

Client Alert

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Website Accessibility: A Perfect Storm

When it comes to disabled access and the Americans with Disabilities Act, it's not just ramps and restrooms anymore. Now plaintiffs, the U.S. Department of Justice and disability rights groups are looking beyond brick-and-mortar issues and are seeking accessibility to company websites, particularly those websites where business is transacted.

A perfect storm of enforcement actions and litigation is coming, and smart retailers should take action to weather the storm. New legal theories are being developed that extend accessibility to websites, particularly in the retail space. The lawsuits are already coming, and the Justice Department is actively suing on this issue, forcing companies to enter consent decrees. It is also poised to issue new regulations to ensure websites are accessible. This is all possible because new technology exists that increases website access for persons with disabilities, including screen reader software technology improvements that allow blind users to read the text on a computer screen with a speech synthesizer, and increased use of captioning and text equivalents for deaf users.

Public awareness is also increasing as groups, such as the National Federation of the Blind, are actively educating individuals about website accessibility, funding lobbying efforts with federal legislators and agencies, co-counseling lawsuits and offering certification programs for accessible websites.

Waves of ADA public accessibility lawsuits have spread across the United States, with a heavy focus on California and Florida. Thousands of lawsuits are filed by well-financed, and very experienced, plaintiffs' attorneys, who know the law and the game very well. Many retailers, ranging from large Fortune 100 companies to small "mom and pops," have been targeted and hit by these attorneys. While some of these cases are unquestionably legitimate, there are many examples of lawsuit abuse by opportunistic firms who are more than happy to seize on technical violations of Title III (for example, bathroom soap dispensers that are a half inch too high), file lawsuits, quickly run up large attorney fee claims while seeking to extract large settlements. While Title III does not allow a plaintiff to recover damages for accessibility violations, it expressly provides for injunctive relief, plus attorney fees. A defendant who litigates and loses (even if it prevails on most of the claims) — can easily be on the hook for \$200,000 or more in fees, in addition to what it paid its own attorneys in defense costs. Even worse, states like California provide for minimum statutory damages of \$4,000 per violation of state law.

There is now a large and verifiable movement to focus on company websites. Courts today are split as to whether websites are considered places of public accommodation. The first view takes a plain-meaning approach and is illustrated in *Access Now Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002). The case involves typical allegations in website accessibility cases. Plaintiff alleged that Southwest.com was inaccessible to the blind because it failed to provide "alternative text," which would provide a screen reader program the ability to communicate what is visually displayed on the website; "online forms which can be readily filled out by plaintiffs"; and "skip navigation links," which facilitates access by permitting blind consumers to bypass the navigation bars and proceed to the main content. The court, however, dismissed the case on the grounds that a place of public accommodation must be a physical place, and a website was not a physical place. The 11th U.S. Circuit Court of Appeals upheld the dismissal, but expressly refused to comment on whether websites qualify as places of public accommodation.

The U.S. District Court for the Northern District of California's 2006 decision in *National Federation of the Blind v. Target*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), was a breakthrough for plaintiffs' lawyers. In this case, blind patrons who use screen readers sought website changes that would allow them to access the website to purchase products, redeem gift cards and find Target stores. Target claimed that Title III applied only to a physical place, not an Internet website. The plaintiffs argued that there was a sufficient nexus between the website and the physical stores to deem the website a "public place of accommodation." The court agreed, but the focus was on transactional aspects of the website, rather than the purely informational aspects.

Target eventually settled. As part of the settlement, Target established a \$6 million fund from which members of the California settlement class can make claims; Target and NFB agreed to a three-year relationship during which NFB will perform accessibility testing of the Target website; and the plaintiffs' attorneys were entitled to fees (the lead plaintiff's attorney sought — and was awarded — substantial "reasonable" fees at a rate of up to \$745 per hour).

The Justice Department intends to push harder. It wants Title III to apply to all websites that transact business, even if they have no physical stores. The department is poised to issue regulations on website accessibility, and has forced QuikTrip and Hilton Hotels to clean up their websites. Website accessibility has now become very much a federal law concern.

The regulations are expected to apply to new websites that are placed online six months after the effective date of the final rule. This includes brand-new websites or "completely redesigned" websites. Likewise, if an entity adds a new page to its existing website (as opposed to a complete redesign), this new page should comply with the new regulations to the maximum extent possible. For existing websites, the Justice Department is considering requiring these websites to comply with the new regulations two years after the effective date of the final rule. The department is also considering a "safe harbor" for existing website pages "so long as [they are] not updated or modified," as well as limiting the new regulations to websites of a certain size (such as companies with 15 or more employees or that earn a certain amount of revenue) or in certain categories (such as retail websites).

Retailers now face quite a bit of uncertainty and risk. While we await the Justice Department's regulations, the department has already started to demand website accessibility in its investigations and in at least two consent decrees. Retailers should proactively address the risks now, before a lawsuit or government investigation hits. They should review their own website with the help of outside counsel and website accessibility specialists. Particular attention should be paid to the retail portions of the website, and at a minimum, modifications should be considered for features that make online retail transactions inaccessible to blind and deaf patrons, the two biggest disability groups who are filing website accessibility lawsuits today.

Roland Juarez is a partner in Hunton & Williams LLP's employment law practice in Los Angeles. He has extensive experience defending national retailers in ADA Title III actions, including at the appellate level, and has practiced exclusively in the area of employment law.

Susan Joo is an associate in Hunton & Williams LLP's employment practice in San Francisco. Her ADA practice includes counseling clients in cutting-edge accessibility topics, including website accessibility, as well as captioning and narrative description technologies.

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