



THE WORKPLACE WORD

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Is Your Website in Danger of Being Sued for Discrimination?

For years, disabled plaintiffs and their attorneys have filed lawsuits regarding the inadequacy of the physical layout of businesses across the country. In fact, a cottage industry developed where disabled individuals and attorneys inspected business facilities, filed suit, and then demanded quick settlements. Now, a new danger is on the horizon. Disabled plaintiffs and their lawyers are inspecting websites and claiming that they discriminate against the disabled.

When President George Bush signed the Americans with Disabilities Act (ADA) into law on July 26, 1990, the Internet as we know it today did not exist and thousands of companies were not selling their goods and services online. Today, however, the Internet is a thriving virtual world of commerce where individuals can shop for just about anything.

Title III of the ADA was enacted to "prohibit discrimination against the disabled with respect to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations by any person who owns, leases (or leases to), or operates a place of public accommodation." U.S.C. § 12182(a); 28 C.F.R. § 36.201(a).

Title III applies to "public accommodations," which are businesses that are open to the public, such as restaurants, hotels, retail stores, car dealerships, movie theaters, health spas, bowling alleys, and business offices. Generally, if you own, operate, or lease to a business or company that is opened to the public, then Title III applies to you. For federal, state, and local governments, and for federally funded businesses, Title II of the ADA and the Rehabilitation Act of 1973 requires equal access to programs and services, including website accessibility compliance.

In determining compliance with the Accessibility Guidelines (ADAAG) was created for companies and businesses to follow – some states and cities possess even stricter accessibility standards. ADAAG is essentially a list of technical standards, like a national building code, which give detailed and precise rules for everything affecting access to a business' premises, inside and out. For example, ADAAG tells you how many disabled parking places are required, proper signage, width of pathways and doorways, types of



hardware on the doors, number and type of accessible seating, height of counters; and height and location of the toilet and bathroom facilities.

In cyberspace, however, there is no formal government imposed set of accessibility guidelines for businesses to follow. Instead, groups like the World Wide Web Consortium (W3C) www.w3c.org have established recommendations on accessibility measures for businesses.

Nevertheless, even without government mandated standards for website accessibility for private businesses, disabled individuals and their attorneys are attempting to expand the ADA's authority to include cyberspace. Blind or visually impaired plaintiffs are currently leading the first wave of ADA litigation by arguing that websites are not accessible to them. These visually impaired Internet users are able to access websites with various assistive technologies including screen-reading software, voice-navigation software, voice-dictation software, and magnification software. Nonetheless, in order for this software to operate, the websites must be specially designed to be readable. Most websites are not currently readable or are limited such that these disabled users cannot utilize all of the functions and services available online.

In 2002, a Florida federal district court was faced with the question of whether Southwest Airline's website, www.southwest.com, was a place of public accommodation under Title III of the ADA. See *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fl. 2002). Back then, the court dismissed the case, holding that the "ADA governs solely access to physical, concrete places of public accommodation" and that "[t]o expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."

Presently, there is a lawsuit pending before a California federal court that again challenges whether Title III of the ADA requires that websites be accessible to individuals with disabilities. The National Federation of the Blind is suing Target, claiming that www.target.com denies access to the blind and visually impaired individuals from its goods and services. Here however, the court has already denied Target's attempt to dismiss, finding that www.target.com may be a place of public accommodation under Title III of the ADA because there could be a nexus between the service provided online and the actual, physical place of public accommodation (i.e. the store). Nevertheless, "[t]o the extent that target.com offers information and services unconnected to the Target stores, which do not affect the enjoyment of goods and services offered in Target stores" those claims have been dismissed. See *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006). Thus, the *Target* court appears to be drawing a line between services that are only available online versus those that are also available at the physical store.

Businesses should keep a careful watch on this case to see how the court finally determines the applicability of the ADA to websites. A win by the plaintiffs will likely result in additional cases being filed across the nation, against businesses with websites that allegedly are not accessible to the disabled.

Businesses should consider proactive steps to deal with these potential ADA website lawsuits, including reviewing their website for accessibility. A number of websites provide free self-tests for accessibility. A number of companies also specialize in website accessibility reviews. Early identification of potential liability is the best prevention. For questions regarding the content of this newsletter, please contact a Snell & Wilmer attorney.

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