways

- ADA lawsuits (both class action and individual suits) against websites are increasing.
- The WCAG 2.0 Level AA Guidelines are an accepted legal measure for website ADA accessibility.
- Companies whose websites are not ADA compliant should (1) initiate at least some compliance efforts, (2) provide an alternative means for consumers to access the website's content, and (3) consider adding website ADA insurance.

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