

Risk of ADA Claims Rises as DOJ Contemplates New Website Compliance Standards

Legal Update

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Is your bank's website accessible to the visually impaired? If it is not - or if you are not sure - now is the time to address this issue as businesses across the country are receiving demand letters and being made parties to legal claims for alleged violations of the Americans with Disabilities Act (ADA).

The ADA prohibits discrimination against individuals "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." The Department of Justice (DOJ) has interpreted this to mean that business websites need to be accessible to visually impaired individuals, who tend to use technology such as screen readers to read websites for them. If a website is not formatted correctly, a blind consumer will not be able to utilize the website.

The DOJ is planning to release regulations that specify the standards websites must meet in order to comply with the ADA with respect to disabled visitors, but those regulations will not be released until 2018 or later. In the meantime, certain disability rights advocacy groups and plaintiffs' attorneys are aggressively pursuing ADA claims across the country. The Bureau of National Affairs reports that over 45 website accessibility cases under the ADA were filed with courts in 2015. Other reports, validated in part by our own experience at Fredrikson & Byron representing multiple website owners, suggest that plaintiffs' firms have sent out hundreds of demand letters to website operators around the country seeking remedial actions and financial payment.

The recent uptick in ADA claims related to websites is similar to what banks faced a few years ago when numerous claims were made against ATM owners because the ATMs were not accessible to the visually impaired. Ultimately, the industry updated ATMs with features to meet the needs of disabled consumers. While the current focus is on websites, industry experts predict that the next wave of claims will be directed at mobile device applications.

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No one knows for sure what website accessibility standards the DOJ will require in its regulations, but industry experts predict it will adopt current Web Content Accessibility Guidelines set forth by the global Website Accessibility Initiative, known as the WCAG 2.0 AA standards (WCAG Standards). These standards are designed to make websites (1) perceivable to text readers by embedding text into each visual feature on the website, (2) maneuverable without the use of a mouse (i.e., keyboard only); (3) easily understandable and predictable; and (4) robust in their compatibility with various tools used by disabled consumers to access website content.

To mitigate the legal and reputational risks of becoming the subject of a legal claim alleging ADA violations, banks and other businesses should first assess the extent to which their websites currently comply with WCAG Standards. To the extent the website does not meet these standards, it may be a good time to make enhancements. Banks with websites that are at least partially compliant with these standards are less likely to become the targets of legal claims or demands.

For banks that work with third-party vendors to design or operate their website, a first step may be to contact the vendor to confirm the website meets WCAG Standards. If the vendor cannot confirm these standards are met, then the bank should review its vendor agreement to determine whether it includes a representation that the services will be compliant with applicable law, as well as the extent to which the vendor is obligated to indemnify the bank for claims made related to website noncompliance. Pointing out any such provisions to the vendor may prompt the vendor to consider updates to comply with WCAG Standards. Regardless of whether the vendor agreement contains these protections, the bank should work with the vendor toward compliance with the WCAG Standards.

For banks renegotiating vendor agreements related to their websites (or mobile applications), the vendor should specifically commit to compliance with the ADA, WCAG Standards, and any replacement to such standards that the DOJ may set forth in regulations. The vendor should also agree to indemnify the bank with respect to claims of noncompliance with the ADA.

Finally, if you receive a demand letter alleging ADA violations and offering a settlement, contact legal counsel. Some demand letters are of a “robo-sign” variety and may lack the requirements for a valid ADA claim, while others may raise more significant legal or reputational concerns.

TAKEAWAY

Now is the time to take steps to protect your bank from ADA claims related to website availability (and mobile application availability) to the visually impaired.