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Legal Alerts

What Businesses Need to Know About DOJ's New Guidance on Web Accessibility and the American With Disabilities Act

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The Department of Justice (DOJ) has issued guidance indicating that it will step up enforcement against websites that are not compliant with the Americans with Disabilities Act (ADA).

Background

The ADA, which was passed in 1990, prohibits discrimination against people with disabilities. Of particular relevance, the ADA prohibits discrimination against those with disabilities in "places of public accommodation." *The new guidance signals that the DOJ will subject the website of any business that is a place of public accommodation to regulation under the ADA.*

The definition of a place of public accommodation is found in the ADA itself. The Act lists distinct places that constitute as places of public accommodation, and also includes some catch-all provisions. The list of distinct places includes, among others, inns, hotels, motels, other places of lodging, restaurants, convention centers, grocery stores, legal offices, and museums. Catch-all provisions include "other sales or rental establishment[s]" and "other place[s] of recreation." So, it is relatively cut and dry for some businesses whether they are a place of public accommodation, while the analysis is more complicated for others.

At its core, the new guidance takes the position that using a business' website is crucial to taking advantage of all the goods, services, and activities offered by that business. Therefore, if a business' website is inaccessible to people with disabilities, those people cannot enjoy all of the business' offerings, and they are being discriminated against in violation of the ADA. Put differently, the website of a business that is a place of public accommodation must be accessible by people with disabilities in order to be ADA compliant.

Web-only Businesses

The Circuit Courts are split as to whether a business (and by extension its website) that has no physical location is considered a place of public accommodation. Currently, the Third (DE, NJ, PA), Fifth (LA, MS, TX), Sixth (KY, MI, OH, TN), and Ninth (WA, OR, CA, AK, AZ, ID, MT, NV, HI) Circuits have ruled that a business where no physical location is involved in the provision of the goods, services, or activities to the customer (

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e.g., eBay) is not a place of public accommodation, meaning that its website is not subject to the ADA. The First Circuit, however, has held the opposite.

The DOJ guidance implicitly takes the latter stance - that businesses and their websites are public accommodations whether the business has a physical location or not. This position is evident from an examination of the list of enforcement action sample cases provided in the guidance, which includes an action against an exclusively internet-based company.

Enforcement History

Including websites within the purview of the ADA is not a new position for the DOJ. In 2010, under the Obama administration, the DOJ initiated administrative rulemaking procedures with the goal of characterizing all business websites as "public accommodations," requiring them to be compliant with the ADA. While the Obama DOJ ended up postponing the issuance of the final rule, it still engaged in enforcement activities - including litigation.

The Trump DOJ did not formally change its position on the applicability of the ADA to websites. However, it did withdraw the proposed rule and stop enforcement activities.

The new DOJ guidance signals that the Biden DOJ is returning to the stance held under Obama, and suggests that the Department is preparing to ramp up enforcement. In fact, the Biden DOJ has already entered into numerous settlement agreements with businesses relating to the accessibility of their websites.

Practical Significance of the Guidance

Consequences of Violating the ADA

The penalties for failing to comply with the ADA can be costly. The federal government can levy fines of up to $75,000 for a business' first violation and $150,000 for each subsequent violation. States and municipalities may impose fines as well. Moreover, the ADA provides a private right of action for individuals to sue non-compliant businesses for additional monetary penalties and/or injunctive relief. If the claimant is successful, the business will also be responsible for the claimant's attorney's fees.

What Does it Mean for a Website to be "Accessible" and ADA Compliant?

The DOJ makes it explicitly clear that there are no uniform standards on what makes a website "accessible" for purposes of the ADA. Rather, it states that "[b]usinesses . . . can currently choose how they will ensure that the programs, services, and goods they provide online are accessible to people with disabilities."

While there are no concrete standards, the DOJ did suggest that the Web Content Accessibility Guidelines, both of which the federal government uses for its own websites, are helpful examples of compliance.

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Practically speaking, ADA website compliance means having text alternatives ("alt text") for images and captions for videos, the ability to navigate the website with a keyboard rather than just a mouse, allowing for text enlargement, being compatible with screen readers used by the visually impaired, and other features of that nature.

Please contact any of Foster Garvey's qualified legal counsel with any questions regarding ADA website compliance.

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