



Legal Alert: Impaired Access: ADA Website Accessibility Lawsuits On the Rise

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An increasing number of class action lawsuits have been filed over the past year against private companies by individuals alleging violations of the Americans with Disabilities Act (ADA) for failure to maintain websites that are accessible to the blind and visually impaired. Since early 2015, approximately 240 lawsuits have been filed by a handful of plaintiffs' firms against companies in the retail, hospitality, and financial services industries alleging ADA violations related to website accessibility. Most of these suits have resulted in settlements that, in addition to the payment of some amount of financial remuneration to the plaintiffs, require companies to make their websites ADA compliant. The steady shift in our economy from traditional brick-and-mortar stores to online commerce has brought increased attention to website accessibility. Given the increasing number of website accessibility suits, it is important for any company that maintains a web presence that constitutes a "place of public accommodation" to understand the requirements of the ADA.

Key Points:

- The ADA prohibits discrimination against the disabled in "places of public accommodation" including websites.
- Lawsuits alleging violations of the ADA for websites inaccessible to the blind are on the rise — with 240 filed since early 2015.
- ADA lawsuits can be costly to businesses and guidance on ADA compliance is still years away.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed or the Sutherland attorney with whom you regularly work.

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ADA PRACTICE TIP

- Prohibits discrimination against disabled individuals in "places of public accommodation."
- Websites have been interpreted to be "places of public accommodation" for purposes of the ADA.
- A circuit court split has developed as to whether a connection must exist between the website and a physical storefront for a website to be a "place of public accommodation."
- Websites inaccessible to the blind or visually impaired may violate the ADA.

Title III of the ADA, which was enacted in 1990, prohibits discrimination against the disabled, which includes the blind and vision impaired, in places of public accommodation:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation.

42 U.S.C. § 12182(a). Although Title III of the ADA does not provide civil penalties for violations of the act, it does permit private rights of action and allows individuals to bring enforcement actions and seek injunctive relief. 42 U.S.C. § 12188.

As originally enacted, the ADA did not expressly include websites as places of “public accommodation,” principally because the internet was in its infancy at the time. Over the past several decades, however, as the internet has become ubiquitous and a seemingly unlimited number of goods and services have been made available online, courts have interpreted places of “public accommodation” to include websites. The interpretations have varied among courts resulting in a circuit split regarding whether a website must have a nexus with a “physical place of public accommodation” to fall within the scope of the ADA.

According to the Seventh Circuit a nexus is not required, and websites without connections to physical commercial entities are nevertheless “places of public accommodation” for purposes of the ADA. As Chief Judge Richard Posner held in *Morgan v. Joint Administration Board, Retirement Plan of the Pillsbury Co. and American Federation of Grain Millers, AFL-CIOCLC*, “An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store.” 268 F.3d 456, 459 (7th Cir. 2001).

By contrast, the usually liberal Ninth Circuit has adopted a more restrictive definition of “place of public accommodation” requiring a nexus between the website and the service of a physical “place of public accommodation” like a brick-and-mortar store. Even employing the more restrictive definition, however, a website inaccessible to visually impaired individuals may still violate the ADA if the website provides unequal access to the “services” that may be available at a physical location. For example, a website allowing a customer to order delivery from a local restaurant could be in violation of the ADA if the site is inaccessible to the blind or vision impaired. In that situation the “nexus” between the challenged service and the physical place of public accommodation would make the website subject to the ADA.

Website Accessibility

Blind and visually impaired individuals use specialized software, including screen reader technology that reads website content aloud to users allowing them to access and navigate websites. Private lawsuits and enforcement actions undertaken by the Department of Justice have highlighted that not all publicly available websites are ADA compliant because they, among other things, fail to

incorporate screen reader technology. Even websites that may have been designed initially to be compatible with screen reader software may become inaccessible when new features are added or the website is updated. Department of Justice technical guidelines concerning how websites should comply with the ADA, originally set for release in 2010, have been delayed until 2018.

The lack of guidance on website compliance and relative ease in identifying inaccessible sites has led to the proliferation of class action enforcement suits on the part of private individuals. In 2016 alone, multiple lawsuits have been filed including, but not limited to, suits against Domino's Pizza, Potbelly Sandwich Works, Reebok, Panera Bread, and AMC Theatres, alleging that some or all of the companies' websites are inaccessible to the blind. These companies represent a small fraction of the 240 companies that have faced website accessibility lawsuits over the past year. These suits, driven in large part by the relatively quick and easy settlements that plaintiffs' counsel have been able to obtain, expose companies to damages, potentially costly litigation, and injunctive actions and are red flags to Department of Justice officials tasked with enforcing the ADA.

One recent case is particularly illustrative of the reach of accessibility requirements under the ADA. A class action lawsuit was brought by the American Council of the Blind and three blind federal government contractors, represented by Sutherland attorneys Lewis Wiener and Amy Xu on a pro bono basis, against the federal government's General Services Administration (GSA), an independent federal agency tasked with managing the basic functioning of other agencies, arising out of the GSA's website being inaccessible to visually impaired government contractors. The case resulted in a landmark settlement with the GSA in October 2015 that ensures that the federal government website, SAM.gov is accessible to blind and visually impaired federal contractors. This agreement emphasizes that no organizations, including government agencies, are exempt from accessibility requirements under the ADA.

Conclusion

The large number of ADA website accessibility lawsuits recently filed illustrates the potential risks that any company offering "a place of public accommodation" online faces. The steady source of attorney's fees these suits provide to plaintiffs' counsel and the relative ease with which allegedly offending sites can be identified make it likely that these actions will continue to be filed. As large companies bring their sites into compliance, either voluntarily or following legal action, plaintiffs may begin to focus on smaller online retailers or mobile applications. Accordingly, it is important to understand the need for ADA compliance and the pitfalls posed by non-compliance in an effort to limit the risk of potential litigation.

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