

“Surf-by” Lawsuits & ADA Website Accessibility

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IREM® White Paper



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Disclaimer: *It is important to note this information is accurate as of September, 2017 and is subject to change. The information in this white paper does not constitute legal advice. This report is intended to provide general information and should not be relied upon as legal or regulatory guidance. Contact an attorney licensed in your state to confirm current information.*

ADA Website Accessibility and Your Business: Be Protected and Prepared

Background

The U.S. Department of Justice (DOJ) is currently working on regulations regarding website accessibility for visually impaired individuals. The regulations would apply to state and local governments described in Title II of the Americans with Disabilities Act (ADA). Beginning in 2010, the DOJ began the rulemaking process by publishing an Advance Notice of Proposed Rulemaking titled *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*. As the rulemaking process unfolded through the years, hundreds of comments outlining concerns with the language were submitted to the Department.

Regulations

On April 28, 2016, the DOJ withdrew the Notice of Proposed Rulemaking that was previously submitted to the Office of Management and Budget (OMB) for official review. The DOJ then issued a Supplemental Advance Notice of Proposed Rulemaking (SANPRM) titled "[*Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities*](#)" on April 29. The purpose of the new SANPRM was to solicit more comments from stakeholders to better shape the rule. In August, the DOJ extended the comment period from August 8 to October 7 to allow the public more time to prepare comments. As of September 2017, work has not begun on extending the website accessibility rulemaking process to Title III. With a new administration in the White House that has voiced concerns about regulatory burdens, many believe work may be delayed, if not completely halted.

The Courts

Between January of 2015 and October 20, 2016, 244 federal lawsuits were filed against various businesses (mainly retailers) regarding Title III website accessibility. Plaintiffs claim the businesses' websites are not accessible to people with disabilities and therefore violate Title III of the ADA. The courts have interpreted public accommodations to include websites and mobile apps, but have been split on which websites the ADA applies. In *Morgan v. Joint Administration Board, Retirement Plan of the Pillsbury Co., and American Federation of Grain Millers, AFL-CIO/CLC*, the Seventh Circuit Court held that a website does not require a physical presence in order to be subjected to ADA accessibility requirements. Conversely, the Ninth Circuit Court ruled that the website in question must be tied to a physical location in order for the ADA requirements to apply.

The courts have continued to take conflicting positions regarding website accessibility. In March, 2017 the U.S. District Court for the Central District of California dismissed a case brought against Domino's Pizza LLC, instead deferring to the DOJ, citing the "primary jurisdiction doctrine." The primary jurisdiction doctrine allows a court to dismiss a case when an administrative agency has specialized knowledge regarding the case that may be used to render a more accurate decision. When this doctrine is invoked, the court will stay their decision pending an administrative ruling from the agency. Just a year prior, a Massachusetts federal court rejected the primary jurisdiction doctrine in two requests to dismiss website accessibility suits.

June 13th, 2017 marked the first time a federal court ruled that a non-accessible website violates Title III of the ADA. In a 13-page decision, Florida District Court Judge Robert Scola found in favor of the plaintiff, a blind man who uses screen reading software, because he was unable to use the Winn-Dixie (a regional

grocery store) website to download coupons, order prescriptions, and find store locations. The decision stated that whether the website itself was covered by the ADA was irrelevant because downloading coupons, ordering prescriptions, and finding store locations creates a nexus between the website and the store. Since using the website could have such a meaningful impact on a shopper's ability to take full advantage of the services offered by the store, it was therefore covered by the law.

In addition to having to pay the plaintiff's attorney's fees, the court issued an injunction requiring Winn-Dixie to make their website more accessible to people with disabilities. Since there is not an established standard for Winn-Dixie to adhere to, the judge is requiring the website comply with the "Web Content Accessibility Guidelines (WCAG) 2.0," an international standard for web accessibility published by the World Wide Web Consortium (W3C). The WCAG 2.0 has been cited in the past by the DOJ as a standard business should strive for.

In recent years, the lawsuits have become more frequent and have shifted towards targeting retailers. Of the 244 lawsuits filed between January 2015, and October 2016, 60% of those defendants were retail businesses. From 2010 through 2015, only 11% of the businesses were retail.

What to Know Right Now

Regardless of what the courts decide, it is never too early to start making necessary changes. And although the Department of Justice has not regulated all websites, it may be advantageous to begin ensuring your website is ADA accessible as soon as possible. Having a readily ADA accessible website not only prepares you for possible future regulations but also broadens your customer pool by being inclusive of all people.

The Department of Justice plans to extend rulemaking to all public websites sometime in 2018. They have indicated the rule pertaining to ADA Title III website accessibility will be influenced by the "Web Content Accessibility Guidelines (WCAG) 2.0." The WCAG 2.0 is an international standard for web accessibility published by the World Wide Web Consortium (W3C). The WCAG 2.0 categorizes compliance into three levels of accessibility: A; AA; and AAA. In the past, the DOJ has advised businesses to strive for an A or AA rating for their websites. The rulemaking for Title II website accessibility was heavily influenced by the WCAG 2.0 standards.

Talk with your web developer about what, if any, accessibility standards are being used when building your website. While the specific details are not yet known, in 2007 the United States Department of Justice (DOJ) published the "[ADA Best Practices Tool Kit for State and Local Governments](#)" along with an [accompanying checklist](#). Using the WCAG 2.0 standards and the DOJ's toolkit, you can identify steps to make your website accessible to those with disabilities.

- ✓ [Use clear easy to read fonts that contrast from the background.](#)
- ✓ Avoid images of text. Do not embed important text within the image, screen readers will not be able to detect the words.
- ✓ Upload documents in non-image based formats such as HTML or Rich Text Format.
- ✓ Use "[alt text](#)" tags to describe images.
- ✓ Make sure your website is able to be navigated with only a keyboard.
- ✓ Avoid using flashing or moving graphics.
- ✓ Provide closed captioning for any videos.

- ✓ Ensure information is relayed through more than one sense. For example, if your site uses an audio recording, provide a transcript.

Additional Resources

- [Web Accessibility Evaluation Tool](#) – This tool, created by the organization “WebAIM,” can help identify areas of your website that could be improved to increase accessibility.
- [WCAG 2.0](#) – The full text of the Web Content Accessibility Guidelines
- **NAR:** [6 Ways to Help Everyone Access Your Website](#)
- **NAR:** [Real Estate Companies Should Address Website Accessibility to Avoid Lawsuits](#)
- **NAR:** [NAR Comments on ADA Website Accessibility](#) – Comment letter submitted by NAR to the DOJ regarding their proposed rulemaking under Title II of the ADA.