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Client Alert

On The Rise: Plaintiffs Target Hotel, Restaurant and Bar Websites Alleging They Do Not Comply with the Americans with Disabilities Act

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In 2018, a record number of lawsuits were filed alleging that websites do not comply with the Americans with Disabilities Act (ADA). According to the [National Retail Federation](#), more ADA lawsuits were filed in federal court in the first half of 2018 than in all of 2017. By way of illustration, since January 4, 2018, the law firm of Cohen & Mizrahi LLP alone has filed 687 ADA website accessibility lawsuits. These lawsuits claim that websites are not accessible because their design and content are not compatible with special screen reading software used by the blind and visually impaired.

A second category of ADA lawsuits single out hotel websites that allegedly do not comply with a 2012 ADA rule requiring places of private lodging to disclose what, if any, ADA accessible lodging they offer.

Unfortunately, ADA website compliance can be very expensive to implement. Even more troublesome, the Department of Justice (DOJ) has not definitively adopted the compliance guidelines developed by the World Wide Web Consortium (W3C). The upward trend in lawsuits is also exasperated by the lack of guidance from courts as to whether websites are “places of public accommodation” and thus, covered by the ADA.

Regrettably, courts have failed to clarify the extent to which the ADA applies to websites in the hospitality area. Nor have courts slowed the flood of lawsuits by serial plaintiffs against businesses both large and small. Thus, websites operated by the hospitality industry, which is public facing by design, must vigilantly limit their liability under the ADA.

ADA Provisions Applicable to Websites Generally

Pursuant to Title III of the ADA, places of public accommodation are barred from discriminating against people with disabilities. “Places of public accommodation” are defined as “private entit[ies]” that “affect commerce” and that fall within one of twelve enumerated categories which cover, among others, private entities that operate hotels, motels, bars, restaurants and entertainment halls. 42 U.S.C §§ 12101-213. Although the ADA clearly regulates physical establishments, the 1990



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law was passed long before mainstream internet commerce took hold, and makes no specific mention of websites.

ADA Provisions Applicable to Hotel Websites Specifically

Hotel websites are subject to an added layer of ADA rules applicable to places that provide private lodging. Under that 2012 rule, hotels are required to disclose on their websites, particularly on *their reservation systems*, information on the availability of accessible rooms and facilities, enabling disabled persons to make choices about appropriate lodging in the same manner as other visitors, and ensuring the availability of reserved rooms. 28 C.F.R. § 36.302(e)(1).

The Law Remains Unsettled Regarding Websites as “Places of Public Accommodation”

Initially, courts were skeptical that websites were “places of public accommodation” and regulated by the ADA because websites do not have “tangible” locations, *i.e.* physical establishments open to the public. However, by 2015, the Ninth Circuit Court of Appeals held that websites that are related to a physical establishment are subject to the ADA because failure to comply with the ADA would prohibit a plaintiff from accessing the goods and services offered by the physical location. *See, e.g., Earll v. eBay, Inc.*, 599 F. App’x 695, 696 (9th Cir. 2015). In 2018, a federal court in Florida – where many ADA plaintiffs reside – held that the ADA applies to websites with physical establishments and strongly suggested that the Eleventh Circuit would reach the same result based on existing precedent. *See Fuller v. Smoking Anytime Two, LLC*, 2018 U.S. Dist. LEXIS 118290 (S.D. Fla. July 11, 2018). Similarly, and although the Second Circuit (which sits in New York) has not definitively ruled on this issue, lower federal courts in New York have held that websites are “places of public accommodation” and stated that the Second Circuit Court would render a similar holding based on existing related precedent. *Del-Orden v. Bonobos, Inc.*, 2017 U.S. Dist. LEXIS 209251, *2 (S.D.N.Y. Dec. 20, 2017).

Even if businesses are not located in these jurisdictions, they may nonetheless be exposed to liability since plaintiffs located in the Ninth and Eleventh Circuits (notably Florida) often sue claiming that those businesses are subject to the jurisdiction of courts in those circuits because they derive income from those places. For instance, a Massachusetts federal court held that it had jurisdiction over a Washington State business and could adjudicate its ADA website violations because the business derived 3.78% of its revenue from Massachusetts residents. *Access Now, Inc. v. Sportswear, Inc.*, 298 F. Supp. 3d 296 (D. Mass. 2018).

This all suggests that hotels, restaurants and bars must make their websites accessible so that individuals with disabilities can have equal access to information hosted on websites such as hotel reservations, restaurant menus, descriptions of photos, directions and more.



