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Companies Continue to Grapple With Website Accessibility Claims

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For the last several years, state and federal courts have been inundated with complaints by individuals alleging that their companies' websites are inaccessible and do not comply with the Americans with Disability Act, as amended, ("ADA") and/or relevant state or local laws. The volume of cases filed in New York regarding inaccessibility of websites decreased during the spring due to the pandemic, but started to pick up again in the summer. In 2020, specifically, the scope of website accessibility cases has expanded significantly. This evolution is fueled by advancing technology for design and remediation, as well as spawning a cottage industry of sorts for the plaintiffs' bar.

History of Website Accessibility Cases

In Andrews v. Blick Art Materials, No. 17-CV-767 (E.D.N.Y. Aug. 1, 2017), the District Court determined that WCAG 2.0 Level AA should be used by companies when making websites accessible, and further determined that the Level AA standard addresses the major barriers encountered by the visually impaired.

In a September 25, 2018 letter to members of Congress, the United States Department of Justice ("DOJ"), which is responsible for oversight of Title III of the ADA with respect to public accommodations, confirmed that the ADA applies to websites of places of public accommodation and, stated,

> *[a]bsent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of non-discrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA.*

This statement by the DOJ is a recognition that a website may be compliant with the ADA without being fully compliant with WCAG 2.0 AA. Though there is currently no guidance from the DOJ regarding website accessibility (and none is expected in the near future), WCAG 2.0/2.1AA is the standard that has been recognized by most courts and the plaintiff's bar. As such, it is recommended that companies comply with this standard to avoid litigation.

Of the cases that have been litigated in New York, there have been some victories for businesses. Namely, in Diaz v. Kroger Co. (S.D.N.Y. June 4, 2019), the District Court found, inter alia, that Kroger's remediation efforts and commitment to "monitoring technological developments in the future to ensure that visually-impaired individuals have equal access to the website" rendered the plaintiff's claims moot. Many companies, recognizing the potential for exposure, are exploring proactive options for remediating their websites prior to being sued.

Overlays—Too Good to Be True?

Remediations used by companies often range from revamping the entire website with the assistance of a knowledgeable web developer to engaging a company to add an overlay (also known as widgets, plugins, or applications) on the website, which these third-parties claim make websites compliant with the ADA and WCAG. Engaging a web developer to make remediations to the coding of the website can be a costly endeavor and may take longer than a company hopes. A more affordable and quicker remediation has been to add an overlay to the website. In fact, some of these overlay companies advertise that remediations to the website can be made within 48 hours of engagement and further guarantees 98% compliance with WCAG 2.1 Level AA.

Despite their lower price points and popularity within the business community, overlays are often insufficient to remediate individual or targeted issues, leaving a company exposed to violations. In fact, the plaintiffs' bar has recently begun to file lawsuits against companies who are using overlays on their website, claiming that the overlays do not make the website fully accessible or comply with the ADA. As

such, companies should proceed with caution before proceeding with an overlay on the website as they may not provide the company with the finality it is hoping for and may, in fact, open the company to further litigation.

Litigation Against Hotels/Resorts Regarding Accessible Features on Websites and Reservation Systems

There has also been an influx of cases filed against hotels and resorts for allegedly failing to have necessary information available on the company-owned reservation website and/or on third-party reservation sites (such as Expedia, Paylocity, etc.) regarding the accessible or inaccessible features at the property. Plaintiffs' complaints usually include a list of information that is not included on the websites, such as the availability of a handicap accessible room, specific handicap accessible features in a guest room (a roll in shower, a handlebar in the shower, etc.), and accessible features around the property (such as a ramp at the entrance, a handicap accessible parking space, elevator access, a handicap accessible chair in the pool, etc.) These plaintiffs claim that they are unable to determine whether the property is even accessible to them.

However, to ensure the company is compliant with the ADA and other relevant federal, state, and local laws, hotels and resorts should update the website and third-party providers' information with accessibility features and, if necessary, retain an accessibility expert to inspect the property to identify accessibility features. Moreover, it is recommended that the company share this information with all third-party reservation systems that they have a contract with to ensure that their information is compliant as well.

In the event that your business receives a demand letter and/or complaint with allegations of violations of the ADA, NYSHRL, NYCHRL, or other relevant state or local laws, you should consult an experienced labor and employment attorney with knowledge of the developing case law and the best way to proceed with remediations of the website. For more information about the this alert, please contact Jennifer E. Sherven or Erika H. Rosenblum, by email at JSherven@kaufmandolowich.com, ERosenblum@kaufmandolowich.com, or by phone at (516) 681-1100, or any member of Kaufman Dolowich & Voluck's Labor & Employment Law Practice Group.