



Newsletters

Increased Threat of Website Accessibility Lawsuits under the ADA

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Update: since the original publication of this article, the DOJ announced it has withdrawn its notice of proposed rulemaking. See this [Federal Register notice](#).

Website accessibility lawsuits continue to increase nationwide. Nearly every business sector has faced such lawsuits. In 2017, Florida ranked first in the number of website accessibility suits filed in federal court. Because of the increasing probability that your business or your clients will be forced to defend a website access claim, it is important to understand the current legal landscape and ways to address this critical concern.

Background

[Title III of the ADA](#) makes it unlawful to discriminate against disabled persons in the full and equal enjoyment of public accommodations. *Gomez v. La Carreta Enters.*, 2017 U.S. Dist. LEXIS 170777 (S.D. Fla. Oct. 13, 2017). To state a claim for relief under Title III, a plaintiff must plausibly allege that because of his disability, he was denied full and equal enjoyment of the public accommodation. The ADA's definition of "place of public accommodation" does not currently include websites, and there is a split among the circuits whether Title III applies beyond physical spaces and into cyberspace. *Id.* at *7.

In June, the Southern District of Florida concluded that websites may be public accommodations under the ADA when they operate as a "gateway" to physical store locations. *Gil v. Winn-Dixie Stores, Inc.*, 2017 U.S. Dist. LEXIS 90204 (S.D. Fla., June 13, 2017). The *Gil* decision was the first web accessibility verdict resulting from a two-day non-jury trial. While the court did not decide whether websites are *per se* places of public accommodation, the court reasoned that where a website is heavily integrated with a physical store and operates as a gateway to the physical location, it is a public accommodation. The court considered factors such as a customer's ability to download coupons, locate stores, and refill prescriptions on the website, demonstrating a nexus between the website and the "brick and mortar" store. The court ultimately ordered injunctive relief and awarded Gil his attorneys' fees and costs.

Conversely, last month the Southern District ruled in favor of a defendant restaurant in a suit alleging that its website violated Title III. See *Gomez*, 2017 U.S. Dist. LEXIS 170777. The Court held that to state a claim under Title III, the plaintiff must adequately allege that his inability to access the website impedes

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his access to the restaurant. *Id.* Similarly, in [Gomez v. Bang & Olufsen Am., Inc.](#), the court dismissed a claim of unequal access where the plaintiff's grievance was that the defendant's website did not provide a blind person with the same online shopping experience as non-disabled persons. 2017 U.S. Dist. LEXIS 15457 (S.D. Fla. Feb. 2, 2017). The court held that "the ADA does not require places of public accommodations to create full-service websites for disabled persons ... [but] if a retailer chooses to have a website, [it] cannot impede a disabled person's full use and enjoyment of the brick-and-mortar store." *Id.* at *4. Thus, courts in the Southern District consider a website's connection to a physical location, while also analyzing actual - as opposed to hypothetical - impediments to the brick and mortar location.

ADA standards are issued by the Department of Justice ("DOJ"). Last year, the DOJ stated that it planned to address the uncertainty on the website issue by most likely adopting the "Web Content Accessibility Guidelines (WCAG) 2.0 AA" in 2018. See [Website Accessibility Lawsuits Expected to Rise from Trump Administration](#), Bureau of Internet Accessibility (Aug. 3, 2017). Notably, a California federal court recently granted a defendant's motion to dismiss, finding the failure of the DOJ to issue clear guidelines for website compliance violated defendant's due process rights. [Robles v. Domino's Pizza LLC, Case No. CV 16-06599 SJO](#) (SPx), (C.D. Cal. March 20, 2017). And yet, despite the DOJ's commitment to adopt website accessibility standards, the Trump administration recently moved ADA website regulations onto the "inactive" list, meaning definitive regulations have no known place in the agency's planned rulemaking. Accordingly, it appears there will be no greater degree of certainty with respect to the website accessibility landscape for the near future.

Given the state of the law, what are businesses to do?

Despite the lack of regulations, there are several steps businesses can take. First, retailers, restaurants, and hospitality companies should be aware that they are popular targets among test plaintiffs and should adopt and implement a web access policy that ensures conformity (even if in steps) with [WCAG 2.0 criteria](#). If a nexus exists between the website and physical location, utilize one of the free website compliance sites to determine areas of non-conformity and take steps to make fixes during periods of regular website updating. Finally, one recent court suggests that an accessible "banner" on the site providing a staffed telephone number to address accessibility issues could be a means of compliance if it can be shown that telephonic access provides equal access. See [Gorecki v. Dave & Buster's Inc., Case No. 17-cv-1138 PSG](#) (AGRx) (C.D. Cal. Oct. 10, 2017).

This newsletter has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.