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How PR firms must navigate website compliance under the Americans with Disabilities Act

Public relations firms increasingly develop content and websites for their clients' programs, products, and services. It is also common for PR firms to enter into client agreements in which they are asked by their clients to "comply with all laws."

A prior column explained that this seemingly innocuous provision may leave PR firms open to liability for failure to comply to unforeseen and unspecified laws. This article provides another example of an unforeseen source of potential liability for PR firms.

There have been a flood of lawsuits in recent years brought by individual plaintiffs, the class action bar, and the federal regulators alleging that consumer-facing websites do not comply with the Americans with Disabilities Act (ADA). These lawsuits could serve as the basis for clients to seek indemnification for the failure of the agencies to "comply with all laws." Although ADA website compliance is still a highly unsettled area of law, there are simple steps a business can take to reduce its risk of becoming subject to an ADA lawsuit.

WHAT DOES THE ADA HAVE TO DO WITH WEBSITES?

The ADA prohibits places of "public accommodation" from discriminating against persons with physical and other disabilities on the basis of those disabilities. The ADA requires that places of public accommodation implement modifications to remove barriers that prevent access by persons with disabilities and persons without disabilities. Since 2000, federal and state regulators and private plaintiffs alike have argued, often successfully, that a website is a "place of public accommodation" and, accordingly, that the ADA applies to websites.

Regulators and civil litigants have demonstrated that websites may not equally accessible by, and thus discriminate against, persons with sight, hearing, mobility, cognitive, and other disabilities in violation of the ADA and related state laws. In addition, the Department of Justice, which is tasked with enforcing the ADA, adheres to the view that the ADA applies to all websites. The DOJ has initiated enforcement actions and entered into consent decrees against websites that allegedly violate the ADA, irrespective of the fact that those websites are for companies with no physical location.

WHEN COMPLIANCE IS UNCLEAR

If a website is a "place of public accommodation" and, therefore, covered by Title III of the ADA, the question is whether that website is accessible by persons with sight, hearing, mobility, cognitive, and other disabilities. There is no uniform standard for determining whether a website is sufficiently accessible by persons with disabilities. In 2010, the DOJ proposed regulations supporting the World Wide Web Consortium's Web Content Accessibility Guidelines 2.0 Level AA Guidelines as the minimum standard for website accessibility. In addition, courts also have looked to WCAG 2.0 AA to determine website accessibility and to identify modifications to websites determined to be inaccessible. For example, WCAG 2.0 AA requires that websites provide the following:

- Alternative text for each image;
- Audio descriptions for video content;
- Captions for audio and video content;

- Functionality that is entirely operable through a keyboard interface, without requiring specific keystroke timings;
- Clear webpage titles that are visible in the title bar and tabs;
- Headings that are navigable by keyboard or screen reader;
- Minimum contrast ratios for text and images; and
- The ability for users to change background colors, font colors and font sizes.

What does this mean for PR firms and their clients?

NEGOTIATE CONTRACTUAL PROTECTIONS

PR firms providing web development services or other services related to their clients' websites should seek to protect themselves from liability contractually. Firms should consider carving out ADA Title III compliance, as applied to websites, from any such representation and shifting the risks associated with non-compliance to the client. Agencies would also be well advised to specify the limited ADA compliance measures that will be taken, to the extent that the client insists on imposing ADA liability. Conversely, where PR firms are negotiating agreements with third parties providing digital content to be incorporated into a client's websites, firms should, where possible, require such third parties to expressly represent and warrant that their content is ADA compliant, and to indemnify the licensee business accordingly.

HAVE AN ADA WEBSITE COMPLIANCE PLAN

Website accessibility is as much a public image issue as it is a legal issue for consumer-facing businesses. Businesses that show their commitment to making sure their websites are accessible to the disabled mitigate their risk of being targeted in an ADA Title III action. In other words, striving for website accessibility is not only a legal requirement, it's good business.

ACCESSIBILITY PLANS MAY INCLUDE:

- Adopting and displaying a website accessibility policy;
- Offering an alternative means of receiving the services that would otherwise be accessed through the website, for example through a toll free phone number;
- Including a statement on the website about how the disabled can access content by an alternative means;
- Testing accessibility of the website regularly, which may include actual users;
- Training employees on website accessibility;
- Designating a website accessibility coordinator.

A recent survey conducted by my law firm shows that an increasing number of PR firms are providing an ever-expanding group of services to its clients, including website design and development. The additional revenues that PR firms are receiving for these services come with a need for firms to exercise greater vigilance in the nature of their agency client agreement and the scope of the indemnities. ●

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