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Retailers Selling Goods Through the Internet Face ‘Digital Access Barrier’ Litigation Under the ADA

Plaintiff class-action lawyers in Massachusetts have filed recent lawsuits in federal court under Title III of the Americans with Disabilities Act (ADA Title III) against retailers who sell goods through their websites. Out of state lawyers have also filed lawsuits against Massachusetts businesses on the same basis. The majority of these lawsuits do not attempt to certify a class action, but do seek to alter retailers’ practices, recover attorneys’ fees and costs, and potentially influence the Department of Justice to seek class-wide like relief against offending retailers. These lawsuits allege that retailers’ websites do not comply with ADA Title III and certain related regulations (ADA Regulations). The lead plaintiffs in these Massachusetts actions are Access Now, Inc. and certain named members. Access Now asserts that it is a non-profit organization advocating for disabled individuals, including those who are blind. Access Now and its members have brought similar lawsuits in other states. In addition to Access Now, there are a number of other plaintiff-advocates filing similar lawsuits around the country. Keeping in mind that state lines are no barrier to websites or the lawsuits that are pursuing them, in order to reduce risks, retailers should consider having their websites evaluated in order to assess compliance with ADA Title III and similar disability-rights laws, even if they do not perceive risks from Massachusetts-based advocates.

Background

Among other things, ADA Regulations require most retailers to take necessary steps to ensure that disabled individuals are not “excluded, denied services, segregated or otherwise treated differently than other individuals *because of the absence of auxiliary aids and services, unless*” the retailer “can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.” 28 C.F.R. 36.303. The term “auxiliary aids and services” is defined to include “screen readers software” for the visually impaired. *Id.* In the recent Massachusetts lawsuits, class plaintiffs allege that retailers’ websites are not compatible with screen reader programs and, therefore, visually impaired plaintiffs do not have access to the same goods and services. Without available screen-reading technology installed on disabled end-users’ computers and mobile devices, visually impaired users do not have access to the goods and services provided, or same benefits that are

available to non-disabled consumers using the websites. Other lawsuits have attacked web accessibility for not providing effective communication to persons with impaired hearing.

One of the difficulties cited by businesses in providing accessible websites is the absence of enforceable technical regulations and standards. The Department of Justice has had rulemaking in progress for several years including several missed announced deadlines. However, this should not be a barrier to providing an accessible, or more accessible, website. Model standards which, when followed, will provide web accessibility have been developed. Web Content Accessibility Guidelines (WCAG) are part of a series of guidelines published by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C), an international standards organization focused on the internet. The series includes guidelines to make web content accessible, primarily for people with disabilities. The current version, WCAG 2.0 Level AA, has been adopted by the U.S. Architectural and Transportation Barriers Compliance Board for its own websites and is now the de facto standard for federal agencies and programs of state and local governments. The Department of Justice (DOJ) employs WCAG 2.0 as the access standard in DOJ settlement agreements and consent decrees concerning websites. While DOJ was expected to announce new ADA Regulations related to public accommodation websites in 2018, recent changes in Washington, D.C., make it unlikely that this rule will be adopted anytime soon. When it finally does come out, however, many anticipate the DOJ will adopt WCAG 2.0 AA standards in that regard given the trend at the federal level.

Failure to comply with web accessibility requirements like Section 36.303 allows an injured party to seek (i) injunctive relief requiring a retailer to comply with ADA Title III and, where appropriate, provide the appropriate auxiliary aid, and (ii) recover attorneys' fees and costs. Also, upon receiving a complaint, the U.S. Attorney General must investigate the claim and may seek to intervene in the action or bring its own enforcement action. If the Attorney General brings an enforcement action (which is most commonly done through the U.S. Attorney's Office in the business' jurisdiction), a court may grant injunctive relief and award monetary damages to aggrieved persons. Also, the court may assess a civil penalty (1) not exceeding \$50,000 to \$90,535, and (2) not exceeding \$100,000 to \$181,071, depending on the date the violation occurred. Because websites tend to find their way across state lines, lawsuits have been filed by plaintiffs in states with laws companion to the ADA which allow for monetary damages; therefore, a Massachusetts retailer whose website does business in other states (*e.g.*, California, New York) may be subject to additional legal liability.

What should retailers do in response to these recent lawsuits?

One truly helpful piece of guidance in the Title III regulations is the defined performance standard. Websites are required to provide *effective communication* for its users with disabilities. This means a person with a sensory disability (such as being blind) is able to use the website to accomplish the things the website is intended to do for members of the public. There are a number of qualified accessible website consultants (and some not so qualified, buyer beware, so check references) who can provide high-level assessments of your website without undertaking significant work). Although defendants may have valid defenses to the claims raised in the recent lawsuits, effective communication appears to be the most effective because it is the compliance benchmark. Therefore, retailers should undertake the steps necessary to determine whether their websites meet this standard (compliance with the WCAG 2.0 AA guidelines is one of the most common ways to meet this standard) and therefore comply with ADA Title III. If not, retailers should determine what steps and costs would be involved in modifying their website to provide effective communication. The prospect of recovering attorneys' fees (and in some cases also recovering monetary damages), and garnering support in litigation from the U.S. Attorney General may motivate plaintiffs' firms to pursue litigation of this nature where they perceive violations. If compliance shortfalls are present, they should be remedied unless the company can demonstrate that compliance would meet the "fundamental alternation" or "undue burden" exemptions set forth in Section 36.303. The availability of an exemption, however, may not prevent the company from being sued and it likely will be the company's burden to prove the exemption applies.

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