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Legal Liability: Fines and Injunctions

Both the DOJ and private plaintiffs may sue under the ADA. The remedies available in a suit by the DOJ are temporary, preliminary or permanent injunctions, monetary damages (excluding punitive damages) to the injured individual, and civil penalties against an entity of up to \$75,000 for the first violation; and up to \$150,000 for any subsequent violation. 42 U.S.C. § 12188(b)(2). However, the DOJ rarely brings such cases. Instead, they are almost universally brought by private attorneys whose only remedy for their clients is injunctive relief requiring the public accommodation to remove the barrier to accessibility. 42 U.S.C. § 12188(a)(2). Compensatory, punitive, or other monetary damages are not available. But, here is the rub: Courts may award attorney fees to a prevailing party pursuant to 42 U.S.C. § 12188(a)(2). For this reason (and, in our view, for this reason alone), attorneys for private ADA plaintiffs demand attorneys' fees as part of any settlement. The reasonableness of these fees is subject to debate since most plaintiffs file the same lawsuit through the same plaintiffs' lawyer against dozens or hundreds of defendants. Nonetheless, when faced with high defense costs, businesses often opt to settle claims and negotiate attorneys' fees.

Common Defenses

Aside from alleging that the ADA does not apply to websites, defendants have asserted a host of other defenses such as:

- Mootness: The claims are moot because the website is or has become compliant, and therefore the court lacks subject matter jurisdiction.
- Alters the Nature of Goods: The requested website alterations would fundamentally alter the nature of the goods, services, facilities, or accommodations being offered thereby creating an undue burden on the defendant or pose a risk to the health and safety of disabled persons or others.
- Due Process: Without regulatory guidance, it is impossible for the website host to be certain that it is in compliance with the ADA. (More on this below.)
- Attorneys' Fees: At least one defendant has successfully challenged the attorney fees sought by the plaintiff's attorney in light of questionable practices of ADA Title III litigation against a Subway restaurant in Brooklyn, NY. *Costello v. Flatman, LLC*, 2013 WL 1296739 (E.D.N.Y. March 28, 2013).

The viability of these defenses remains unclear because the vast majority of ADA suits settle or are decided on other grounds. Accordingly, these defenses remain largely untested.



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How Can Websites Become ADA Compliant?

There are no clear governmental rules regarding which ADA-website guidelines to follow. The DOJ previously indicated that a minimum standard for website compliance could be found in the Web Content Accessibility Guidelines (WCAG) created and issued by the World Wide Web Consortium (W3C), a non-governmental organization that develops www protocols and guidelines. However, these have not been codified into DOJ regulations and its prior guidance was subsequently rescinded by the DOJ. WCAG 2.0 outlines four general principles of accessible design (relating to text, visual, audio, page logistics, and software accessibility, among other design elements). Websites must be: “Perceivable; Operable; Understandable; and Robust.” Generally, hotel, restaurant and bar websites must enable disabled persons to access information on the website (e.g., with visual cues/colors/layout/captions to assist with legibility compatibility with software utilized by disabled persons for accessing online content).

A major issue with the W3C protocols and criteria is that they require coding, ongoing technology audits and updates – all of which are both expensive and time-consuming. A second, equally troubling issue is that DOJ has not definitively stated that compliance with W3C protocols means the website complies with the ADA. In a September 2018 letter to Congress, the DOJ simply reiterated its position that Title III of the ADA applies to websites for businesses that qualify as places of public accommodation and that the absence of specific regulation does not serve as a basis for noncompliance with a statute’s requirements. Although the DOJ did not mention the WCAG, it did clarify that places of public accommodation have flexibility in how they choose to comply with the ADA’s general requirements of nondiscrimination and effective communication and that “noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.” However, in the absence of formal policy, courts still rely on the WGAG as the standard for ADA website compliance. *See e.g., Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 (E.D.N.Y. 2017); *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017).

In addition to being accessible to the blind and visually-impaired, *hotel websites*, must (1) disclose the accessibility of the facility for disabled persons, including the availability of accessible rooms and areas; and (2) if the hotel provides an online reservation interface, it must be accessible to disabled persons.



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Takeaways and Precautions

Hotel, Restaurant and Bar Websites

- Given the unsettled nature of the law, businesses with websites – and specifically hotels, restaurants and bars – will remain targets for ADA plaintiffs.
- The case law and the DOJ guidelines suggest *all* websites may be subject to the ADA and must make their websites accessible so that individuals with disabilities can have equal access to information hosted on websites such as hotel reservations, restaurant menus, directions, and more.
- There is no clear guidance on how to make your website accessible. However, compliance with the W3C guidelines promulgated by WCAG is strongly recommended as they are the only once – governmentally-endorsed guidance on ADA website compliance.

Hotel Websites

- Hotel websites must specifically identify and describe accessible features in the hotel and guest rooms in sufficient detail for an individual with a disability to be able to assess independently whether a specific hotel or room meets his or her accessibility needs.
- Hotels must hold accessible guest rooms open until all guest rooms of that type are rented and the accessible room requested is the only remaining room of that type.
- Hotels must guarantee that the specific accessible guest room reserved through its reservation system is held for the reserving guest, regardless of whether specific rooms are typically held in response to reservations made by others.
- When updating websites and providing ADA accessible information, hotels should err on the side of over-inclusiveness, often redirecting concerned individuals to an ADA-specific drill-down page.

Kent, Beatty & Gordon, LLP continues to monitor developments in this area of law as it defends these types of claims and our attorneys remain available to answer any questions regarding this and other hospitality-related issues that you may face. For inquiries, please contact Jack A. Gordon at 212-421-4300 or email him at JAG@KBG-law.com.